Monographia

Reto Patrick Müller / Stéphanie Greuter

Anti-Terrorist Operations and the Right to Life

The European Court of Human Rights case law from Gibraltar to Beslan

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Dedicated to *Fatima D.*

Police officer at school no. 1 in Beslan (survivor).

The only person ensuring the security of the gathering.
Not armed or equipped with any mobile means of communication.

CONTENT OVERVIEW

PREFACE

Dealing with *use of force* is not a pleasant occupation. When it comes to the use of force *to protect* other people, *i.e.,* the use of coercive means, particularly delicate legal questions arise.

The first author deals with the case law of the European Court of Human Rights (ECtHR) on the use of force by security forces in the context of his teaching activities at the University of Basel and the ETH Zurich. In 2017, together with Prof. Dr. *Felix Hafner* (University of Basel) and Prof. Dr. *Anderas Stöckli* (University of Freiburg i.Ü.), he gave a legal opinion on the legal claim for Jewish communities to be protected in the canton of Basel-City in light of existing terrorist threats. The second author has dealt with the means of coercion in her legal studies. As a member of the Cantonal Police of Basel-City (Switzerland), the use of force is part of her everyday professional life. The joint decision to review, present and appreciate the relevant case law has led to exciting discussions. This book shall bring these discussions to the public.

The legal guidelines for the use of force by state security forces are highly relevant to practice. Operations by security forces may only take place within the permissible framework and must also meet special legal requirements. This must already be taken into account in general precautions or in concrete plannings of operations. Furthermore, the legal framework plays a central role in the training of security forces, in the development of doctrine as well as the design of rules of engagement. The legal requirements also determine the behaviour of the security forces during and after operations. The following findings are intended to provide the basis for this in the sense of a compass for the authorities applying the law.

From a legal-dogmatic point of view, this study wants to contribute to the scientific discourse on the right to life in its general manifestations (in the field of dangerous activities for example) as well as with regard to the state's use of force. To this end, the different characteristics of this fundamental right will be put into context according to the EctHR's corresponding case law. The analysis of that case law should explain its possible consequences for legal practice and stimulate further legal contributions and

discussions in other areas as well – *e.g.*, on state obligations to protect human lives from technical risks. The present book was also published in 2021 as a mixed-language version (German/English). Literature and case law are taken into account until end of 2020.

The authors have produced this work in their spare time. They would like to thank all those who contributed directly or indirectly to its success. This applies especially to PD Dr. *Krista Nadakavukaren Schefer*, who gave advice on how to make several improvements (including the title), to *K. Riju Raj S. Jamwal*, PhD(c), LLM, Advocate and Legal Consultant, Supreme Court of India and to *Nick Jones* (Full Proof) for his comprehensive proofreading. Major thanks also go to the publishing house Weblaw and especially to the publishing director *Dr. Philip Hanke* for his fast and uncomplicated cooperation.

During the completion of the final version of this book, the first author was accepted as a full-time lecturer at the *Zurich University of Applied Sciences* (ZHAW). He would like to express his sincere thanks to his new employer for providing additional support.

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Basel, spring 2022

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ABBREVIATIONS

ACO	Allied Command Operations (NATO)
ACT	Allied Command Transformation (NATO)
AD	Admissibility
ALARA	as low as reasonably achievable (principle)
Art.	Article
BGBl	Bundesgesetzblatt (Germany)
BGE	Bundesgerichtsentscheid (Judgment of the Swiss Federal High Court, published in the collection)
BVerfGer	Bundesverfassungsgericht (German Constitutional Court)
CCM	Convention on Cluster Munitions
CCWC	Convention on Certain Conventional Weapons (UN)
E	Erwägung (consideration in judgments of the Swiss Federal High Court)
ECMR	European Commission for Human Rights
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
Ed	edition
Ed(s).	editor(s)
FM	Field Manual
GA	General Assembly (UN)
GC	Grand Chamber (ECtHR)
HRC	Human Rights Committee (UN)

HUMINT	human intelligence
IAC	international armed conflict
IAEA	International Atomic Energy Agency
ICA	incapacitating chemical agent
ICCPR	International Covenant on Civil and Political Rights (UN)
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
i.e.	id est (latin) / that is
IED	improvised explosive device
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IMINT	imagery intelligence
INSAG	International Nuclear Safety Advisory Group (IAEA)
JESIP	Joint Emergency Services Interoperability Principles (U.K.)
LOAC	Law of Armed Conflicts
MACP	military in aid of the civil power
MASINT	measurement and signatures intelligence
MOD	Ministrytry of Defence (U.K.)
NATO	North Atlantic Treaty Organization
NIAC	non international armed conflict
OH	Operative Headquarters
OHCHR	Office of the High Commissioner for Human Rights
OSINT	open-source intelligence

p./pp.	page/pages
para.	paragraph/paragraphs
PKK	Partiya karkerên Kurdistan (Kurdistan Workers' Party)
RCA	Riot Control Agent
RoE	Rules of engagement
SFIR	Stabilization Force in Iraq
SIGINT	signals intelligence
SFO	Special Firearms Officers
SOF	special operations forces
SR	Systematische Rechtssammlung (systematic collection of laws; Switzerland)
SWAT	Special Weapons and Tactics
TRNC	Turkish Republic of Northern Cyprus
U.K.	United Kingdom
UN	United Nations
U.S. NRC	United States Nuclear Regulatory Commission
Vol.	volume
WHO	World Health Organisation

LITERATURE

John Adams, Risk, London 1995 (Risk).

Yonah Alexander, Terrorism and the Media: Some Considerations, in: Yonah Alexander/David Carlton/Paul Wilkinson (Eds.), Terrorism: Theory and Practice, Boulder (Colorado/U.S.A.) 1979, pp. 159 ff. (Terrorism and the Media).

Robert Alexy, Theorie der Grundrechte, Baden-Baden 1994 (Theorie der Grundrechte).

Christopher Andrew, Defend the Realm: The Authorized History of MI5, London 2009 (History of MI5).

Gil Avriel, Terrorism 2.0: The Rise of the Civilitary Battlefield, Harvard National Security Journal, Vol. 7 (2016), pp. 199 ff. (Terrorism 2.0).

André Beaufre, Introduction à la stratégie, Paris 1963/reprint 1968 (Introduction à la stratégie).

Stratégie de l'action, Editions de l'Aube 1966/reprint 1997 (Stratégie de l'action).

Dan Belz, Is International Humanitarian Law Lapsing into Irrelevance in the War on International Terror?, Theoretical Inquiries in Law, Vol. 7, No. (1 January 2006), pp. 97 ff. (War on International Terror).

Kristin Bergtora Sandvik, Security and International Law, in: J. Peter Burgess (Ed.), The Routledge Handbook of New Security Studies, pp. 110 ff. (Security and International Law).

Jochen von Bernstorff/Josephine Asche, Nachrichtendienst und Menschenrechte, in: Jan-Hendrik Dietrich/Sven-R. Eiffler (Eds.), Handbuch des Rechts der Nachrichtendienste, Stuttgart et al. 2017, pp. 79 ff. (Nachrichtendienst und Menschenrechte).

Nick van der Bijl, Operation Banner – The British Army in Northern Ireland 1960 – 2007, Barnsley 2009 (Operation Banner).

Derek Birrell/Paul Carmichael, Brexit, Devolution and Northern Ireland's Political Parties: Differential Solutions, Special Status or Special Arrangements?, in: Marius

Guderjan/Hugh Mackay/Gesa Stedman (Eds.), Contested Britain – Brexit, Austerity and Agency, Bristol University Press 2020, pp. 203 ff. (Brexit).

Laurie Blank/Amos Guiora, Teaching old Dogs New Tricks: Operationalizing the Law of Armed Conflict in New Warfare, Harvard National Security Journal, Vol. 1 (2010), pp. 45 ff. (Teaching old Dogs New Tricks).

Frank A. Bolz, Intelligence Requirements in Hostage Situations, Journal of Police Crisis Negotiations, Vol. 1 (2001), No. 1, pp. 61 ff. (Intelligence Requirements in Hostage Situations).

William H. Boothby, Weapons and the Law of Armed Conflict, 2nd ed., Croydon 2016 (Weapons and LOAC).

Shannon Bosch, The International Humanitarian Law Notion of Direct Participation in Hostilities – A Review of The ICRC Interpretive Guide and Subsequent Debate, Potchefstroom Electronic Law Journal, 1 August 2014, Vol. 17 (3), pp. 998 ff. (IHL Notion of Direct Participation in Hostilities).

Francesca Bosco/Niklas Creemers/Valeria Ferraris/Daniel Guagnin/Bert-Jaap Koops, Profiling Technologies and Fundamental Rights and Values: Regulatory Challenges and Perspectives from European Data Protection Authorities, in: Serge Gutwirth/Ronald Leenes/Paul de Hert (Eds.), Reforming European Data Protection Law, 2015 (Profiling Technologies and Fundamental Rights).

James F. Broder/Eugene Tucker, Risk Analysis and the Security Survey, 4th ed., Oxford 2012 (Risk Analysis).

Oldrich Bures, Terrorism and Counterterrorism, in: Myriam Dunn Cavelty/Thierry Balzacq (Eds.), Routledge Handbook of Security Studies, 2nd ed., London/New York 2017, pp. 139 ff. (Terrorism and Counterterrorism).

Jeremy G. Carter/David L. Carter, Law enforcement intelligence: implications for self-radicalized terrorism, Police Practice and Research, Vol. 13 (2012), No. 2, pp. 138 ff. (Law enforcement intelligence).

Stuart Casey-Maslen/Sean Connolly, Police Use of Force under International Law, Cambridge 2017 (Police Use of Force under International Law).

Juanita Chang, Social Media and Transparency – A Perspektice of Armed Forces, in: Tibor Szvircsev Tresch (Ed.), #transparenz – Chance oder Risiko? Social Media aus den Perspektiven Wirtschaft, Politik, Medien und Armee, MILAK Schrift No. 20 (Social Media and Transparency).

David A. Charters, Conclusions: Security and Liberty in Balance – Countering Terrorism in the Democratic Context, in: David A. Charters (Ed.), The Deadly Sin of Terrorism – Its Effect on Democracy and Civil Liberty in Six Countries, Westpoint/London 1994, pp. 211 ff. (Countering Terrorism in the Democratic Context).

Juliet Chevalier-Watts, Effective Investigations under Article 2 of the European Convention of Human Rights: Securing the Right to Life or an Onerous Burden on a State? in: The European Journal of International Law, Vol. 21, No. 3, 2010 (Effective Investigations).

John C. Chicken/Tamar Posner, The Philisophy of Risk, London 1998 (Philisophy of Risk).

Mark Cochrane, The Role of the Royal Ulster Constabulary in Northern Ireland, in: C. Christine Fair/Sumit Ganguly (Eds.), Policing Insurgencies: Cops as Counterinsurgents, Oxford 2014, pp. 107 ff. (RUC in Northern Ireland).

Cynthia C. Combs, Terrorism in the Twenty-First Century, 8th Edition, New York/London 2018 (Terrorism in the Twenty-First Century).

Geoffrey Corn/Ken Watkin/Jamie Williamson, The Law in War – A Concise Overview, New York 2018 (Law in War).

David M. Crane/Daniel Reisner, "Jousting at Windmills": The Laws of Armed Conflict in an Age of Terror – State Actors and Nonstate Elements, in: William C. Banks (Ed.), New Battlefields Old Laws – Critical Debates on Asymmetric Warfare, New York 2011, pp. 67 ff. (Jousting at Windmills).

Emily Crawford, Combatants, in: Rain Liivoja/Tim McCormack (Eds.), Routledge Handbook of the Law of Armed Conflict, London/New York 2016, pp. 123 ff. (Combatants).

Michael Crowley, Chemical Control – Regulation of Incapacitating Chemical Agent Weapons, Riot Control Agents and their Means of Delivery, New York 2016 (Chemical Control).

International Legal Constraints upon the Weaponization of Toxic Chemicals, in: Michael Crowley/Malcom Dando/Jijun Shang (Eds.), Preventing Chemical Weapons – Arms Control and Disarmament as the Sciences Converge, (The Royal Society of Chemistry) Croydon 2018 (Weaponization of Toxic Chemicals).

Raphaela Cueni, Schutz von Satire im Rahmen der Meinungsfreiheit, PhD thesis, Basel 2018, Zürich/St. Gallen 2019 (Schutz von Satire).

Neville J Curtis, Planning for the Next Generation of Soldier Modernisation, Land Warfare Conference 2000, Melbourne 2000 (Planning for the Next Generation of Soldier Modernisation).

Jayantha Dhanapala, The United Nation's Response to 9/11, in: Magnuns Ranstorp/Paul Wilkinson (Eds.), Terrorism and Human Rights, London/New York 2008, pp. 9 ff. (UN's Response to 9/11).

Brice Dickson, The European Convention on Human Rights and the Conflict in Northern Ireland, Oxford 2010 (ECHR and the Conflict in Northern Ireland).

The planning and control of operations involving the use of lethal force, in: Lawrence Early/Anna Austin/Clare Ovey/Olga Chernishova (Eds.), The Right to Life under Article 2 of the European Convention on Human Rights – Twenty Years of Legal Developments since McCann v. the United Kingdom, Oijsterwijk 2016, pp. 47 ff. (Planning and control of operations).

Pieter van Dijk/Fried van Hoof/Arjen van Rijn/Leo Zwaak (Eds.), Theory and Practice of the European Convention on Human Rights, 5th ed., Cambridge 2018 (Theory and Practice).

Laura K. Donohue, The Special Powers Acts, 1922-1972, The Historical Journal, Vol. 41, No. 4 (December 1998), pp. 1089 ff. (Special Powers Acts).

Knut Dörmann, The legal situation of "unlawful/unprivileged combatants", International Review of the Red Cross, No. 849, March 2003 (legal situation of "unlawful/unprivileged combatants").

Karlheinz Dudek, Die Besondere Aufbauorganisation. Bewältigung komplexer Lagen (Teil 1), SIAK-Journal – Zeitschrift für Polizeiwissenschaft und polizeiliche Praxis 1/2007,

part 1, pp. 14 ff. and 2/2007, part 2, pp. 41 ff. (Besondere Aufbauorganisation, part 1 / part 2).

Aaron Edwards, The Northern Ireland Troubles – Operation Banner 1969–2007, Oxford 2011 (Northern Ireland Troubles).

Bernhard Ehrenzeller/Benjamin Schindler/Rainer J. Schweizer/Klaus A. Vallender (Eds.), Die schweizerische Bundesverfassung, St. Galler Kommentar, 3rd ed., Zürich/St. Gallen 2014 (St. Galler Kommentar).

Simon Egbert/Matthias Leese, Criminal Futures – Predictive Policing and Everyday Police Work, London 2020 (Criminal Futures).

Richard English, Armed Struggle: The History of the IRA, Oxford 2004 (History of the IRA).

David P. Fidler, Police in Counterinsurgency – The Challenge of Comprehensive Reformation, in: C. Christine Fair/Sumit Ganguly (Eds.), Policing Insurgencies: Cops as Counterinsurgents, Oxford 2014, pp. 319 ff. (Police in Counterinsurgency).

James J.F. Forest, An Introduction to the Study of Counterterrorism, in: James J.F. Forest (Ed.), Essentials of Counterterrorism, Santa Barbara 2015, pp. 1 ff. (Counterterrorism).

Global trends in kidnapping by terrorist groups, Global Change Peace & Security, October 2012, pp. 311 ff. (Kidnapping).

Gloria Gaggioli Gasteyger/Robert Kolb, A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights, Israel Yearbook on Human Rights, Vol. 37 (2007), pp. 115 ff. (Right to Life in Armed Conflicts).

Judith Gail Gardam, Non-combatant immunity as a norm of international humanitarian law, PhD thesis, Melbourne 1993 (Non-combatant immunity).

Martin J. Gallagher, The 2016 'Lone Wolf' Tsunami – Is Rapoport's ‹Religious Wave› Ending?, Journal of Strategic Security, Vol. 10 (2017), No. 2, pp. 60 ff. (Lone Wolf Tsunami).

Pascal Gemke/Mariëlle Den Hengst/Flore Van Rosmalen/Annette De Boer, Towards a maturity model for intelligence-led policing – A case study research on the in-

vestigation of drugs crime and on football and safety in the Dutch police, Police Practice and Research, 2019, published online (intelligence-led policing).

Geneva Academy of International Humanitarian Law and Human Rights, Use of Force in Law Enforcement and the Right to Life : The Role of the Human Right Council, Academy In-Brief No. 6, November 2016 (In-Brief No. 6).

Emanuela-Chiara Gillard, Protection of civilians in the conduct of hostilities, in: Rain Liivoja/Tim McCormack (Eds.), Routledge Handbook of the Law of Armed Conflict, London/New York 2016, pp. 157 ff. (Protection of civilians in the conduct of hostilities).

Sean P. Giovanello, Riot Control Agents and Chemical Weapons Arms Control in the United States, Journal of Strategic Security 5, No. 4 (2012), pp. 1 ff. (RCA and Chemical Weapons Control).

David S. Goddard, Applying the European Convention on Human Rights to the Use of Physical Force: *Al-Saadoon*, in: International Law Studies (U.S. Naval War College), No. 91 (2015), pp. 402 ff. (Applying the ECHR to the Use of Physical Force).

Luc Gonin, Les droits de l'homme en pratique: analyse comparative du droit à la vie, de la liberté religieuse et de la liberté d'expression, et conséquences théoriques, Basel 2013 (Droits de l'homme).

Camilla Guldahl Cooper, NATO Rules of Engagement, On ROE, Self-Defence and the Use of Force during Armed Conflict, Leiden/Boston 2020 (NATO ROE).

Rules of Engagement Demystified: A Study of the History, Development and Use of ROEs, Military Law and The Law of War Review 53/2 (2014), pp. 189 ff. (RoE Demystified).

Christoph Gusy, Nachrichtendienste in der sicherheitsbehördlichen Kooperation – Verfassungsrechtliche Grundlagen und gesetzliche Grundfragen, in: Jan-Hendrik Dietrich/Sven-R. Eiffler (Eds.), Handbuch des Rechts der Nachrichtendienste, Stuttgart et al. 2017, pp. 349 ff. (Sicherheitsbehördliche Kooperation).

Felix Hafner/Andreas Stöckli/Reto Patrick Mueller, in: Hafner/Stöckli/Mueller (Eds.), Schutzanspruch der jüdischen Religionsgemeinschaften, Rechtsgutachten zur Rechtslage im Bund sowie in den Kantonen Zürich, Bern und Basel, Zürich/St. Gallen

2018, Rechtslage im Kanton Basel-Stadt, pp. 71 ff. (Schutzanspruch der jüdischen Religionsgemeinschaften).

Leonard Hammer, The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe, The Hague 2012 (Fundamental Freedoms).

Françoise Hampson, Article 2 of the Convention and military operations during armed conflict, in: Lawrence Early/Anna Austin/Clare Ovey/Olga Chernishova (Eds.), The Right to Life under Article 2 of the European Convention on Human Rights – Twenty Years of Legal Developments since McCann v. the United Kingdom, Oijsterwijk 2016, pp. 191 ff. (Article 2 during armed conflict).

Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law, in: International Law Studies (U.S. Naval War College), No. 87 (2011), pp. 187 ff. (Direct Participation).

Agnes Hankiss, The Legend of the Lone Wolf, Journal of Strategic Security, Vol. 11 (2018), No. 2, pp. 54 ff. (Legend of the Lone Wolf).

Christopher C. Harmon, How Terrorist Groups End: Studies of the Twentieth Century, Strategic Studies Quarterly, Vol. 4, No. 3, 2010), pp. 43 ff. (How Terrorist Groups End).

David Harris/Michael O'Boyle/Colin Warbrick, Law of the European Convention on Human Rights, 3th ed., Oxford 2014 (European Convention [3th ed.]).

David Harris/Michael O'Boyle/Ed Bates/Clara Buckley, Law of the European Convention on Human Rights, 4th ed., Oxford 2018 (European Convention [4th ed.]).

Ulrich Hauptmanns/Michael Herttrich/Wolfgang Werner, Technische Risiken – Ermittlung und Beurteilung, Berlin et al. 1987 (Technische Risiken).

Vincent E. Henry, The Need for a Coordinated and Strategic Local Police Approach to Terrorism: A Practitioner's Perspective, Police Practice and Research, Vol. 3 (2002), No. 4, p. 319 (Coordinated and Strategic Local Police Approach to Terrorism).

Bruce Hoffman, Inside Terrorism, 3rd ed., New York 2006 (Inside Terrorism).

Bruce Hoffman/Fernando Reinares, Conclusions, in: Hoffman/Reinares (Eds.), The Evolution of the Global Terrorist Threat – From 9/11 to Osama bin Laden's Death, New York 2014, pp. 618 ff. (Global Terrorist Thereat – Conclusions).

Jennifer Holmes, Developing and Implementing Counterterrorism Policy in a Liberal Democracy, in: James J.F. Forest (Ed.), Essentials of Counterterrorism, Santa Barbara 2015, pp. 35 ff. (Counterterrorism Policy).

Christian A. Honeywood, Britain's Approach to Balancing Counter-Terrorism Laws with Human Rights, Journal of Strategic Security, Vol. 9 (2016), No. 3, pp. 28 ff. (Britain's Approach).

Geraint Hughes, The Military's Role in Counterterrorism: Examples and Implications for Liberal Democracies, U.S. Army War College, Carlisle 2011 (Military's Role).

Thomas Byron Hunter, Targeted Killing: Self-Defense, Preemption, and the War on Terrorism, Journal of Strategic Security, Vol. 2 (2010), No. 2, pp. 1 ff. (Targeted Killing).

International Committee of the Red Cross (Nils Melzer), Interpretative guidance on the notion of Direct participation in hostilities under international humanitarian law, Geneva 2009 (Interpretative guidance [direct participation]).

Brian A. Jackson, Counterinsurgency Intelligence in a "Long War" – The British Experience in Northern Ireland, Military Review, January-February 2007, pp. 74 ff. (Counterinsurgency Intelligence in a "Long War").

Francis G. Jacobs/Robin C. A. White/Clare Ovey, The European Convention on Human Rights, 8th ed., Oxford 2021 (European Convention).

The European Convention on Human Rights, 7th ed., Oxford 2017 (European Convention [7th ed.]).

Yateendra Singh Jafa, Defeating Terrorism: A Study of Operational Strategy and Tactics of Police Forces in Jammu & Kashmir (India), Police Practice and Research, Vol. 6 (2005), No. 2, pp. 141 ff. (Defeating Terrorism).

Adrian James, Forward to the past: reinventing intelligence-led policing in Britain, Police Practice and Research, Vol. 15 (2014), No. 1, pp. 75 ff. (reinventing intelligence-led policing).

Eric Talbot Jensen, Direct Participation in Hostilities – A Concept Broad Enough for Today's Targeting Decisions, in: William C. Banks (Ed.), New Battlefields Old Laws – Critical Debates on Asymmetric Warfare, New York 2011, pp. 85 ff. (Direct Participation in Hostilities).

Antoine Henri de Jomini, The Art of War, Philadelphia 1862, Restored Edition 2008 (The Art of War).

Michael Karlsson, 9/11 and the Design of Counterterrorism Institutions, Farnham/Burlington 2012 (Counterterrorism).

Mohammadmoein Khazaeli Jah/Ardavan Khoshnood, Profiling Lone-Actor Terrorists: A Cross-Sectional Study of Lone-actor Terrorists in Western Europe (2015–2016), Journal of Strategic Security, Vol. 12 (2019), No. 4, pp. 25 ff. (Profiling Lone-Actor Terrorists).

James D. Kiras, Terrorism and globalization, in: John Baylis/Steve Smith/Patricia Owens (Eds.), The Globalization of World Politics: An Introduction to International Relations, 7th ed., Oxford 2017, pp. 402 ff. (Terrorism and globalization).

Jann K. Kleffner, Human Rights and International Humanitarian Law: General Issues, in: Terry D. Gill/Dieter Fleck (Eds.), The Handbook of the International Law of Military Operations, Second Edition, pp. 35 ff. (Human Rights and International Humanitarian Law).

The Applicability of the Law of Armed Conflict and Human Rights Law to Organised Armed Groups, in: Erika de Wet/Jann Kleffner (Eds.), Convergence and Conflicts – Of Human Rights and International Humanitarian Law in Military Operations, Pretoria 2014 (Organised Armed Groups).

Aaron J. Klein, Striking Back – The 1972 Munich Olympics Massacre an Isreael's Deadly Response, New York 2005 (Stricking Back).

Charles Krauthammer, Partners in Crime, in: Benjamin Netanyahu (Ed.), Terrorism – How the West Can Win, London 1986, pp. 111 ff. (Partners in Crime).

Heike Krieger, Völkerrechtliche Fundamente einer neuen Sicherheitsarchitektur, in: Herfried Münkler/Matthias Bohlender/Sabine Meurer (Eds.), Handeln unter Risiko – Gestaltungsansätze zwischen Wagnis und Vorsorge, Bielefeld 2010 (Neue Sicherheitsarchitektur).

Walter Krutzsch/Ralf Trapp, Definitions and Criteria, in: Walter Krutzsch/Eric Myjer/Ralf Trapp (Eds.), The Chemical Weapons Convention – a Commentary, Oxford 2014, pp. 73 ff. (Definitions and Criteria).

Audrey Kurth Cronin, How Terrorism Ends – Understanding the Decline and Demise of Terrorist Campaigns, Princeton 2009 (How Terrorism Ends).

Walter Laqueur, Krieg dem Westen – Terrorismus im 21. Jahrhundert, München 2003 (Krieg dem Westen).

Terrorismus. Die globale Herausforderung, Frankfurt a.M./Berlin 1987 (Terrorismus).

Philip Leach, Taking a Case to the European Court of Human Rights, 4th ed., Oxford 2017 (European Court).

Michelle Lesh, Direct participation in hostilities, in: Rain Liivoja/Tim McCormack (Eds.), Routledge Handbook of the Law of Armed Conflict, London/New York 2016, pp. 106 ff. (Direct participation in hostilities).

Interplay as regards conduct of hostilities, in: Erika de Wet/Jann Kleffner (Eds.), Convergence and Conflicts – of Human Rights and International Humanitarian Law in Military Operations, Pretoria 2014, pp. 99 ff. (Conduct of hostilities).

Sherrill Lingel/Carl Rhodes/Amado Cordova/Jeff Hagen/Joel Kvitky/Lance Menthe, Methodology for Improving the Planning, Execution, and Assessment of Intelligence, Surveillance, and Reconnaissance Operations, Santa Monica 2008, RAND Corp, sponsored by the United States Air Force (Improving Intelligence).

Noam Lubell/Nanci Prud'homme, Impact of human rights law, in: Rain Liivoja/Tim McCormack (Eds.), Routledge Handbook of the Law of Armed Conflict, London/New York 2016, pp. 123 ff. (Impact of human rights law).

Orla Lynskey, Criminal justice profiling and EU data protection law: precarious protection from predictive policing, International Journal of Law in Context, 15 (2019), pp. 162 ff. (Profiling and data protection).

Scott D. MacDonald, The Lawful Use of Targeted Killing in Contemporary International Humanitarian Law, Journal of Terrorism Research, 2011 (Vol. 2, Issue 3), pp. 126 ff. (Lawful Use of Targeted Killing).

Sarah V. Marsden/Alex P. Schmid, Typologies of Terrorism and Political Violence, in: Alex P. Schmid (Ed.), The Routledge Handbook of Terrorism Research, London/New York 2011, pp. 158 ff. (Typologies of Terrorism).

Céline Martin, Grundrechtskollisionen, PhD thesis, Basel 2007 (Grundrechtskollisionen).

Gus Martin, essentials of terrorism – concepts and controversies, 3th ed., Los Angeles et al. 2014 (Essentials of terrorism).

Mark S. Martins, Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering, Military Law Review, Vol. 143, Winter 1994, pp. 1 ff. (RoE for Land Forces).

Danny McKnight, Streets of Mogadishu, Leadership At Its Best, Political Correctness At Its Worst!, Chester (Maryland, USA) 2011 (Streets of Mogadishu).

Nils Melzer, Targeted killing in international law, Oxford 2008 (Targeted Killing).

Christopher Michaelsen, Derogating from International Human Rights Obligations in the 'War Against Terrorism'? – A British-Australian Perspecive, in: Magnuns Ranstorp/Paul Wilkinson (Eds.), Terrorism and Human Rights, London/New York 2008, pp. 118 ff. (War Against Terrorism).

Stefan Mogl, Technical Workshop on Incapacitating Chemical Agents, Spiez, 8–9 September 2011 (Technical Workshop).

Herfried Münkler, Ältere und jüngere Formen des Terrorismus – Strategie und Organisationsstruktur, in: Werner Weidenfeld (Ed.), Herausforderung Terrorismus – Die Zukunft der Sicherheit, Wiesbaden 2004, pp. 29 ff. (Ältere und jüngere Formen des Terrorismus).

Reto Patrick Mueller, Innere Sicherheit Schweiz – Rechtliche und tatsächliche Entwicklungen im Bund seit 1848, PhD thesis, Basel 2009, Egg bei Einsiedeln 2009 (Innere Sicherheit Schweiz).

Reto Patrick Mueller/Herbert Zech, Was ist Technikrecht? Herausforderungen der Rechtsordnung im Umgang mit einer "hybriden" Querschnittsmaterie, Sicherheit & Recht 2/2019, pp. 72 ff. (Technikrecht).

Donald A. Neill, Riot Control and Incapacitating Chemical Agents under the Chemical Weapons Convention, Defence R&D Canada, Centre for Operational Research and Analysis, June 2007 (Riot Control and Incapacitating Chemical Agents under the CWC).

Benjamin Netanyahu, Defining Terrorism, in: Benjamin Netanyahu (Ed.), Terrorism – How the West Can Win, London 1986, pp. 7 ff. (Defining Terrorism).

Georg Nolte, Thin or Thick? The Principle of Proportionality and International Humanitarian Law, Law & Ethics of Human Rights, Vol. 4, Issue 2 (2010), pp. 245 ff. (Principle of Proportionality).

Robert B. Oakley, Combating Terrorism, Harvard International Review, Vol. 7 (1985), No. 6, pp. 8 ff. (Combating Terrorism).

Brendan O'Leary, Mission Accomplished? Looking Back at the IRA, Field Day Review 2005, pp. 217 ff. (IRA).

Zane Pokorny/Andrei Barysevich/Levi Gundert/Allan Liska/Maggie McDaniel/John Wetzel, The Thread Intelligence Handbook – Moving Towards a Security Intelligence Program, 2nd ed., Annapolis 2019 (Thread Intelligence Handbook).

Maurice Punch, Shoot to kill – Police accountability, firearms and fatal force, Bristol University Press 2010 (Shoot to kill).

Karen Reid, A Practitioner's Guide to the European Convention on Human Rights, 6th ed., London 2019 (Practitioner's Guide).

A Practitioner's Guide to the European Convention on Human Rights, 4th ed., London 2012 (Practitioner's Guide [4th ed. 2012]).

Shane R. Reeves/David Wallace, The Combatant Status of the "Little Green Men" and Other Participants in the Ukraine Conflict, in: International Law Studies (U.S. Naval War College), No. 91 (2015), pp. 361 ff. (Little Green Men).

Michael S. Reilly, The Rules of Engagement in the Conduct of Special Operations, Master Thesis, Naval Postgraduate School Monterey/California 1996 (RoE in Special Operations).

Louise Richardson, What Terrorists Want – Understanding the Enemy, Containing the Threat, New York 2006 (What Terrorists Want).

J. Ashley Roach, Rules of Engagement, Naval War College Review, Vol. 36, No. 1, January-February 1983, pp. 46 ff. (RoE).

Ralph Roche, "Operationalising" the European Convention on Human Rights for police, in: Lawrence Early/Anna Austin/Clare Ovey/Olga Chernishova (Eds.), The Right to Life under Article 2 of the European Convention on Human Rights – Twenty Years of Legal Developments since McCann v. the United Kingdom, Oijsterwijk 2016, pp. 61 ff. (Operationalising the ECHR).

Florian Sax, Soldaten gegen Piraten: Der extraterritoriale Einsatz der deutschen Marine zur Pirateriebekämpfung im Lichte von Völkerrecht und Grundgesetz, PhD thesis, Berlin 2018 (Soldaten gegen Piraten).

Markus Schefer, Die Kerngehalte von Grundrechten: Geltung, Dogmatik, inhatliche Ausgestaltung, Habilitation Bern, Bern 2001 (Kerngehalte von Grundrechten).

Michael N. Schmitt, Deconstructing Direct Participation in Hostilities: The Constitutive Elements, New York University, Journal of International Law and Politics, Vol. 42 (2010), pp. 697 ff. (Deconstructing Direct Participation in Hostilities).

The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis, Harvard National Security Journal, Vol. 1 (2010), pp. 5 ff. (Direct Participation in Hostilities).

The Status of Opposition Fighters in a Non-International Armed Conflict, in: International Law Studies (U.S. Naval War College), No. 88 (2012), pp. 119 ff. (Status of Opposition Fighters).

Daniel Schorr, The Encouragement of Violence, in: Benjamin Netanyahu (Ed.), Terrorism – How the West Can Win, London 1986, pp. 114 ff. (Encouragement of Violence).

Fred Schreier, Fighting the Pre-eminent Threats with Intelligence-led Operations, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper – No. 16, Geneva 2009 (Intelligence-led Operations).

George P. Schulz, The Challenge to the Democracies, in: Benjamin Netanyahu (Ed.), Terrorism – How the West Can Win, London 1986, pp. 16 ff. (Challenge to the Democracies).

Karen P. Seifert, Interpreting the Law of War: Rewriting the Rules of Engagement to Police Iraq, Minnesota Law Review, 92 (2008), pp. 836 ff. (Rewriting the RoE).

Linos-Alexander Sicilianos, Out of harm's way: positive obligations under Article 2 of the European Convention on Human Rights, in: Lawrence Early/Anna Austin/Clare Ovey/Olga Chernishova (Eds.), The Right to Life under Article 2 of the European Convention on Human Rights – Twenty Years of Legal Developments since McCann v. the United Kingdom, Oijsterwijk 2016, pp. 29 ff. (Positive obligations).

Stephen Skinner, The core of McCann: lethal force and democracy under the European Convention on Human Rights, in: Lawrence Early/Anna Austin/Clare Ovey/Olga Chernishova (Eds.), The Right to Life under Article 2 of the European Convention on Human Rights – Twenty Years of Legal Developments since McCann v. the United Kingdom, Oijsterwijk 2016, pp. 67 ff. (The core of McCann).

Stephen Sloan/Sean K. Anderson, Historical Dictionary of Terrorism, 3rd ed., Lanham Maryland/U.S.A. 2009 (Historical Dictionary of Terrorism).

Lionel F. Solis, Critical Incident Intelligence Gathering, Coordination and Analysis, Journal of Police Crisis Negotiations, Vol. 2 (1) 2002, pp. 91 ff. (Critical Incident Intelligence Gathering, Coordination and Analysis).

Evelyne Sturm, Untersuchung von polizeilicher Gewaltanwendung – Menschenrechtliche Vorgaben und ihre Umsetzung in der Schweiz, PhD thesis, Zürich/St. Gallen 2019 (Gewaltanwendung).

John O'Sullivan, Deny Them Publicity, in: Benjamin Netanyahu (Ed.), Terrorism – How the West Can Win, London 1986, pp. 120 ff. (Deny Them Publicity).

Nassim Nicholas Taleb, The Black Swan: The Impact of the Highly Improbable, New York 2007 (The Black Swan).

Daniela Tatu, Medical negligence: In the case-law of the European Court of Human Rights, Vicalvi 2018 (Medical negligence).

Frederick W. Turner II/Bryanna Hahn Fox, Public servants or police soldiers? An analysis of opinions on the militarization of policing from police executives, law enforcement, and members of the 114th congress U.S. house of representatives, Police Practice and Research, Vol. 20 (2019), No. 2, pp. 122 ff. (Public servants or police soldiers?).

Ralf Trapp, Declarations, in: Walter Krutzsch/Eric Myjer/Ralf Trapp (Eds.), The Chemical Weapons Convention – a Commentary, Oxford 2014, pp. 105 ff. (Declarations).

Mark Urban, Big Boys' Rules – The Secret Struggle against the IRA, London/Boston 1992 (Big Boys' Rules).

Ayşegül Uzun Marinković/Aida Grigć, State responsibility for injuries and killings perpetrated by State agents other than in the performance of their duties, in: Lawrence Early/Anna Austin/Clare Ovey/Olga Chernishova (Eds.), The Right to Life under Article 2 of the European Convention on Human Rights – Twenty Years of Legal Developments since McCann v. the United Kingdom, Oijsterwijk 2016, pp. 75 ff. (State responsibility).

Martin Van Creveld, The Transformation of War, New York et al. 1991 (Transformation of War).

Colin Warbrick, The European Convention on Human Rights and the Prevention of Terrorism, The International and Comarative Law Quarterly, Vol. 32, No. 1 (1983), pp. 82 ff. (Prevention of Terrorism).

The European Response to Terrorism in an Age of Human Rights, The European Journal of International Law, Vol. 15 (2004), No. 5, pp. 989 ff. (European Response to Terrorism).

Grant Wardlaw, Linkages Between the Illegal Drugs Traffic and Terrorism, Conflict Quarterly 6, No 3 (1988), pp. 5 ff. (Linkages).

The Democratic Framework, in: David A. Charters (Ed.), The Deadly Sin of Terrorism – Its Effect on Democracy and Civil Liberty in Six Countries, Westpoint/London 1994, pp. 5 ff. (Democratic Framework).

Jan-Philipp Weisswange, Der ditigale Soldat – Der Kampf mit und gegen neue Technologien, Europäische Sicherheit & Technik, Juli 2020, pp. 52 ff. (Der ditigale Soldat).

Elizabeth Wicks, The Right to Life and Conflicting Interests, Oxford 2010 (Right to Life).

Paul Wilkinson, International terrorism: the changing threat and the EU's response, Paris 2005 (Changing threat).

Terrorism and the rule of law, Harvard International Review, Vol. 7, No. 6 (May/June 1985), pp. 11 ff. (Terrorism and the rule of law).

Paul Wilkinson, Terrorism Versus Democracy – The liberal State Response, London 2000 (Terrorism versus Democracy).

Winston S. Williams, Training the Rules of Engagement for the Counterinsurgency Fight, The Army Lawyer (42), January 2012, pp. 42 ff. (Training the RoE for the Counterinsurgency Fight).

Marten Zwanenburg, The interplay of international humanitarian law and international human rights law in peace operations, in: Erika de Wet/Jann Kleffner (Eds.), Convergence and Conflicts – of Human Rights and International Humanitarian Law in Military Operations, Pretoria 2014, pp. 153 ff. (Peace Operations).

Jürgen Zeitner, Einsatzlehre, 2nd ed., Hilden 2015 (Einsatzlehre).

SCIENTIFIC STUDIES

ICRC, Toxic Chemicals as Weapons for Law Enforcement, A Threat to Life and International Law?, Geneva, September 2012 (Toxic Chemicals as Weapons for Law Enforcement).

International Institute of Humanitarian Law, Rules of Engagement Handbook, Sanremo 2009 (Sanremo Handbook on RoE).

National Research Council/Committee on the Institutional Means for Assessment of Risks to Public Health, Risk Assessment in the Federal Government: Managing the Process, Washington 1983, 13. printing 1996 (Risk Assessment in the Federal Government).

The Royal Society, Brain Waves Module 3: Neuroscience, conflict and security, February 2012, RS Policy document 06/11 (Neuroscience, conflict and security).

The Royal Society, Risk: Analysis, Perception and Management – Report of a Royal Society Study Group, London 1992, seventh impression 2010 (Risk: Analysis, Perception and Management).

The Royal Society, Risk assessment, Report of a Royal Society Study Group, London 198 (Risk assessment).

U.S. NRC, Reactor Safety Study – An Assessment of Accident Risks in U.S. Commercial Nuclear Power Plants, Main Report, October 1975, WASH-1400 / NUREG-75/14 (Rasmussen Report).

MATERIALS AND REPORTS

Bundesamt für Verfassungsschutz (Germany), Verfassungsschutzbericht 2018.

International Nuclear Safety Advisory Group (INSAG), Basic Safety Principles for Nuclear Power Plants, Safety Series No. 75, INSAG-3, Wien 1988; (Basic Safety Principles NPP, INSAG-3).

Basic Sefety Prinzicples for Nuclear Power Plants, Safety Series No. 75, INSAG-3 Rev. 1, INSAG-12, Wien 1999 (Basic Safety Principles NPP, INSAG-12).

Key Practical Issues in Strengthening Safety Culture, INSAG-15, Wien 2002 (Strengthening Safety Culture, INSAG-15).

Management of Operational Safety in Nuclear Power Plants, INSAG-13, Wien 1999 (Management of Operational Safety in NPP, INSAG-13).

Probabilistic Safety Assessment, Safety Series No. 75, INSAG-6, Wien 1992 (Probabilistic Safety Assessment, INSAG-6).

Safe Management of the Operating Lifetimes of Nuclear Power Plants, INSAG-14, Wien 1999 (Safe Management of the Operating Lifetimes of NPP, INSAG-14).

Safety Culture, Safety Series No. 75, INSAG-4, Wien 1991 (Safety Culture, INSAG-4).

Intelligence and Security Committee of Parliament (U.K.), Annual Report 2016–2017, 2 December 2017.

Intelligence and Security, Annual Report 2017–2018, 22 November 2018.

Ministry of Defence (U.K.), Operation Banner – An analysis of Military Operations in Northern Ireland, Army Code 71842, July 2006 (Operation Banner – Analysis).

National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on Disorders and Terrorism, Washington 1976.

Nachrichtendienst des Bundes NDB (Switzerland), Sicherheit Schweiz 2016, Lagebericht des Nachrichtendienstes des Bundes.

Sicherheit Schweiz 2017, Lagebericht des Nachrichtendienstes des Bundes.

Sicherheit Schweiz 2018, Lagebericht des Nachrichtendienstes des Bundes.

Sicherheit Schweiz 2019, Lagebericht des Nachrichtendienstes des Bundes.

Rapport de M. François GROSDIDIER, fait au nom de la commission d'enquête, Vaincre le malaise des forces de sécurité intérieure : une exigence républicaine, n° 612 tome I (2017-2018), 27 juin 2018.

Report on the activities of the Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate pursuant to Security Council resolution 2322 (2016), annex to Security Council, Letter dated 14 December 2017 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, 2017/1065.

The National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report – Final Report of the National Commission on Terrorist Attacks Upon the United States, (vermutlich Washington) 2004 (9/11 Commission Report).

UN General Assembly, Resolution 41/60 (1985) adopted by the General Assembly on 9 December 1985: Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to elfect radical changes (A/40/1003), UN GA Resolution 41/60.

Resolution 60/288 (2006) adopted by the General Assembly on 8 September 2006.

UN Security Council, Fifth report of the Secretary-General on the threat posed by ISIL (Da'esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat, 2017/467, 31 May 2017.

Resolution 1373 (2001).

Resolution 1624 (2005).

Resolution 2178 (2014).

Resolution 2322 (2016).

Sixth report of the Secretary-General on the threat posed by ISIL (Da'esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat, 2018/80, 31 January 2018.

World Health Organisation (WHO), Public health response to biological and chemical weapons, WHO guidance, Geneva 2004.

DECREES

International Human Rights Law

- Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950 (European Convention on Human Rights [ECHR] / European Convention).
- European Convention on the Suppression of Terrorism of 27 January 1977, European Treaty Series No. 90 (European Convention on the Suppression of Terrorism).
- Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies (Guidelines on human rights and the fight against terrorism).
- International Covenant on Civil and Political Rights of 16 December 1966 (ICCPR).
- Universal Declaration of Human Rights, Paris, 10 December 1948.

International Humanitarian Law and Law of Armed Conflicts

- Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949 (Geneva Convention I).
- Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949 (Geneva Convention II).
- Convention on Certain Conventional Weapons, Geneva, 10 October 1980, (CCWC).
- Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (Geneva Convention IV).
- Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (Geneva Convention III).
- Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (Hague Convention IV).
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977 (Protocol I).

- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Geneva, 8 June 1977 (Protocol II).
- Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (CCWC-Protocol III).

International Conventions

- Charter of the United Nations and the Statute of the International Court of Justice (UN Charter).
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993 (CWC).
- Convention on offences and certain other acts committed on board aircraft, 14 September 1963, UN Treaty Series no. 10106.
- Convention for the Suppression of unlawful seizure of aircraft, 16 December 1970, UN Treaty Series vol. 860/I-12325, p. 106.
- Convention for the suppression of unlawful acts against the safety of civil aviation, 23 September 1971, UN Treaty Series vol. 974/I-14118, p. 178.
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, UN Treaty Series vol. 1035, p. 167.
- Vienna Convention on Diplomatic Relations, 18 April 1961 (Vienna Convention on Diplomatic Relations).
- Vienna Convention on Consular Relations, 24 April 1963 (*Vienna Convention on Consular* Relations).
- Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 (Vienna Convention).
- Rome Statute of the International Criminal Court, Rome, 17 July 1998 (Rome Statute).
- Convention on Cluster Munitions, Dublin, 30 May 2008 (CCM).
- Convention on the Physical Protection of Nuclear Material, 26 October 1979 (IAEA, INFCIRC 274).

Recommendations

- American Association for the International Commission of Jurists, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles).
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990 (U.N. Basic Principles).
- Code of Conduct for Law Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979.
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Annexed to General Assembly resolution 3166 (XVIII) of 14 December 1973.
- International Convention Against the Taking of Hostages, New York, 17 December 1979.
- The European Code of Police Ethics, Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum.

United Kingdom and Northern Ireland

- Northern Ireland (Emergency Provisions) Act 1973, 1973 CHAPTER 53.
- Prevention of Terrorism (Temporary Provisions) Act 1974, 1974 CHAPTER 56.
- The Northern Ireland Peace Agreement, 10 April 1998 (Good Friday Agreement).

MANUALS AND REGULATIONS

Switzerland

- *Schweizerisches Polizeiinstitut* (SPI), Führung im Polizeieinsatz, Neuchâtel 2017 (FIP).
- *Schweizerisches Polizeiinstitut* (SPI), Führung im Polizeieinsatz, Stabsarbeit, Neuchâtel 2018 (FIP Stabsarbeit).

NATO

- Allied Command Operations/Allied Command Transformation, Public Affairs Handbook, May 2020 (Public Affairs Handbook).
- Glossary of Terms and Definitions, Edition 2019, February 2016 (NATO AAP-06 [Terms and Definitions, 2019]).
- Legal Deskbook, 2nd ed., 2010.
- ROE Manual MC 362-1 (restricted).
- Standard AJP-2, Allied Joint Doctrine for Intelligence, Counter-Intelligence and Security, Edition A Version 2, February 2016 (NATO Standard AJP-2 [Intelligence, 2016]).
- Standard AJP-2.1, Allied Joint Doctrine for Intelligence Procedures, Edition B Version 1, June 2016 (NATO Standard AJP-2-1 [Intelligence Procedures, 2016]).
- Standard AJP-2.7, Allied Joint Doctrine for Joint Intelligence, Surveillance and Reconnaissance, Edition A Version 1, July 2016 (NATO Standard AJP-2-7 [Joint Intelligence, 2016]).

United Kingdom

- *Joint Emergency Services Interoperability Principles* (JESIP), The interoperability framework, edition 2, July 2016 (Interoperability framework).
- *Ministry of Defence*, Land Operations, Army Doctrine Publication AC 71940, 2017.
- *Ministry of Defence*, Manual of the law of armed conflict (JSP 383), 2004.
- *Ministry of Defence*, UK Defence Doctrine, Joint Doctrine Publication 0-01 (JDP 0-01), 5th Edition November 2014.

– *Ministry of Defence*, UK Defence Doctrine, Joint Doctrine Publication 3-46 (JDP 3-46), Legal Support to Joint Operations, 3th ed., June 2018.

United States of America

– *Headquarters Departement of the Army* (Headquarters Department of the Army/ Headquarters Marine Corps Combat Development Command/Headquarters United States Marine Corps), Insurgencies and Countering Insurgencies, Field Manual (FM) 3-24/Marine Corps Warfighting Publication (MCWP) 3-33.5, Washington D.C. May/June 2014 (Field Manual 3-24).
– *Joint Chiefs of Staff* (Department of the Army/Departement of the Navy/ Departement of the Navy U.S. Marine Corps/Department of the Air Force), Joint and National Intelligence Support to Military Operations, (probably Washington D.C.) 5 July 2017 (Joint and National Intelligence Support).

I. INTRODUCTION

«[T]he information that the [...] authorities received that there would be a terrorist attack [...] presented them with a fundamental dilemma. On the one hand, they were required to have regard to their duty to protect the lives of the people [...] including their own military personnel and, on the other, to have minimum resort to the use of lethal force against those suspected of posing this threat in the light of the obligations flowing from both domestic and international law.»

McCann and others v. The United Kingdom (GC), 18984/91 (1995), § 192.

The scourge of terrorism has returned to Europe. New forms of action by misguided perpetrators are particularly perfidious and confront the Convention States with major challenges. In a democratic state, the permissibility of the use of force by state actors is bound by strict rules, even in the face of terrorist threats. Recourse to the use of force by security forces is only permitted within the limits of constitutional law and the wider legal and administrative framework. The question of whether the state may legitimately use even potentially lethal force against persons is crucial in the case of perturbators threatening the life of other persons.

The European Court of Human Rights (ECtHR) has dealt with the different aspects of the right to life in various judgments and decisions. The content of the resulting case law concerns the design of a legal and administrative framework[1], the state's duty to protect[2], specific duties to investigate[3] and the actual use of force[4]. A strict

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1 *Calvelli and Ciglio v. Italy* (GC), 32967/96 (2002); *Makaratzis v. Greece* (GC), 50385/99 (2004).

2 *Mastromatteo v. Italy* (GC), 37703/97 (2002); *Öneryildiz v. Turkey* (GC), 48939/99 (2004).

3 *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011); *Mustafa Tunç and Fecire Tunç v. Turkey* (GC), 24014/05 (2015); *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016).

4 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995); *Nachova and others v. Bulgaria* (GC), 43577/98 and 43579/98 (2005); *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011); *Mocanu and others v. Romania* (GC), 10865/09 (2014).

separation of the different aspects of the right to life is hardly possible and not even advisable[5].

Overall, the ECtHR has so far had to deal with the use of potentially lethal use of force in relatively few cases. However, as its jurisprudence has proven to be constant, the resulting practice can be regarded as a binding standard on the right to life for the Council of Europe states[6]. The fact that a judgment of the ECtHR is in principle only to be complied with by the state that is itself affected as a party (Art. 46 [1] ECHR) is therefore of minor relevance[7].

In the following section, the most important cases are briefly introduced (Section II). Based on the case law developed by the ECtHR, the question is answered as to what specific obligations are incumbent on states to ensure security in particular situations (Section III). The relevant judgments will be used to derive which state obligations to act can exist in the forefront of certain anti-terrorist operations (Section IV), during their execution (Section V) and afterwards (Section VI). Summary theses (Section VII) and concluding remarks (Section VIII) complete this study.

The resulting findings are intended to help shape state action under extreme situations in accordance with fundamental rights. As will be shown, fundamental rights obligations in anti-terrorist operations must be considered already with preparatory activities and extend in various forms through each individual phase of operations to their conclusion – and even beyond. The fundamental dilemma between the prohibition on killing and the duty to protect and rescue people under threat (such as hostages) must be resolved. Unfortunately, such exceptional situations can currently arise throughout Europe: from Gibraltar in the West to Beslan in the East.

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5 Other – legally quite controversial – questions in connection with the right to life, such as the beginning of life, the permissibility of the death penalty, self-determined suicide, etc., are, in contrast, special questions and are not dealt with here.

6 On the general change of victim categories in international law, *cf.* Sandvik, Security and International Law, pp. 114 ff.

7 In addition, the questions to be examined here are, in the view of the authors, similar in principle in all Convention States.

II. INTERPRETATION OF THE RIGHT TO LIFE BY THE CASE LAW

«The question arises […], whether the anti-terrorist operation as a whole was controlled and organised in a manner which respected the requirements of Article 2 […] and whether the information and instructions given to the soldiers which, in effect, rendered inevitable the use of lethal force, took adequately into consideration the right to life of the three suspects.»

McCann and others v. The United Kingdom (GC), 18984/91 (1995), § 201.

1. USE OF FORCE AS AN OBJECT OF THE CASE LAW OF THE ECTHR

In the *McCann* judgment (1995)[8], the ECtHR had to assess an anti-terrorist operation. The *Grand Chamber* laid down principal guidelines on the right to life under Art. 2 of the ECHR[9]. The obligations for the states arising from this judgment have since been taken as a benchmark and developed further by the Court. Three recent judgments – *Tagayeva and others*, *Finogenov and others* and *Isayeva v. Russia* – concern state actions against terrorist activities in Russia[10].

Whereas in the *McCann* case the right to life of terrorists (perpetrators) was in question for the Court, the cases of *Finogenov*, *Tagayeva* and *Isayeva* concerned the protection of the lives of civilians – *i.e.* of persons in the situation of being victims. The law enforcement officials were faced with the dilemma of not only

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8 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995).

9 Dickson, Planning and control of operations, p. 47.

10 *Isayeva v. Russia*, 57950/00 (2005) – use of heavy weapons in the conflict in Chechnya; *Finogenov and others v. Russia*, 18299/03 (2011) – hostage rescue operation in a Moscow theatre; *Tagayeva and others v. Russia*, 26562/07 (2017) – hostage rescue operation in Beslan.

protecting the right to life of (potential) victims but also that of terrorists (at least they would have been obliged to do so).

The limits of state obligations to protect human life in the context of use of force are shown by the *Grand Chamber* in *Giuliani and Gaggio v. Italy*[11]. It deals with a "classic" self-defence situation of an attacked law enforcement officer during a violent riot.

In addition to these major cases relating to police operations, the ECtHR's case law on the use of force in everyday police life, *i.e.,* at a lower level of escalation, also applies[12]. Further cases concern the post-operational duty to investigate[13] or a special state responsibility to protect human life[14].

2. FROM GIBRALTAR (1988/1995) TO BESLAN (2004/2017)

The above-mentioned major cases are subsequently repeatedly referred to throughout the book. Therefore, a brief summary of the facts of each of them is provided for a better understanding.

2.1. MCCANN AND OTHERS V. THE UNITED KINGDOM (GC)

The *McCann* case concerned the Special Air Services (SAS)[15] operation "Flavius" in Gibraltar in 1988. Daniel McCann, Seán Savage and Mairéad Farrell of the active service unit of the Provisional Irish Republican Army (PIRA) were under surveillance by

[11] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011) – Anti-G8 summit demonstration and riot in Genua.

[12] *McKerr v. The United Kingdom*, 28883/95 (2001); *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), *Mocanu and others v. Romania* (GC), 10865/09 (2014).

[13] *Nagmetov v. Russia* (GC), 35589/08 (2017); *McDonell v. The United Kingdom*, 19563/11 (2014); *Collette and Michael Hermsworth v. The United Kingdom*, 58559/09 (2013); *Mikheyev v. Russia,* 77617/01 (2006).

[14] *Mastromatteo v. Italy* (GC), 37703/97 (2002); *Mustafa Tunç and Fecire Tunç v. Turkey* (GC), 24014/05 (2015); *Jaloud v. The Netherlands* (GC), 47708/08 (2014); *Cyprus v. Turkey* (GC), 25781/94 (2001) and *Varnava and others v. Turkey* (GC), 16064/90 (2009); *Scavuzzo-Hager and others v. Switzerland,* 41773/98 (2006).

[15] To the SAS as the best known and best trained counterterrorist strike force in the United Kingdom, *cf.* Combs, Terrorism in the Twenty-First Century, pp. 284 ff.

the authorities[16]. According to intelligence information, the PIRA planned a car bomb attack on the changing of the guard ceremony in Gibraltar. Concrete evidence indicated that the terrorists would travel to Gibraltar as perpetrators. The three were classified as very dangerous. In particular, the authorities assumed that they could all detonate a car bomb or use concealed handguns at any time[17].

In the late afternoon of 6 March 1988, the responsible Police Commissioner issued an arrest warrant against McCann, Savage and Farrell «on suspicion of conspiracy to murder»; the special military forces on the ground were instructed to «[…] proceed with the military option which may include the use of lethal force for the preservation of life»[18].

At the beginning of the operation, which was aimed at arresting the suspects, a contact between SAS soldiers and two of the terrorists took place at a petrol station. The soldiers opened fire on McCann and Farrell[19]. Seán Savage was further away, but within earshot of the shooting. A member of the SAS immediately tried to stop Savage. He «[…] spun round and his arm went down towards his right hand hip area; the soldier believed that Savage was going for a detonator and opened fire»[20]. Daniel McCann, Mairéad Farrell and Seán Savage were all killed immediately.

The *Grand Chamber* of the ECtHR protected the concrete security measures – as such they did not infringe Art. 2 (para. 2) ECHR (right to life of the terrorists)[21]. The SAS soldiers had neutralised the terrorists on the assumption that there was an imminent serious danger[22]. However, the Court extended the case to include operation Flavius as a whole[23].

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16 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), §§ 38 ff.

17 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), §§ 28 and 48 ff.

18 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 54.

19 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), §§ 61 ff.

20 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 78.

21 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), in particular § 200.

22 *But cf.* Charters, Countering Terrorism in the Democratic Context, pp. 222 f. ("grey area of legality and morality").

23 The actions of the State are thus relegated to the foreground and the concrete actions of the members of the SAS to the background. A declaration of inadmissibility ratione personae is therefore basically no longer an option. *Cf.* Warbrick, Prevention of Terrorism, pp. 93 ff.; on the

By a narrow ten votes to nine, the *Grand Chamber* declared that the fundamental right to life of the terrorists had been violated[24]: «In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) of the Convention.»[25]

The key significance of the judgment lies in the extension of the question to be examined by the court: from the point of view of fundamental rights, the planning and control of potentially lethal actions by state authorities are thus also relevant and justiciable[26]. On the other hand, concrete individual behaviour by law enforcement officials (members of the security forces) takes a back seat. Therefore, when use of force takes place, there may be – depending on the circumstances – pre-operational obligations of states. They arise directly from Art. 2 ECHR.

2.2. FINOGENOV AND OTHERS V. RUSSIA

The judgment *Finogenov and others v. Russia* concerned a hostage rescue operation in Moscow. Chechen terrorists had taken more than 900 people hostage in the Dubrovka theatre on the evening of 23 October 2002[27].

The rescue operation started three days later with the introduction of an anaesthetic gas through the ventilation system of the theatre building. «A few minutes later, when the terrorists controlling the explosive devices and the suicide bombers in the auditorium lost consciousness under the influence of the gas, the special squad stormed the

demarcation between state responsibility and the actions of persons off-duty, *cf.* Marinković/Grigć, State responsibility, in particular pp. 76 ff.

24 And thus reversed a decision of the Commission made by 11 to 6 votes; *cf.* Dickson, Planning and control of operations, p. 48.

25 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 213.

26 *Cf.* Reid, Practitioner's Guide, 85-018 or Wicks, Right to Life, p. 63.

27 *Finogenov and others v. Russia*, 18299/03 (2011), § 8.

building. Most of the suicide bombers were shot while unconscious; others tried to resist but were killed in the ensuing gunfire.»[28]

«As a result of the attack, forty terrorists were killed – either because they resisted and fired back at the special-squad officers, or because there was a real danger that they would activate the explosive devices which they had planted in the building"[29]. A further 125 hostages died as a result of: "[…] acute respiratory and cardiac deficiency, induced by the fatal combination of negative factors existing […], namely severe and prolonged psycho-emotional stress, a low concentration of oxygen in the air of the building (hypoxic hypoxia), prolonged forced immobility, which is often followed by the development of oxygen deprivation of the body (circulatory hypoxia), hypovolemia (water deprivation) caused by the prolonged lack of food and water, prolonged sleep deprivation, which exhausted compensatory mechanisms, and respiratory disorders caused by the effects of an unidentified chemical substance (or substances) applied by the law-enforcement authorities in the course of the special operation to liberate the hostages […].»[30]

The ECtHR confirmed the *McCann* judgment and refined its reasoning on the state's duty to protect as it concluded a breach of the positive obligations under Art. 2 of the Convention «[…] in the circumstances the rescue operation […] was not sufficiently prepared, in particular because of the inadequate information exchange between various services, the belated start of the evacuation, limited on-the-field coordination of various services, lack of appropriate medical treatment and equipment on the spot, and inadequate logistics.»[31]

2.3. TAGAYEVA AND OTHERS V. RUSSIA

The judgment *Tagayeva and others v. Russia* concerned a hostage rescue operation at a gymnasium in the Russian republic of North Ossetia. On 1 September 2004 (the opening of the school year), 35 armed Islamist fighters took 1,128 people hostage at School No. 1

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28 *Finogenov and others v. Russia*, 18299/03 (2011), § 22.

29 *Finogenov and others v. Russia*, 18299/03 (2011), § 100.

30 *Finogenov and others v. Russia*, 18299/03 (2011), § 99, citing the study report.

31 *Finogenov and others v. Russia*, 18299/03 (2011), § 266.

in Beslan, of whom more than 800 were children[32]. «The attackers then proceeded to arrange a system of improvised explosive devices (IEDs) around the gymnasium»[33].

In the rescue operation, special units of the FSB (Federal Security Service) were involved and heavy army equipment was used[34]. A total of 317 hostages were killed and 728 people were injured with varying degrees of severity[35]. During the operation, ten members of the special forces (including three group leaders) were also killed and 30 injured – the highest losses of the elite units *Vympel* and *Alfa* in any operation[36]. It remained unclear who had triggered the heavy explosions which claimed the first victims and led to the subsequent collapse of the burning roof of a building[37].

The ECtHR found multiple violations of the right to life. First of all, this was due to the fact that the state authorities had not taken effective preventive measures against it despite sufficient indications of possible attacks[38]. Furthermore, «since the investigation was not capable of leading to a determination of whether the force used in the case was or was not justified in the circumstances, and, therefore, not ‹effective›»[39]. The Court also attributed other failures to the authorities, such as an inadequate command structure in the (main) anti-terrorist operation and a partial failure of the rescue services to intervene afterwards[40]. And «although the decision to resort to the use of lethal force was justified in the circumstances, Russia had breached Article 2 of the Convention on the account of the use of lethal force, and, in particular, indiscriminate weapons. The weakness of the legal framework governing the use of force contributed to the above finding»[41].

32 *Tagayeva and others v. Russia,* 26562/07 (2017), § 25.

33 *Tagayeva and others v. Russia,* 26562/07 (2017), § 27.

34 *Tagayeva and others v. Russia,* 26562/07 (2017), §§ 137 ff. and 145 ff.

35 *Tagayeva and others v. Russia,* 26562/07 (2017), § 349 (findings according to the investigations of the North Ossetian High Court).

36 *Tagayeva and others v. Russia,* 26562/07 (2017), § 93.

37 *Tagayeva and others v. Russia,* 26562/07 (2017), §§ 74 ff.

38 *Tagayeva and others v. Russia,* 26562/07 (2017), §§ 486 ff.

39 *Tagayeva and others v. Russia,* 26562/07 (2017), § 539.

40 *Tagayeva and others v. Russia,* 26562/07 (2017), § 574.

41 *Tagayeva and others v. Russia,* 26562/07 (2017), § 611.

2.4. ISAYEVA V. RUSSIA

The judgment *Isayeva v. Russia* was also linked to the conflict in Chechnya. After the withdrawal from the capital Grozny, a «significant group of Chechen fighters – ranging from several hundred to four thousand people – entered the village of Katyr-Yurt early on the morning of 4 February 2000»[42].

The state authorities assured the inhabitants of the possibility of leaving the village. When they did so, they were attacked[43]: it was «undisputed that the applicant and her relatives were attacked when trying to leave the village of Katyr-Yurt through what they had perceived as safe exit from heavy fighting. It is established that an aviation bomb dropped from a Russian military plane exploded near their minivan, as a result of which the applicant's son and three nieces were killed and the applicant and her other relatives were wounded»[44].

The Court considered «that using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society. No martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention [...]. The operation in question therefore has to be judged against a normal legal background. Even when faced with a situation where [...] the population of the village had been held hostage by a large group of well-equipped and well-trained fighters, the primary aim of the operation should be to protect lives from unlawful violence. The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents»[45]. The Court accepted «that the operation in Katyr-Yurt [...] was pursuing a legitimate aim" but did "not accept that it was planned and executed with the requisite care for the lives of the civilian population»[46].

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42 *Isayeva v. Russia*, 57950/00 (2005), § 15.

43 *Isayeva v. Russia*, 57950/00 (2005), § 18.

44 *Isayeva v. Russia*, 57950/00 (2005), § 179.

45 *Isayeva v. Russia*, 57950/00 (2005), § 191.

46 *Isayeva v. Russia*, 57950/00 (2005), § 200.

2.5. GIULIANI AND GAGGIO V. ITALY (GC)

The judgment *Giuliani and Gaggio v. Italy* concerned violent riots during the G8 summit in Genoa in July 2001. The city was divided into different security zones (red – yellow – white). The meeting of the G8 members took place in the red zone, which was secured by metal fences. The authorities had been instructed to fend off any attempts to attack or break through the fence[47].

On 20 July 2001 there were several violent clashes between extremely aggressive demonstrators ("black bloc"), who had previously announced that they were entering the red zone[48]. In the course of the clashes, a Carabinieri jeep was overrun by armed rioters. The police officers inside, who had already been injured beforehand, were threatened with stones, sticks and metal bars. Finally, a Carabiniere was attacked by Carlo Giuliani with a fire extinguisher used as a throwing object. The Carabiniere shot Giuliani in self-defence[49].

The *Grand Chamber* found no violation of Art. 2 ECHR in the lethal use of force *per se* or as regards the domestic legislative framework governing the use of lethal force or as regards the weapons issued. The organisation and planning of the policing operations during the G8 summit in Genoa had also not violated the ECHR, and the procedural obligation had also been respected[50]. The fact that the firing carabiniere was «no longer fit to remain on duty» was (consistently) not further considered by the Court[51]. The case thus shows, *mutatis mutandis*, a limit to the State's duty to protect the right to life.

2.6. OTHER JUDGMENTS

In addition to the above-mentioned judgments, there are further cases at a *lower level of escalation* with regard to the obligations of the Convention States under Art. 2 ECHR. They generally concern the assessment of the use of force by law enforcement officials in various situations as well as cases in which the ECtHR had to assess a downstream

47 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), §§ 12 f.

48 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 17.

49 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), §§ 22-25.

50 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), §§ 307 ff. as well as the judgment dispositive.

51 Marinković/Grigć, State responsibility, p. 77.

(post-operational) duty to investigate or a special state responsibility. These cases will be discussed in more detail at the appropriate places.

In addition, the ECtHR's further case law on the right to life according to Art. 2 ECHR must be taken into account – especially insofar as it deals with the further general aversion (and prevention) of danger as well as any obligations to act or investigate.

3. THE IMPORTANCE OF THE CASE LAW AND METHODOLOGY OF WORK

3.1. THE SPECIAL NATURE OF FUNDAMENTAL RIGHTS

In addition to the general obligation of the Convention States to create a "legal and administrative framework" for the protection of life, Art. 2 ECHR contains various further elements. These materialise in concrete individual cases. In the case of anti-terrorist operations, all aspects of the right to life come into play, and under certain circumstances they can even come into conflict with each other. The requirements for the appropriateness of the actions of law enforcement officials in the Convention States are derived from the binding standard flowing from the case law of the ECtHR on Art. 2 ECHR (*see* no. I).

In particular, the judgments in *McCann and others v. The United Kingdom* (GC) and *Tagayeva and others v. Russia* (First Section) show that fundamental rights can materialise early on, whether it is with regard to taking measures at all or with regard to various options for taking action to avert danger (prevention or minimisation of a threat). Thus, the law enforcement officials and state authorities are not only obliged to act against perpetrators, but also to take preventive measures in the event of an increased threat. However, it remains vital that the Convention State knows or should know about a concrete threat (and then it becomes a danger).

In accordance with the case law of the ECtHR, the Convention States cannot be required to do the impossible. The law enforcement officials and state authorities may legitimately rely on assumptions and assessments. Therefore, it is crucial to make assessments of the situation in general and to base state action on them. The Court assumes that terrorists may be neutralised by law enforcement officials in their perfidious and lethal actions.

Since terrorists are also human beings and are subject to the fundamental protection of the right to life, a strict proportionality test is also required ("absolute necessity").

The ECtHR also derives from the right to life and from fundamental procedural rights (such as the right to an effective appeal under Art. 13 of the ECHR) the obligation to provide information in the event of an unexplained death[52].

3.2. POLICE OPERATIONS

Countering terrorism challenges states at different levels. At the *strategic level*, fundamental assessments and classifications are made and decisions must be taken on how to "deal" with terrorist threats (in the end it always comes down to either terrorist organisations or individual actors).

At the *operational level*, it is primarily a matter of the state security forces acting as security policy systems in certain situations – for example, in the event of hostage-taking or in the concrete defence against attacks. As a rule, anti-terrorist operations involve various state agencies (intelligence services, regular police forces, law enforcement agencies, special forces and even military units).

The actual use of force always takes place individually and concretely on the *tactical level*. This can be spontaneous individual situations – or tactical behaviour within the framework of operations that can be planned and controlled.

3.3. RELEVANCE FOR THE PRESENT WORK

It is recognisable from the case law of the ECtHR that a use of force *to protect* humans always affects all three central tenets of the fundamental right to life (the positive, negative and procedural obligations of the Convention States).

Against this background, anti-terrorist operations can in principle be investigated according to the usual phases of action by law enforcement officials:

- Planning and preparation (including the framework conditions set by the Convention States);

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[52] *Cf., e.g., Mikheyev v. Russia*, 77617/01 (2006), § 142 (a fall from a window was not cleared up).

- leadership (operational and tactical level);
- conclusion of the operation (including transition to possible investigations).

On the basis of the ECtHR's sometimes quite distinct case law, the individual phases of the operation can be measured and assessed against the (minimum) legal requirements.

In the following section, there will be a distinction between "pre-operational" duties, duties in anti-terrorist operations and "post-operational" duties of the Convention States. The conduct of police operations is closely linked to the guarantee of the fundamental rights contained in Art. 2 ECHR. It will be shown that the case law of the ECtHR has general consequences for the use of state power. The state law enforcement officials are (situationally) bound to these legal requirements. Depending on this, consequences for national legislators (legislation) can be drawn with regard to the implementation by state security forces (application of law).

The linking of the case law of the ECtHR with police practice is intended to provide "tangible" insights and consequences for legislation and application of the law in the Convention States. It takes into account the fact that the protection of the right to life under Art. 2 ECHR – as with all fundamental rights – ultimately involves the enforcement of (highest-ranking) legal principles[53].

[53] *Cf., e.g.,* Alexy, Theorie der Grundrechte, pp. 72 ff. or in general Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), pp. 4 ff. and 29 ff. and Jacobs/White/Ovey, European Convention, pp. 84 ff.

III. ENSURING PHYSICAL SECURITY

«States claim a – usually – limited monopoly to use force within their territories. Accordingly, individuals who use force against the authorities (or against other people) have no right to do so; states regard these activities as criminal. But a constitutional state faces a dilemma – if the acts to which the state responds are crimes, then it is limited in how it may do so, not just its limited right to use force, but how it investigates, prosecutes and punishes those who have recourse to force against it.»

Colin Warbrick
(European Response to Terrorism)

1. FORMS OF TERRORIST ACTION

The monopoly on the *legitimate* exercise of state authority is necessarily closely linked to the principle of the rule of law. The monopoly on the use of force can be challenged by third parties with acts of violence directly aimed at the state and its representatives[54]. It is also challenged by violent actions against the population or parts of the population (*soft targets*).

All forms of terrorism have the use of a "tactic of violence"[55] against the state or against the general public in common[56]. Terrorism thus directly challenges the state's monop-

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54 Warbrick, European Response to Terrorism, p. 990; Van Creveld, Transformation of War, p. 192 (in a broader sense).
Historical examples are anarchistically motivated attacks on princes and state representatives in Europe in the 19th century. Recent examples are jihadist motivated attacks on members of the police and army in the United Kingdom (soldier at a bus stop), in France (knife attack) and in Belgium (knife attack).

55 Kiras, Terrorism and globalization, p. 403.

56 On the political impregnation of violence, *cf., e.g.,* Hoffman, Inside Terrorism, p. 40.

oly on the use of force. However, terrorist acts are indirectly aimed at changing the constitutional order of a state[57].

The "phenomenon" of terrorism remains elusive[58]. Attempts have been made to clarify the terminology[59] or to paraphrase it legally[60] – but there is no generally accepted scientific definition[61].

> In general, reference can be made to the rather open (sometimes even self-referential) definition of the *NATO Military Committee*, which defines terrorism as the «unlawful use or threatened use of force or violence, instilling fear and terror, against individuals or property in an attempt to coerce or intimidate governments or societies, or to gain control over a population, to achieve political, religious or ideological objectives»[62].

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57 *Cf.* Martin, Essentials of terrorism, pp. 10 ff.; Van Creveld, Transformation of War, p. 198 points out, that a "community which cannot safeguard the lives of its members (…) is unlikely either to command their loyalty or to survive for very long".

58 *Cf.* on the origins of the term "terrorism" up to its (still) current use (and an associated loss of meaning) Laqueur, Terrorismus, pp. 19 ff. or Hoffman, Inside Terrorism, pp. 1 ff.

59 *Cf.* Wilkinson, Terrorism and the rule of law, p. 12: "systematic use of murder, injury and destruction or thereat of same to create a climate of terror, to publicise a couase and to intimidate a wider target into conceding to the terrorist's aims". Although this definition contains generally recognised elements of "terrorist" acts – in particular a target beyond acts of violence – It is partly self-referential (terrorist acts lead to a climate of terror).

60 For example, in the United Kingdom the *Terrorism Act 2000* c. 11, § 1.

61 To a certain extent, "classifying" an act as a terrorist act is also always a political assessment or condemnation. From a legal point of view, the violation of the right to life for a larger number of people is the most important.
On the difficulty of defining terrorism, *cf.* Warbrick, Prevention of Terrorism, pp. 82 ff.; Kiras, Terrorism and globalization, pp. 402 ff.; Kurth Cronin, How Terrorism Ends, pp. 6 f.; Forest Counterterrorism, pp. 1 ff. and – more generally – Laqueur, Krieg dem Westen, pp. 32 ff. and 41 ff.; Karlsson, Counterterrorism, p. 7 and also Martin, Essentials of terrorism, pp. 5 ff. or Marsden/Schmid, Typologies of Terrorism, pp. 169 ff. with the attempt of typologies. According to Bures, Terrorism and Counterterrorism, p. 139 this is a consequence of the involvement of various scientific disciplines with the phenomenon; Wilkinson, Terrorism, p. 132 furthermore points out fundamental differences in the understanding of "terrorism" between the U.S.A. and Europe. *Cf.* also Wardlaw, Democratic Framework, p. 7.

62 NATO AAP-06 (Terms and Definitions, 2019), p. 128 (terrorism); same NATO, Military Decision on MC 0472/1 (6 January 2016), § 7. For further information on "elements and types of terrorism", Sloan/Anderson, Historical Dictionary of Terrorism, pp. LI ff.

The use of force is not an end in itself for terrorists, but a means of attracting attention[63]. The end result is ultimately the direct influence on decision-makers or, indirectly, intimidation of the public[64]. The causes and forms of action of terrorism vary.

> Forms of terrorist action and threats are old [65]. They have increased sharply since the 1960s[66]. At that time, the use of terrorist violence still had a primarily territorial context: whether in connection with independence movements (the Irish Republican Army [IRA] in Northern Ireland, the Basque Euskadi Ta Askatasuna [ETA] in Spain and France), or with socially motivated coup attempts in individual states (the Red Army Faction [RAF] in Germany, Brigate Rosse in Italy).
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> Some blazing conflicts were "exported"[67]. Behind this were also changed tactics. For example, from the end of the 1960s onwards, the "spectacle value" of hijackings or attacks on international flights proved to be particularly high[68].

While historically the "recourse" to terrorist violence has been an ultima ratio of oppressed groups, in recent decades terrorism has become a primary tool in nationalistically or religiously impregnated conflicts[69]. In open (communication) societies, terrorist activities can develop particularly easily[70]. A basic order that is based on the democratic

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63 On the importance of the media as a communication tool for terrorist groups, *cf.* Alexander, Terrorism and the Media, p. 160 and Wilkinson, Terrorism Versus Democracy, pp. 174 ff. or Hoffman, Inside Terrorism, pp. 173 ff.
On the differences between classical and modern terrorism, *cf.* Krauthammer, Partners in Crime, pp. 111 ff. or Schorr, Encouragement of Violence, p. 114 to the "symbiotic relationship (…) between terrorism and television".

64 *Cf.* Martin, Essentials of terrorism, p. 2.

65 *Cf.* the overview of terrorist activities in Sloan/Anderson, Historical Dictionary of Terrorism, pp. XXIX ff. (Chrolology; A.D. 66 to A.D. 2009).

66 Netanyahu, Defining Terrorism, p. 11.

67 On the suppression of the guerrilla fight by terrorism, *cf.* Laqueur, Terrorismus, p. 383.

68 Forest, Kidnapping, p. 326 (with reference to an interview by George Habash).

69 *Cf.* Laqueur, Terrorismus, p. 385.

70 Laqueur, Terrorismus, p. 397 (in comparsion to dictatorships) and Laqueur, Krieg dem Westen, pp. 20 f.

rule of law is no longer able to remove the breeding ground for a terrorist threat but is itself directly challenged by extremists due to its particular vulnerability[71].

> Overall, terrorist activities in Europe and the United States were still responsible for relatively few casualties even in the 1980s. Above all, comparisons with deaths due to unintentional dangers (risks to civilisation) relativised the terrorist threats[72].

Currently, the greatest terrorist threat in Europe[73] comes from "jihadist" motivated attacks[74]. The actors de-territorialise violence and apply new approaches[75]. These kinds of terrorist acts are often characterised by the fact that the perpetrators are prepared to sacrifice their lives in order to carry out attacks, dragging as many people as possible to their violent deaths.

> The most spectacular examples of this worldwide were the air attacks in New York and Washington on 11 September 2001 (9/11). This was followed by the Madrid train attack (2004) and the four almost simultaneous attacks on public

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71 *Cf. also* Laqueur, Terrorismus, pp. 385 ff.

72 Charters, Countering Terrorism in the Democratic Context, p. 212; similar Van Creveld, Transformation of War, p. 194.

73 On the temporary seizure of territory by terrorist groups, particularly in Iraq, Syria, Nigeria, Yemen, Lebanon, Somalia, Pakistan and Afghanistan, *cf.* Avriel, Terrorism 2.0, pp. 204 ff.

74 For *Switzerland, cf.* NDB, Sicherheit Schweiz 2019, pp. 35 ff.; Sicherheit Schweiz 2018, pp. 31 ff.; Sicherheit Schweiz 2017, pp. 18 ff. and 36 ff.; Sicherheit Schweiz 2016, pp. 16 ff. and 34 ff.; for *Germeny, cf.* Bundesamt für Verfassungsschutz (BRD), Verfassungsschutzbericht 2018, pp. 170 ff.; Verfassungsschutzbericht 2017, pp. 164 ff.; Verfassungsschutzbericht 2016, pp. 154 ff.; Verfassungsschutzbericht 2015, pp. 150 ff.; for the *United Kingdom, cf.* Intelligence and Security Committee of Parliament (U.K.), Intelligence and Security, Annual Report 2017–2018, 22 November 2018, pp. 3 f.; Annual Report 2016–2017, 2 December 2017, pp. 9 ff.; for *France* for example the Rapport de M. François GROSDIDIER, fait au nom de la commission d'enquête, Vaincre le malaise des forces de sécurité intérieure : une exigence républicaine, n° 612 tome I (2017-2018), 27 juin 2018, pp. 17 f.
In this sense already Laqeur, Krieg dem Westen, p. 8, according to which "radical Islamism" is the most significant force in international terrorism after 11 September 2001 and is likely to remain so for the foreseeable future. The background may be that most (armed) conflicts are currently being fought out in the Islamic world; op. cit., pp. 27 ff.

75 *Cf., e.g.,* Münkler, Ältere and jüngere Formen des Terrorismus, pp. 34 ff. or Hoffman/Reinares, Global Terrorist Thereat – Conclusions, pp. 618 ff.

transport in London (2005), the latter being the first case of suicide bombing in Western Europe[76].

At present, there are attacks carried out with the simplest of means ("low budget terrorism") in various European metropolises: The best known have occurred in Paris (2015), Brussels (2016), Nice (2016), Berlin (2016), London and Stockholm (2017) or Vienna (2020)[77].

Compared to the spectacular attacks at the beginning of this millennium, which were elaborate in terms of planning and logistics and led to relatively high numbers of victims, the poorly equipped and probably also poorly organised (but in some cases already monitored by the intelligence services[78]) "low budget terrorists" are no longer able to do so to the same extent.

Terrorist attacks were and are «often deliberately stage-managed by the terrorists and publicized by the media as spectaculars [...]. The perceptions that flow from sensational coverage of such events are responsible in part for the widespread belief that terrorism poses a significant challenge to the survival of democracies that are the target of terrorist attack. [... Even experts] are victims of a medium that values the visual over the cerebral and that is not oriented to exploring complex and contradictory issues at length.»[79]

In particular, sensationalist reporting means that the perception of a terrorist attack is no longer commensurate with the damage it could cause on its own[80].

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76 *Cf., e.g.,* Wilkinson, Changing threat, pp. 14, 26, 31 and 42 f.

77 On the "lone wolf terrorist attacks", which apparently reached a peak in Europe in 2016, *cf., e.g.,* Gallagher, Lone Wolf Tsunami, pp. 67 ff.

78 A sad example is *Anis Amri*, the assassin from Berlin's Breitscheidplatz on December 2016: Since September 2016 there had been warnings from Moroccan authorities about the danger by Amri. Six weeks before the attack, the German authorities at the "Joint Terrorism Defence Centre" (GTAZ) determined that no concrete danger was discernible. On 14 December 2016, the North Rhine-Westphalian Office for the Protection of the Constitution noted that Amri is staying in various mosques and accommodation facilities in Berlin; he changes his sleeping place every night (!). On 19 December 2016 Amri struck.

79 Wardlaw, Democratic Framework, p. 6.

80 O'Sullivan, Deny Them Publicity, pp. 121 f.

Jihadist terrorism (attacks that have taken place or attempted attacks that have been uncovered) leads to similar reactions in European countries. On the one hand, preventive instruments for state protection are created or existing defensive measures are expanded[81]. On the other hand, attempts are also being made to adapt the application of concrete state defensive measures to new forms of terrorist action[82]. Both lead to tests for the democratic constitutional state and its institutions (which the opposite side is trying to fight).

> In response to the attacks of 9/11, the German legislator wanted to regulate the shooting down of (hijacked) aircraft by revising the "Aviation Security Act"[83]. However, the Federal Constitutional Court was quite correct when it annulled the relevant norm, stating – among other things – that this would mean weighing human life (potential victims of the attack) against other human life (hostages), which is contrary to human dignity[84].

According to historical experience, it is *not possible* to achieve strategic objectives with terrorist violence[85]. Rather, every terrorist threat comes to an end – and usually sooner rather than later[86]. Even open (and therefore particularly vulnerable) societies are

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81 This usually involves the preventive surveillance of "endangered persons" or the possibility of fending off possible attacks with means outside the criminal law.
While the U.S.A. obviously follows the proactive "war model", the focus in Europe is on measures for "law enforcement" according to the "criminal model"; *cf.* Bures, Terrorism and counterterrorism, pp. 144 ff.

82 *Cf., e.g.,* Melzer, Targeted Killing, p. 24 to the "shoot-to-kill policy specifically for operations against suspected suicide bombers" in the United Kingdom.

83 § 14 para. 3 of the law on the new regulation of aviation security tasks (BGBl. I 78 of 11 January 2005, pp. 83 f.).

84 BVerfGer, 1 BvR 357/05, Judgment of 15 February 2006; *cf.* Melzer, Targeted Killing, p. 20.

85 Wilkinson, Terrorism, p. 131 (correctly with the remark, "that in the era of anti-colonial struggles" terrorist activities have not been decisive for the success of independence movements); similar Wardlaw, Democratic Framework, p. 7.

86 Kurth Cronin, How Terrorism ends, pp. 1 and 3.
Laqueur, Terrorismus, pp. 380 and 387 f. recognised in 1987 that terrorism only affected the lives of a very small group of people and could not bring about major political, economic, social or cultural upheavals and that no terrorist group had succeeded in seizing power (in a state) in recent history. In our opinion this is still true. Even in so-called "failed states", terrorist gangs are not able to establish themselves permanently (neither in Afghanistan, Syria nor in Iraq). *Cf. also* Harmon, How Terrorist Groups End, *passim*, with concrete examples.

proving to be extremely resilient[87]. The importance of terrorist activities only emerges from the (medial and political) attention paid to them[88]. However, the prevention of terrorist activities by the state is not an easy task[89].

It has been shown that the use of coercive means alone is not enough to avert a terrorist threat. Rather, a holistic approach is required[90] – which, according to the view expressed here, must be within the bounds of what is legally permissible.

> «An effective strategy against terrorists has to be multi-pronged, involving the intelligence services, the police, the judiciary, immigration and customs services, the private sector, etc., and success in gaining support from the media and from the public, which can provide the eyes and ears to pick up information and clues to assist the intelligencegathering by the police and intelligence services.»[91]

A holistic approach can also lead to rethinking and adapting the forms of operation and operational doctrine of the state security forces in line with the problem[92]. In our opinion, a factual and a legal thesis must be taken into account: on one hand, forms of terrorist action are aimed precisely at provoking overreactions on the part of the state[93];

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87 Wardlaw, Democratic Framework, p. 7; Laqueur, Terrorismus, p. 398 (and also to the real threats to public order in Italy and Turkey in the 1970s); *cf. also* Laqueur, Krieg dem Westen, pp. 7 f. with reference to the "notoriously short" memory of attacks and the deeply rooted "wishful thinking".

88 Laqueur, Terrorismus, p. 380.

89 Kurth Cronin, How Terrorism ends, p. 3. On the challenges following the attacks in New York, London and Madrid, *cf.* Sandvik, Security and International Law, pp. 117 f.

90 A holistic approach requires strategic thinking, and in particular strategic goals, variants including possibilities for developing the situation and corresponding planning; *cf.* Beaufre, Stratégie de l'action, pp. 117 ff. and 121 ff. (description des modes d'action) and more generally, but in connection with terrorism Holmes, Counterterrorism Policy, p. 35 (with references).

91 Wilkinson, Terrorism, p. 137.

92 Beaufre, Introduction à la stratégie, pp. 55 ff. and 58 f. compares forms of action in various military strategies with definitions known in *fencing*. Such approaches in connection with legal frameworks can serve in particular to respect the principle of proportionality.

93 *Cf.* Skinner, The core of McCann, p. 72; Holmes, Counterterrorism Policy, pp. 39 ff.; Jafa, Defeating Terrorism, pp. 161 f. Van Creveld, Transformation of War, p. 198, does not expect the state to fight a long battle and instead postulates massive reactions: "If (…) that state cannot defend itself effectively against internal or external low-intensity conflict, then clearly it does not have a future in front of it. If the state does take on such conflict in earnest then it will have to win

on the other hand, terrorist behaviour is fundamentally criminal in nature[94] – and always to be punished accordingly. Nothing better illustrates the inferiority of terrorist acts in every respect than a conviction for crimes committed in accordance with the rule of law.

2. THE RIGHT TO LIFE UNDER ARTICLE 2 ECHR

The right to life is guaranteed as a human right in the national constitutions of the European states.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950 establishes these rights at international level. Its validity extends to all 47 Convention States[95] and their authorities (Art. 1 ECHR).

In the present context, a special obligation exists in particular for those state bodies which exercise the monopoly on the use of force.

2.1. PRINCIPLE AND EXCEPTIONS

The right to life is protected by Art. 2 (para. 1) ECHR.

> *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.*

Jurisprudence and doctrine distinguish three specific features of the fundamental right:

– According to the wording of the law, the starting point is the *positive obligation* of the Convention States to establish a legal framework for the protection of life (first sentence)[96].

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quickly and decisively. Alternatively, the process of fighting itself will undermine the states·foundations (…)".

94 Warbrick, Prevention of Terrorism, pp. 83 f.

95 Chart of signatures and ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms; status as of 13/04/2019. Belarus (candidate country) and Kosovo (observer status) are the only two European states not to belong to the Council of Europe. After its aggression against Ukraine, Russia has announced that it will leave the Council of Europe.

96 Reid, Practitioner's Guide, 75-004; Gonin, Droits de l'homme, p. 40.

- The *negative obligation* is that state bodies must refrain from the illegal, unnecessary and disproportionate use of force (second sentence)[97].
- In addition, there is an (unwritten) *procedural obligation* to carry out an effective investigation in case of the use of force or in case of unclear or possibly inadmissible circumstances of death[98].

Dogmatically, the main focus is on the obligation to implement resulting from the positive obligation. In practice, the obligation to refrain arising from the negative obligation is dominant. The procedural obligation shows that the three obligations ultimately form complementary features of the same concept of protection. The obligation of the Convention States to protect human life ultimately derives not only from the positive obligation.

The fundamental right to life is resistant to emergencies (*see* no. III.3)[99]. Together with the prohibition of torture and inhuman treatment, it is one of the core values of the Convention and the Convention States[100]. The personal scope of protection extends to both living and dead people; a violation can occur even without the death of a person[101].

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97 Reid, Practitioner's Guide (4th ed. 2012), II-651.

98 Reid, Practitioner's Guide (4th ed. 2012), II-651.

99 Art. 15 (para. 2) ECHR: *No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.*

100 *Cf., e.g., McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 147; *Anguelova v. Bulgaria*, 38361/97 (2002), § 109; *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 174; *Makaratzis v. Greece* (GC), 50385/99 (2004), § 56; *Finogenov and others v. Russia*, 18299/03 (2011), § 206; *Isayeva v. Russia*, 57950/00 (2005), § 172; with reference to Article 2 ECHR only, for example *Mastromatteo v. Italy* (GC), 37703/97 (2002), § 67; *Nachova v. Bulgaria* (GC), 43577/98 (2005), § 93 or *Leonidis v. Greece*, 43326/05 (2009), § 53; more restrained in comparison *Tagayeva and others v. Russia*, 26562/07 (2017), § 599; emphasising the importance of the right to life, the Commission in *Stewart v. The United Kingdom* (AD), 10044/82 (1984), § 11 («one of the most important rights in the Convention»); from the literature *e.g.,* Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 205; Gerards, Right to Life, in: van Dijk/van Hoof/van Rijn/Zwaak (Eds.), Theory and Practice, pp. 354 f. or Skinner, The core of McCann, pp. 67 f.

101 *Oyal v. Turkey*, 4864/05 (2010), § 52.

According to Art. 2 (para. 2) of the ECHR, the killing of human beings by force may exceptionally be authorised where it is strictly necessary in order to achieve one of the three objectives[102].

> *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.*

Accordingly, the death penalty[103] mentioned in the Convention is an exception to the scope of protection of the fundamental right to life. In contrast, the elements of the crime according to Art. 2 (para. 2) ECHR are to be understood as justification. The scope of protection of the fundamental right has been fully opened up – every restriction must (can) be examined in every partial aspect according to strict justification reasons[104].

> Similarly, Art. 6 (para. 1) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to life:
>
> *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

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102 Hampson, Direct participation, p. 202.

103 Art. 2 (para. 1) second sentence ECHR "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"* (highlighted only here).
The death penalty will not be discussed in detail below. On this and on the question of whether the death penalty is still permissible under the ECHR in view of the fact that all but two Convention States have signed Protocol No. 13 (to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances) *cf.* Jacobs/White/Ovey, European Convention, pp. 151 ff. (with reference to the case law of the ECtHR).

104 *Cf.* the Commission in *Stewart v. The United Kingdom* (AD), 10044/82 (1984), § 15.

Where restrictions are possible, the provisions of the ICCPR are less stringent than those of the ECHR. Instead of a catalogue of exceptions, Art. 6 (para. 1) ICCPR is satisfied with the prohibition of an "arbitrary" deprivation of life. This means that other norms – in particular those of International Humanitarian Law (IHL) – can allow exceptions without further ado[105].

2.2. POSITIVE OBLIGATION

Cases brought before the ECtHR concerning the positive obligations of States have not been particularly numerous for a long time. Since the end of the 1990s, the case law of the ECtHR has gained momentum and has given shape to this central element of the fundamental right.

2.2.1. A dogmatic challenge

As obvious and clear as the positive obligation seems (*everyone's right to life shall be protected by law*), it is difficult to grasp and penetrate it from a *legal-dogmatic* point of view. According to its wording, the open standard aims at protecting the legal asset life – and thus at a finality. *Prima vista* there is no restriction according to the nature or severity of a potential threat to the legal asset. A relativisation of the material scope of protection of the fundamental right does not appear to be appropriate in itself. Nevertheless, no absolute protection can be intended – such a claim would be completely illusory and unfulfillable (and as a consequence the positive obligation would in fact lose its significance).

A threat to the legal asset can manifest itself as an actual danger or as a mere risk. Both terms (danger/risk) are used differently in different scientific disciplines. In addition, the concept of risk in particular is controversial[106].

Risk research was originally characterised by objectivity. The decisive factor was risk assessment according to a risk formula. The risk formula is based

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105 *Cf.* Goddard, Applying the ECHR to the Use of Physical Force, p. 421 or Lesh, Conduct of hostilities, pp. 105 f., 109 ff. and 119 f. (with focus on the practice).

106 Chicken/Posner, Philiosphy of Risk, p. 7; Adams, Risk, pp. 1 ff.; Broder/Tucker, Risk Analysis, p. 3 (almost anything can be a hazard).

centrally on the extent of damage and the probability of its occurrence. These two factors should be assessed according to objective criteria or objectifiable models[107]. The objective concept of risk thus inherently assumes that all the elements to be taken into account have already been determined or could at least be determined. In the recent past, the concept of risk has become increasingly subjective by attaching greater importance to "social acceptance"[108].

The discussion of the concept of risk in the *Royal Society* is illustrative. Its 1983 report has established itself as a reference work[109]. The report explains "RISK as the probability that a particular adverse event occurs during a stated period of time, or results from a particular challenge. As a probability in the sense of statistical theory risk obeys all the formal laws of combining probabilities. Explicitly or implicitly, it must always relate to the ‹risk of ... (a specific event or set of events)› and where appropriate must refer to an exposure to hazard specified in terms of its amount or intensity, time of starting or duration. The word ‹risky› is undefined, and is not to be used as a synonym for ‹dangerous›. [...] hazard is seen as the situation that in particular circumstances could lead to harm, where harm is the loss to a human being or to a human population consequent on the damage and damage is the loss of inherent quality suffered by an entity (physical or biological)"[110]. A study in 1992, intended as an *update*, failed to find consensus[111]. Controversial was the consequence of the removal of a distinction between the objective and subjective concept of risk[112].

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107 Chicken/Posner, Philosophy of Risk, p. 7.

108 *Cf.* Adams, Risk, pp. 8 f. as well as the U.S. National Research Council, Risk Assessment in the Federal Government, p. 49: "Risk management policy, by its very nature, must entail value judgments related to public perceptions of risk and to information on risks, benefits, and costs of control strategies for each substance considered for regulation. Such information varies from substance to substance, so the judgments made in risk management must be case-specific."

109 *Cf.* Adams, Risk, p. 7.

110 Royal Society, Risk assessment, p. 22.

111 Royal Society, Risk: Analysis, Perception and Management, *passim*.

112 Royal Society, Risk: Analysis, Perception and Management, p. iii (preface); *cf.* also Adams, Risk, p. 9.

The legal systems of the modern industrialised countries traditionally also deal with defence against (certain) *dangers*. The classic areas of security and police law are ultimately characterised by a decisionist approach, in which certain areas of regulation are defined[113]. A characteristic of danger is the certainty or at least sufficient probability of damage to legal assets. The sufficient probability of damage occurring required for a danger is just not (yet) fulfilled in the case of a *risk*[114]. Risks are below the danger threshold, regardless of the extent of damage. Within the framework of risk provisioning, an attempt can be made to reduce them to a reasonable "level". In the *legal* context, different concepts exist depending on the legal system (and probably also depending on the subject area within a legal system) and therefore different relationships between the terms.

This seems to be one of the reasons why the case law of the ECtHR as an international court cannot (even if it wanted to) rely on a fixed concept of danger or risk when interpreting the first sentence of Art. 2 (para. 1) of the ECHR (as would be more conceivable for national courts). Therefore, case law seems to have reached its methodological limits.

In the following, the case groups established in the interpretation of the positive obligation and the questions arising are dealt with (the rules on the use of force are dealt with in the context of the negative obligation; *see* no. III.2.3). The first task is a general examination of the organisation of national legal systems for the protection of human life (III.2.2.2). More specific are the obligations of the Convention States to take general precautions with regard to dangerous activities (III.2.2.3). This is followed by possible obligations in connection with natural hazards (III.2.2.4). As claims for concrete security exist only within narrow limits (III.2.2.5 and III.2.2.6), the States may also be asked about the general limits of positive obligations (III.2.2.7). In conclusion, a possible development of the positive obligation will be shown (III.2.2.8).

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113 In the past, it was about mill wheels or fire regulations – today it is about nuclear technology or preventive fire protection.

114 Chicken/Posner, Philosophy of Risk, p. 7.

2.2.2. General protection of life by the legal and administrative framework

Art. 2 (para. 1) ECHR obliges the Convention States in general to "take appropriate steps to safeguard the lives of those within their jurisdiction"[115]. However, the requirement to create an "effective judicial system" applies to the *whole legal system* and affects a wide range of legislation.

> In the health sector for example: «The [...] positive obligations [...] require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable.»[116]

This is primarily about the creation and enforcement of *criminal law norms*[117] in respect of a legal and administrative framework[118] for the protection of life as a legal asset[119].

> «By requiring a State to take appropriate steps to safeguard the lives of those within its jurisdiction, Article 2 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

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115 *Öneryildiz v. Turkey* (GC), 48939/99 (2004), § 71; *Oyal v. Turkey*, 4864/05 (2010), § 53; *Kontrová v. Slovakia,* 7510/04 (2007), § 49; *Calvelli and Ciglio v. Italy* (GC), 32967/96 (2002), § 48; *L.C.B. v. The United Kingdom*, 14/1997/798/1001 (1998), § 36; *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (2010), § 64; Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 206; Jacobs/White/Ovey, European Convention, pp. 153 ff.; Gonin, Droits de l'homme, p. 40.

116 *Calvelli and Ciglio v. Italy* (GC), 32967/96 (2002), § 49.

117 *Mustafa Tunç and Fecire Tunç v. Turkey* (GC), 24014/05 (2015), § 171; *Mastromatteo v. Italy* (GC), 37703/97 (2002), §§ 67 f.; *Nikolova and Velichkova v. Bulgaria*, 7888/03 (2007), § 57; *Osman v. The United Kingdom*, 23452/94 (1998), § 115.

118 *Makaratzis v. Greece* (GC), 50385/99 (2004), § 57.

119 *Cf., e.g.,* Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), pp. 206 ff. or Wicks, Right to Life, pp. 48 f.

> machinery for the prevention, suppression and punishment of breaches of such provisions»[120] (*see* no. III.2.2.4).

As to the question of the *necessity* of a criminal law regulation, there is room for manoeuvre in implementation as long as the purpose enshrined in fundamental law can be achieved. In this context, the respective subject area must be taken into account: The required «effective judicial system [...] may, and under certain circumstances must, include recourse to the criminal law»[121].

> «In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged.»[122]

Criminal law norms aim, *inter alia*, to protect the physical integrity of individuals. The penalisation of bodily injury and homicide offences also reinforces the state's monopoly on the use of force (*see* no. III.1).

> However, the fact that criminal law enshrines grounds for justification and excuse, in particular self-defence and in assistance to self-defence, puts the monopoly on the use of force into perspective[123].

It may be questionable how far the state's obligation to protect human life through criminal law (substantive criminal law and criminal procedural law) must extend in individual cases. In principle, the ECtHR requires "effective criminal-law provisions":

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120 *Mustafa Tunç and Fecire Tunç v. Turkey* (GC), 24014/05 (2015), § 171.

121 *Calvelli and Ciglio v. Italy* (GC), 32967/96 (2002), § 51.

122 *Calvelli and Ciglio v. Italy* (GC), 32967/96 (2002), § 51.

123 The right of self-defence is one of the so-called "everyman's rights". Everyman's rights are established differently in the European legal systems. According to the Swiss understanding, they are conferred by the legal system; *cf., e.g.,* Hafner/Stöckli/Mueller, Schutzanspruch der jüdischen Religionsgemeinschaften, pp. 88 ff. (monopoly on the use of force) and pp. 106 ff. (self-defence).

«The State's obligation extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions»[124].

In the *Mastromatteo v. Italy* judgment, a bank robber on the run shot a motorist in 1989. The shooter was a convicted offender who should have been serving a prison sentence for armed robbery, attempted murder and other offences until 2 July 1999[125]. The *Grand Chamber* considers that the fact that the bank robber was on prison leave at the time of the crime did not lead to a violation of Art. 2 ECHR. On the grounds of State responsibility «it must be shown that the death of A. Mastromatteo resulted from a failure on the part of the national authorities to ‹do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge› […], the relevant risk in the present case being a risk to life for members of the public at large rather than for one or more identified individuals»[126].

In *Opuz v. Turkey*, the ECtHR had to assess the "legal framework" for protection against domestic violence. «The pursuit of criminal proceedings against the aggressor was dependent on the complaints lodged or pursued by the applicant, since the criminal acts in question had not resulted in sickness or unfitness for work for ten days or more, within the meaning of […] the Criminal Code.»[127] In our opinion, these requirements are too strict to ensure effective protection.

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124 *Mastromatteo v. Italy* (GC), 37703/97 (2002), §§ 67 f.; quite similarly in further judgments: *cf. Opuz v. Turkey,* 33401/02 (2009), § 128; *Kontrová v. Slovakia,* 7510/04 (2007), § 49; *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 54; *Kılıç v. Turkey,* 22492/93 (2000), § 62 and *Osman v. The United Kingdom*, 23452/94 (1998), § 115 (in that context *sanctioning*, not *punishment*).

125 *Mastromatteo v. Italy* (GC), 37703/97 (2002), §§ 11 and 14.

126 *Mastromatteo v. Italy* (GC), 37703/97 (2002), §§ 69 ff. (quote in § 74); similarly, in *Choreftakis et Choreftaki v. Greece*, 46846/08 (2012), §§ 50 ff.

127 *Opuz v. Turkey,* 33401/02 (2009), §§ 123 (quote) and 145.

2.2.3. Special precautions in case of dangerous activities

Following the obligation of the Convention States to create a legal framework, the question arises to what extent a general obligation flows from Art. 2 ECHR to take appropriate steps to safeguard lives against abstract dangers (on the question of concrete preventive measures to avert danger, *see* no. III.2.2.5). In our opinion, abstract dangers are primarily concerned with the defence against risks that are caused by civilisation (there is not intention to harm)[128].

In 1998, in the case of *L.C.B. v. The United Kingdom*, the ECtHR held that a potential risk of death was in principle sufficient to infringe the right to life. In the specific case, however, there was a lack of causality between a potential danger and the concrete "damage".

> The father of a woman suffering from leukaemia as a child had been involved in nuclear weapons tests before her birth. The complainant argued that her risk of death could have been minimised if her disease had been detected earlier. In order to do so, the authorities should have monitored her father's exposure to radiation and informed the family about possible links at an early stage. The Court examined whether all necessary steps had been taken by the State to prevent the complainant's right to life from being put at avoidable risk. The Court did not consider that the complainant's right to life had been infringed since her father had not been exposed to a dangerous dose of radiation[129].

The ECtHR's leading case on the State's general duty to protect against unintentional dangers to life as a legal asset is *Öneryildiz v. Turkey*[130].

> The case was related to a methane explosion at a waste disposal site. The explosion had caused a landslide, resulting in the death of 39 people in nearby slums[131].
>
> Turkey had adopted standards to protect people and the environment but had not sufficiently enforced them. In particular, the authorities had not taken any

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128 *Cf.* Mueller/Zech, Technikrecht, pp. 92 f.

129 *L.C.B. v. The United Kingdom*, 14/1997/798/1001 (1998), §§ 29 and 36 ff.

130 *Öneryildiz v. Turkey* (GC), 48939/99 (2004).

131 *Öneryildiz v. Turkey* (GC), 48939/99 (2004), § 18.

> further measures against the creation of the unauthorised slums, nor had they informed the local people of the potential dangers. This was despite the fact that the authorities knew about the danger or should have known about it[132].

As regards the question of whether the case would be *admissible*, the Chamber (former First Section) had taken *potential risks* into account in order to examine the state's possible duties to protect[133]. According to the *Grand Chamber*, the positive obligation of the state in all types of *dangerous activities – i.e.,* potential threats to human life as a legal asset – is to be understood in a broad sense.

> It «[…] must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites […].»[134]

> The «[…] harmfulness of the phenomena inherent in the activity in question, the contingency of the risk to which the applicant was exposed by reason of any life-endangering circumstances, the status of those involved in bringing about such circumstances, and whether the acts or omissions attributable to them were deliberate are merely factors among others that must be taken into account in the examination of the merits of a particular case, with a view to determining the responsibility the State may bear under Article 2 […].»[135]

In its judgment, the *Grand Chamber* emphasises the positive obligation of the Convention States to protect human life by establishing a general security-related legisla-

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132 *Cf., e.g.,* Harris/O'Boyle/Warbrick, European Convention (3th ed.), p. 208 with reference to on the further development of this case law.

133 *Öneryildiz v. Turkey* (GC), 48939/99 (2004), § 65: «Referring to the examples provided by cases (…) and European standards in this area, the Chamber emphasised that the protection of the right to life, as required by Article 2 of the Convention, could be relied on in connection with the operation of waste-collection sites, on account of the potential risks inherent in that activity. It accordingly held that the positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction, for the purposes of Article 2, applied in the instant case». *Cf.* the Chamber's judgment of 18 June 2002, §§ 62 ff. In our opinion, the Chamber would have been stricter than the *Grand Chamber* («seriours risk»).

134 *Öneryildiz v. Turkey* (GC), 48939/99 (2004), § 71.

135 *Öneryildiz v. Turkey* (GC), 48939/99 (2004), § 73.

tion[136]. In the case of dangerous activities, this leads to wide-ranging state regulation and enforcement obligations.

> «This obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks. [...] In any event, the relevant regulations must [...] 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.»[137]

In the case law following *Öneryildiz*, the EctHR has further extended the state's duty to protect in the case of dangerous activities. Thus, the Convention States are obliged to anticipate potential (abstract) dangers to human life and to take general measures to avert danger.

> For example, in the case of *Vilnes and others v. Norway*, the EctHR assessed long-term damage caused by professional deep-sea diving (decompression sickness). Deep-sea diving for oil wells in the North Sea is subject to an authorisation. The authorities had failed to adopt measures to prevent decompression sickness from occurring too early.
>
> «Mr Vilnes' decompression sickness in 1977 had most likely been caused by the facts that the diving company had used too rapid a decompression table and there was no medical doctor who could assist him. This incident had probably been a strong contributory cause of his brain and spinal injuries [...]. Mr Muledal, Mr Lindahl, Mr Sigurdur P. Hafsteinsson, Mr Nesdal and Mr Jakobsen all submitted specialist medical statements indicating that they had suffered

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136 *Cf.* Mueller/Zech, Technikrecht, pp. 91 ff.

137 *Öneryildiz v. Turkey* (GC), 48939/99 (2004), § 90.

> from various forms of bends [...]. Mr Nygård, whose grievances mainly focussed on accidents and near-accidents, as did the relevant medical expert statement, also described experiences of decompression sickness when seeking compensation at the national level [...], and the Court accepts his account. All seven applicants furnished evidence of disability, including medical evidence and the grant of disability pensions [...]. The Court, having regard to the parties' arguments in the light of the material submitted, finds a strong likelihood that the applicants' health had significantly deteriorated as a result of decompression sickness, amongst other factors. This state of affairs had presumably been caused by the use of too-rapid decompression tables. In this regard it cannot but note that, as observed by the Supreme Court, standardised tables had not been achieved until 1990, [...] and that decompression sickness had since then become an extremely rare occurrence. Thus, with hindsight at least, it seems probable that had the authorities intervened to forestall the use of rapid decompression tables earlier, they would have succeeded in removing more rapidly what appears to have been a major cause of excessive risk to the applicants' safety and health in the present case.»[138]

The health-care system has proved to be a "focal point" – probably because of its particular proximity to the state[139].

> In, *inter alia*, *Oyal v. Turkey*, the EctHR found that the negligence of the authorities in relation to HIV-infected blood transfusions constitutes a violation of Art. 2 ECHR: «The aforementioned positive obligations therefore require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives.»[140]

The security legislation to be adopted by the Convention States must be sufficiently specific and allow an effective enforcement.

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138 *Vilnes and others v. Norway*, 52806/09 and 22703/10 (2014), § 233.

139 *Cf., e.g.,* Tatu, Medical Negligence, *passim*.

140 *Oyal v. Turkey*, 4864/05 (2010), § 54; there was «no regulation requiring blood donors to give information about their sexual history which could help determine their eligibility to give blood» (§ 69).

In the judgment *Brincat and others v. Malta*, the handling of asbestos by workers of the state-controlled Malta Drydocks Corporation had to be assessed. The first state measures to protect against the toxic substance were taken in 1987; these «regulations make no reference to asbestos, unlike the later legislation which was enacted for that precise purpose».[141] The former «legislation was deficient in so far as it neither adequately regulated the operation of the asbestos-related activities nor provided any practical measures to ensure the effective protection of the employees whose lives might have been endangered by the inherent risk of exposure to asbestos. Moreover, even the limited protection afforded by that legislation had no impact on the applicants since it appears to have remained unenforced […].»[142]

There seems to be little coherence in confusing the right to life (as one of the highest rights of all) with – or even substituting for – other fundamental rights.

The judgment *Georgel and Georgeta Stoicescu v. Romania* considered the attack on *Georgeta Stoicescu* by seven stray dogs. The 71-year-old woman was wounded in the head and had fractured bones. As a result, she suffered from amnesia and physical pain. About three years after the incident, she was declared disabled and died another four years later[143].

The complaint was lodged on the basis of Art. 8 ECHR, the right to private life. The EctHR took the view that the provision had been infringed: The «lack of sufficient measures taken by the authorities in addressing the issue of stray dogs in the particular circumstances of the case, combined with their failure to provide appropriate redress to the applicant as a result of the injuries sustained, amounted to a breach of the State's positive obligations under Article 8 of the Convention to secure respect for the applicant's private life.»[144]

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141 *Brincat and others v. Malta*, 60908/11 et al. (2014), § 108.

142 *Brincat and others v. Malta*, 60908/11 et al. (2014), § 111.

143 *Georgel and Georgeta Stoicescu v. Romania*, 9718/03 (2016), §§ 5 ff.

144 *Georgel and Georgeta Stoicescu v. Romania*, 9718/03 (2016), § 62.

> In our opinion, the case should have been examined under Art. 2 ECHR. This applies not only to the attack of the stray (*i.e.,* ownerless) dogs, but also to the insufficient medical care of the pensioner.

2.2.4. Duties to protect against natural hazards?

The leading case *"Öneryildiz"* was based on human behaviour (on one hand, the operation of a waste disposal site and on the other hand, the construction of slums) and on governmental omission (neither the slum inhabitants were informed about the danger nor the illegal settlement was cleared). *Natural hazards* are to be distinguished: they are not in themselves the result of human behaviour that can be managed or controlled. It is sometimes decided more or less by chance whether and to what extent natural hazards arise at all, and even more so whether hazards materialise at all. In this respect, there may be a connection between the materialisation of a natural hazard and "*force majeure*" – an external event causing damage that cannot be averted even with all reasonable care.

A direct link from the state's obligation in the context of dangerous activities to the prevention of *natural hazards* appears difficult. According to the recent case law of the EctHR, a state responsibility can ironically arise if a Convention State fails to *adequately defend* itself against a natural hazard when damage occurs.

> «In assessing whether the respondent State had complied with the positive obligation, the Court must consider the particular circumstances of the case, regard being had, among other elements, to the domestic legality of the authorities' acts or omissions [...], the domestic decision-making process, including the appropriate investigations and studies, and the complexity of the issue, especially where conflicting Convention interests are involved [...].
>
> In the sphere of emergency relief, where the State is directly involved in the protection of human lives through the mitigation of natural hazards, these considerations should apply in so far as the circumstances of a particular case point to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use [...]. The scope of the positive obligations imputable to the State in the particular circumstances would depend on the

origin of the threat and the extent to which one or the other risk is susceptible to mitigation.»[145]

For example, in *Budayeva and others v. Russia*, the EctHR judged state behaviour after the occurrence of mudslides. Art. 2 ECHR had been violated «in its substantive aspect on account of the State's failure to discharge its positive obligation to protect the right to life»[146].

The events claimed lives on various days. The authorities had not sufficiently maintained existing mud-protection engineering facilities, although mudslides were likely. In addition, no temporary observation posts had been established after the first events[147].

«In such circumstances the authorities could reasonably be expected to acknowledge the increased risk of accidents in the event of a mudslide that year and to show all possible diligence in informing the civilians and making advance arrangements for the emergency evacuation. In any event, informing the public about inherent risks was one of the essential practical measures needed to ensure effective protection of the citizens concerned.»[148]

After a first mudslide occurred with fatalities, the population was evacuated from the sector of immediate danger. The following day the first inhabitants returned to their homes. They had not been informed that the danger continued. The majority of the fatalities due to the events were to be lamented after further mudslides.

«[Having] regard to the authorities' wide margin of appreciation in matters where the State is required to take positive action, the Court must look beyond the measures specifically referred to by the applicants and consider whether the Government envisaged other solutions to ensure the safety of the local population. [... In] exercising their discretion as to the choice of measures

145 *Budayeva and others v. Russia*, 15339/02 (2008), §§ 136 f.

146 *Budayeva and others v. Russia*, 15339/02 (2008), verdict, § 2.

147 *Budayeva and others v. Russia*, 15339/02 (2008), §§ 146 ff.

148 *Budayeva and others v. Russia*, 15339/02 (2008), § 152.

> required to comply with their positive obligations, the authorities ended up by taking no measures at all up to the day of the disaster. [... There] was no justification for the authorities' omissions in implementation of the land-planning and emergency relief policies in the hazardous area [...] regarding the foreseeable exposure of residents, including all applicants, to mortal risk. Moreover, [...] there was a causal link between the serious administrative flaws that impeded their implementation and the death of Vladimir Budayev and the injuries sustained by the first and the second applicants and the members of their family.»[149]

Strictly speaking, the obligation of the state is thus not linked to the natural hazard itself, but to the behaviour of the state in dealing with it. By their own misconduct in the light of a known hazard and subsequent damage, the authorities had not adequately protected the people who were endangered and then actually died.

Another question is the extent to which public authorities must *recognise and anticipate* the threat posed by "*force majeure*". The EctHR links measures for disaster awareness to its jurisprudence on dangerous activities.

> The case of *M. Özel and others v. Turkey*, dealt with the death of 195 people due to the collapse of houses in an earthquake[150]. «[... Eearthquakes] are events over which States have no control, the prevention of which can only involve adopting measures geared to reducing their effects in order to keep their catastrophic impact to a minimum. In that respect, therefore, the prevention obligation comes down to adopting measures to reinforce the State's capacity to deal with the unexpected and violent nature of such natural phenomena as earthquakes.»[151]
>
> «The [...] principles developed in relation to judicial responses to incidents resulting from dangerous activities also lend themselves to application in the area of disaster relief. Where lives are lost as a result of events engaging the

149 *Budayeva and others v. Russia*, 15339/02 (2008), §§ 146 ff.

150 *M. Özel and others v. Turkey*, 14350/05 et al. (2016), § 17.

151 *M. Özel and others v. Turkey*, 14350/05 et al. (2016), § 173.

> State's responsibility for positive preventive action, the judicial system required by Article 2 must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied to the extent that this is justified by the findings of the investigation [...]. In such cases, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved in whatever capacity in the chain of events in issue.»[152]

> «[C]riminal proceedings were commenced against the property developers responsible for the buildings which had collapsed and certain individuals directly involved in their construction»[153]. But the procedures took too long and were only completed for two out of five defendants due to time constraints. This was a "classical" violation of the procedural obligation from Art. 2 ECHR (*cf.* III.2.4)[154]. The judgment seems all the more understandable given that a complaint had already been lodged against the buildings which had been built in accordance with the regulations two years before they collapsed.[155]

In our opinion, the "duty to investigate" constitutes indeed the closest (analogous) link between disasters and dangerous activities. It is a matter – both here and there – of assessing state behaviour and the knowledge underlying this behaviour, which may be legally relevant. Beyond this, however, there are also references to general hazard prevention in the case of unintentional hazards caused by civilisation. The authorities do not perform a licensing function or supervision in the proper sense with regard to natural hazards or "*force majeure*".

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152 *M. Özel and others v. Turkey*, 14350/05 et al. (2016), § 189.

153 *M. Özel and others v. Turkey*, 14350/05 et al. (2016), § 192.

154 *M. Özel and others v. Turkey*, 14350/05 et al. (2016), §§ 197 ff.

155 *M. Özel and others v. Turkey*, 14350/05 et al. (2016), §§ 8 and 16.

> In the judgment *M. Özel and others v. Turkey*, the EctHR did not examine the positive obligation for procedural reasons (time lapse)[156]: The «[…] Court pointed out, in connection with natural hazards, that 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, and clearly affirmed that those obligations applied in so far as the circumstances of a particular case pointed to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use […]. Therefore, the applicability of Article 2 of the Convention and the State's responsibility have been recognised in cases of natural disasters causing major loss of life […]»[157].

However, when there are inadmissible permits or uncontrolled construction activities in an earthquake zone, we do not consider natural hazards but dangerous activities. The case constellation is then not significantly different from "*Öneryildiz*".

In the judgment *Kolyadenko and others v. Russia*, the links between dangerous activities and disaster appear particularly close. The EctHR correctly treated the case as dangerous activity.

> On 7 August 2001, an urgent massive evacuation of water from the Pionerskoye reservoir near Vladivostok had to be carried out. The reason for the opening of the dam was heavy precipitation (exceptionally heavy rain) combined with the fear that it might break; an alternative was considered impossible in the given situation[158].
>
> «At the same time, the Court is not convinced that the events of 7 August 2001 could be explained merely by adverse meteorological conditions on that date which were beyond the Government's control. [… The] Pionerskoye reservoir is a man-made industrial facility containing millions of cubic metres of water […]

156 *M. Özel and others v. Turkey*, 14350/05 et al. (2016), § 179.

157 *M. Özel and others v. Turkey*, 14350/05 et al. (2016), § 171.

158 *Kolyadenko and others v. Russia*, 17423/05 et al. (2012), §§ 162 f.

and situated in an area prone to heavy rains and typhoons during the summer season […]. In the Court's opinion, the operation of such a reservoir undoubtedly falls into the category of dangerous industrial activities […], particularly given its location.»[159]

The ECtHR considers Art. 2 ECHR to have been violated with regard to the positive obligation (in addition to the procedural obligation): «Firstly, the authorities failed to establish a clear legislative and administrative framework to enable them effectively to assess the risks inherent in the operation of the Pionerskoye reservoir and to implement town planning policies in the vicinity of the reservoir in compliance with the relevant technical standards. Secondly, there was no coherent supervisory system to encourage those responsible to take steps to ensure adequate protection of the population living in the area, and in particular to keep the Pionerskaya river channel clear enough to cope with urgent releases of water from the reservoir, to set in place an emergency warning system there, and to inform the local population of the potential risks linked to the operation of the reservoir. Lastly, it has not been established that there was sufficient coordination and cooperation between the various administrative authorities to ensure that the risks brought to their attention did not become so serious as to endanger human lives. Moreover, the authorities remained inactive even after the flood of 7 August 2001, with the result that the risk to the lives of those living near the Pionerskoye reservoir appears to persist to this day»[160].

2.2.5. Real and immediate risk

a. Limitation

In parallel to the obligation to establish a legal and administrative framework with an ultimately preventive character, Art. 2 ECHR may also impose an obligation on the Convention States to take *concrete preventive measures* (to avert dangers). The case law on this refers to (intentional) dangers by third parties. The obligation can then

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159 *Kolyadenko and others v. Russia,* 17423/05 et al. (2012), § 164.

160 *Kolyadenko and others v. Russia,* 17423/05 et al. (2012), § 185.

take effect if a state fails to prevent physical damage – in particular through criminal offences – which is sufficiently likely to occur (for a delimitation, we refer to *Mastromatteo v. Italy*, *see also* no. III.2.2.2).

> In an earlier case, the Commission had denied a specific duty to protect a life endangered by a third party as long as life as a legal asset is protected by the legal system: X, whom had been *shot by three IRA members*, could not invoke his right to life to be personally protected by the Irish authorities: «[…] Art. 2 cannot be interpreted as imposing a duty on a State to give protection of this nature, at least not for an indefinite period of time […]»[161].

The obligation to take concrete preventive measures (to avert danger) is about whether and to what extent the authorities must take concrete measures in the event of potential threats to life. According to recent case law, a state duty to act depends on the concrete degree of danger posed by an individual threat (to a life). In principle, the state is only obliged to intervene in the case of *real and immediate risk* and corresponding knowledge or need to know about it (*cf.* on this, as well as on the actual leading case of *Osman v. The United Kingdom* – in which Art. 2 ECHR had not been violated according to the *Osman test*, *see also* no. III.2.2.7.b).

> The ECtHR has expressed in an *earlier formula* that «[…] Article 2 may also imply in *certain well-defined circumstances* a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual»[162].
>
> Its more recent formula, on the other hand, appears somewhat broader: «It also extends *in appropriate circumstances* to a positive obligation on the authorities

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161 *X v. Ireland* (AD), 6040/73 (1973), p. 2; *cf., e.g.,* Dickson, ECHR and the Conflict in Northern Ireland, pp. 231 ff. (with reference to further applications by people living in Northern Ireland who alleged that the UK government was not doing enough to protect the lives of Protestants living in terrorized areas or the lives of persons employed in the security forces).

162 *Mastromatteo v. Italy* (GC), 37703/97 (2002), §§ 67 f.; *Osman v. The United Kingdom*, 23452/94 (1998), § 115; *R.R. and others v. Hungary*, 19400/11 (2012), § 28; *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (2010), § 64.

to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual» (highlighted only here)[163].

The real and immediate risk distinguishes between general, sometimes low-threshold life risks and abstract dangers. According to the EctHR standard, a specific (intentional) danger for a certain person is required. The Court of Justice has affirmed specific dangers, in particular for journalists, people in witness protection programmes or in cases of domestic violence.

The *Kılıç v. Turkey* judgment is based on the violent death of a journalist in south-east Turkey. *Kemal Kılıç* had asked the governor for protection after vendors and distributors of his newspaper were attacked in his city. The request was rejected on the grounds that Kılıç was no more at risk than any other person or journalist in south-eastern Turkey[164]. In recognition of the local situation in general and the high number of journalists killed in south-eastern Turkey, the EctHR affirmed that Kemal Kılıç was «at this time at particular risk of falling victim to an unlawful attack. Moreover, this risk could in the circumstances be regarded as real and immediate»[165]. In addition, a «framework of law in place whith the aim of protecting life [...]. [... However], that the implementation of the criminal law in respect of unlawful acts allegedly carried out with the involvement of the security forces discloses particular characteristics in the south-east region in this period. [...] In addition to these defects which removed the protection which Kemal Kılıç should have received by law, there was an absence of any operational measures of protection. [...] A wide range of preventive measures were available which would have assisted in minimising

163 So in *Kılıç v. Turkey*, 22492/93 (2000), § 62; *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 54; *Kontrová v. Slovakia,* 7510/04 (2007), § 49; *Opuz v. Turkey,* 33401/02 (2009), § 128.

164 *Kılıç v. Turkey*, 22492/93 (2000), §§ 65 f.

165 *Kılıç v. Turkey*, 22492/93 (2000), §§ 66 f.: furthermore, «the authorities were aware, or ought to have been aware, of the possibility that this risk derived from the activities of persons or groups acting with the knowledge or acquiescence of elements in the security forces. A 1993 report by a Parliamentary Investigation Commission [...] stated that it had received information that a Hizbullah training camp was receiving aid and training from the security forces and concluded that some officials might be implicated in the 908 unsolved killings in the south-east region» (§ 68).

the risk to Kemal Kılıç's life and which would not have involved an impractical diversion of resources. On the contrary however, the authorities denied that there was any risk. There is no evidence that they took any steps in response to Kemal Kılıç's request for protection either by applying reasonable measures of protection or by investigating the extent of the alleged risk to Özgür Gündem employees in Şanlıurfa with a view to taking appropriate measures of prevention»[166]. Referring to these circumstances, the authorities «failed to take reasonable measures available to them to prevent a real and immediate risk to the life of Kemal Kılıç»[167].

A particular threat has been identified in the case of *R.R. and others v. Hungary* concerning the exclusion of a person and his family from a witness protection programme (Serbian drug mafia)[168]. Although there were still risks, the camouflage identities previously granted were revoked in favour of «measures of personal protection, that is, the availability of an emergency phone number and the occasional visits by police officers. Given the importance of witness protection […], the […] authorities' actions in this case may have potentially exposed Ms H.H. and her children to life-threatening vengeance from criminal circles and thus fell short of the requirements of Article 2 of the Convention.»[169]

The case of *Opuz v. Turkey* concerns the continuous exercise of domestic violence (*see* no. III.2.2.2). Before killing his victim, the perpetrator had made clear death threats and used various forms of severe physical violence against the victim. The EctHR therefore considered that his life was in immediate danger. The police had also been called upon to act. The «local authorities could have foreseen a lethal attack […]. While the Court cannot conclude with certainty that matters would have turned out differently and that the killing would not have occurred if the authorities had acted otherwise, it reiterates that a failure to take reasonable measures which could have had a real prospect of altering

166 *Kılıç v. Turkey*, 22492/93 (2000), §§ 70 f. and 76.

167 *Kılıç v. Turkey*, 22492/93 (2000), § 77.

168 *R.R. and others v. Hungary*, 19400/11 (2012), §§ 5 ff.

169 *R.R. and others v. Hungary*, 19400/11 (2012), §§ 31 f.

the outcome or mitigating the harm is sufficient to engage the responsibility of the State [...].»[170] However, the authorities have remained inactive and did not take any special measures to protect the victim[171].

Similarly, in the case of *Talpis v. Italy*, following various incidents of domestic violence and the filing of a complaint against the perpetrator, the authorities had failed to take adequate measures to protect his wife and children[172]. The drunken perpetrator was searched during a night-time police check. Afterwards he went home, attacked his wife and fatally injured his son with a knife[173].

The ECtHR has refused to accept a special duty to protect human life as a legal asset where an increased threat is conceivable *per se* but there is no concrete evidence of a concrete danger (yet).

Selahattin Demirtaş was mentioned as one of several people in an article by author I.E. entitled *"Turk, here is your enemy"*. Demirtaş accused the authorities of not punishing the author of the article and of not protecting him with specific measures[174]. «The applicant's representative did not allege in his petition that his client faced a real and immediate risk to his life. Nor did he claim [...] that the applicant had received actual threats from third persons following the publication of the article [...]. The applicant and his representative did not allege that the applicant had become the victim of a campaign of violence and intimidation and that the national authorities had failed to take measures for his protection although they were aware of this campaign. Similarly, the applicant did not allege, [...] that there had been actual or attempted physical violence against him which had or could have placed his life in danger [...].»[175]

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170 *Opuz v. Turkey,* 33401/02 (2009), § 136.

171 *Opuz v. Turkey,* 33401/02 (2009), §§ 145 ff.

172 *Talpis v. Italy*, 41237/14 (2017), §§ 117 ff.

173 *Talpis v. Italy*, 41237/14 (2017), §§ 39 ff.

174 *Selahattin Demirtaş v. Turkey*, 15028/09 (2015), §§ 10 f. and 35.

175 *Selahattin Demirtaş v. Turkey*, 15028/09 (2015), § 33.

The right to life is also not violated when a person becomes the victim of general criminal acts[176].

> «[… Three] days before he was killed, İlker mentioned […] the possibility that something might happen to him […], without providing further details. [… There] is nothing to suggest that, even supposing İlker Tufansoy feared that his life was at real and immediate risk, he had ever reported these fears to the Cypriot police. Nor is there anything to indicate that the Cypriot authorities ought to have known that İlker Tufansoy was at risk of attack from criminal acts of a third party and failed to take steps to protect him.»[177]

b. Threat to public security?

Whether a person may present a real and immediate risk to the *public security* was to be assessed in *Maiorano and others v. Italy.*

> It concerned the murder of *Maria Carmela Linciano* and *Valentina Maiorano* by a certain Mr Izzo. Mr Izzo had been sentenced to life imprisonment on several occasions for serious violence. Despite this, he was placed in semi-custody – albeit with conditions – and under police surveillance[178]. That he would kill his two close friends was *not foreseeable* according to the EctHR[179]. However, the authorities should have concluded from Izzo's general behaviour in contacts with the criminal milieu that he would violate criminal law again[180]. The Court expressed its doubts about the administrative procedure which allowed Izzo to be held in semi-captivity. It stressed that the gradual reintegration of Izzo into society would have had to be weighed against the interest in protecting the Community[181]. Due to the social danger («[…] notamment de la personnalité

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176 *Denizci and others v. Cyprus*, 25316-25321/94 and 27207/95 (2001), § 348: «killed by unidentified men using automatic rifles and shotguns».

177 *Denizci and others v. Cyprus*, 25316-25321/94 and 27207/95 (2001), § 375.

178 *Cf. Maiorano and others v. Italy*, 28634/06 (2010), §§ 8 ff., 48, 112 and 117 ff. (background).

179 *Maiorano and others v. Italy*, 28634/06 (2010), § 110.

180 *Maiorano and others v. Italy*, 28634/06 (2010), § 118.

181 *Maiorano and others v. Italy*, 28634/06 (2010), § 120.

de M. Izzo, de ses nombreux antécédents et des éléments donnant à penser qu'il aurait pu être socialement dangereux») and the failure of the authorities to intervene in Izzo's breaches of his terms of parole, the ECtHR found that there had been a breach of the positive obligation (duty to protect life as a legal asset) under Art. 2 ECHR[182].

In the case of a general risk by other persons, we believe that the limit is drawn by the *Grand Chamber* in its leading case, *Mastromatteo v. Italy*[183] (later confirmed by the Court in other cases (*see* no. III.2.2.2). The judgment in *Maiorano and others v. Italy* therefore goes too far. A real and immediate risk presupposes that a potential victim can be identified at all. The misconduct of the interrogators (concerning Mr Izzo's semi-captivity) cannot change this. The situation would be different if the authorities had not intervened when they had knowledge of a concrete threat to the two women (*see Osman v. The United Kingdom,* no. III.2.2.7.e).

c. Aversion of a risk or danger

To avert a possible risk or danger, a distinction can be made between measures that focus on the *object of protection* and those that focus on the *source of danger*. Thus, measures can either aim at the concrete and active protection of a certain person (although the EctHR is reluctant to take actual personal protection measures) or be directed against a danger *per se* (*e.g.,* prohibition of approach for certain people). The right to life does not imply a duty to succeed – but to take appropriate measures.

The ECtHR expressed this in the judgment *Bljakaj and others v. Croatia*. The judgment dealt with violence within the family: «[…] there are several other measures which the domestic authorities might reasonably have been expected to take to avoid the risk to the right to life from the violent acts of A.N. While the Court cannot conclude with certainty that matters would have turned out differently if the authorities had acted otherwise, it reiterates that the test under Article 2 does not require it to be shown that ‹but for› the failing or omission of the authorities the killing would not have occurred […]. Rather,

182 *Maiorano and others v. Italy*, 28634/06 (2010), § 121.

183 *But cf.* Sicilianos, Positive obligations, p. 38.

> what is important, and sufficient to engage the responsibility of the State under that Article, is that reasonable measures the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm [...].»[184]

In this context, it must be noted which means or measures are permissible under national law (if at all). A complete absence of them could constitute a violation of a sufficient legal and administrative framework for the protection of life (at least, this seems to be mentioned sometimes by the EctHR). If measures are available, it depends on whether the authorities have applied them adequately – always under the reservation that the authorities knew or ought to have known that life as a legal asset according to Art. 2 ECHR was threatened.

> In the case of *Branko Tomašic and others v. Croatia*, a father had shot his wife, his daughter and then himself. A police intervention took place only 20 minutes after the report that the perpetrator was on the move with an automatic weapon – and thus too late[185]. However, it was not this circumstance that led to a violation of Art. 2 ECHR, but the state's knowledge of the previous history: the perpetrator had already been sentenced to prison for threatening the victims' lives and was undergoing ordered psychiatric treatment. Although the authorities considered the perpetrator's potential for violence to be serious and he repeatedly claimed to have weapons and bombs at his disposal, he had never been searched for such items[186]. The EctHR also referred to the – brief – psychiatric treatment of the offender ordered by the authorities: they «[...] failed to show that the compulsory psychiatric treatment ordered in respect of M.M. during his prison term was actually and properly administered. [... The] regulation concerning the enforcement of a measure of compulsory psychiatric treatment, namely the relevant provisions of the Enforcement of Prison Sentences Act, is of a very general nature. [...These] general rules do not properly address the issue of

184 *Bljakaj and others v. Croatia*, 74448/12 (2014), § 124.

185 *Branko Tomašic and others v. Croatia*, 46598/06 (2009), § 10.

186 *Branko Tomašic and others v. Croatia*, 46598/06 (2009), §§ 52 ff.

enforcement of obligatory psychiatric treatment as a security measure, thus leaving it completely to the discretion of the prison authorities to decide how to act. However, […] such regulations need to be sufficient in order to ensure that the purpose of criminal sanctions is properly satisfied. In the present case neither the regulation on the matter nor the court's judgment ordering M.M.'s compulsory psychiatric treatment provided sufficient details on the administration of this treatment.»[187]

In the case of *Dink v. Turkey*, the journalist *Fırat Dink* had published an article in which he pointed out the Armenian origin of Atatürk's adopted daughter. This led to protests and a complaint against Dink by ultra-nationalists[188]. The local security services subsequently received information about a possible attack on the journalist's life by certain individuals. These people had already been monitored by the authorities and had also revealed their plans to third parties[189]. On 19 January 2007, Fırat Dink was killed by three shots to the head[190]. In the circumstances, the EctHR considered that the Turkish authorities knew or should have known of the imminent mortal threat[191]. But measures to protect the journalist had not been taken. The Court emphasises that it is irrelevant whether or not the person at risk requests such measures[192].

A concrete danger to people can also exist on a larger scale. Even then, however, the discussion is not about general risks to human life, but a real and immediate risk.

In the decision *P.F. and E.F. v. The United Kingdom*, the behaviour of the state security forces during the permanent riots between Catholics and Protestants

187 *Branko Tomašic and others v. Croatia*, 46598/06 (2009), §§ 56 f.

188 *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (2010), § 66.

189 *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (2010), §§ 68 f.

190 *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (2010), §§ 68 f.

191 *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (2010), § 70: «[…] on peut estimer que les autorités savaient ou auraient dû savoir que Fırat Dink était tout particulièrement susceptible de faire l'objet d'une agression fatale. De plus, eu égard aux circonstances, ce risque pouvait passer pour réel et imminent.»

192 *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (2010), §§ 72 ff.

(respectively loyalists) in Belfast in the years 2001 to 2003 was to be assessed. During this period, Protestant Loyalists tried to prevent the children of the Catholic *Holy Cross* primary school in Ardoyne Road from attending school. At the height of the tensions, around 400 police officers and 100 soldiers were deployed to protect parents and children. A total of 41 police officers were injured during the operations. Not a single child, on the other hand, was physically harmed[193]. The applicants allege a violation of the prohibition of torture[194]. The EctHR has nevertheless examined (under the title of Art. 3 ECHR) the "positive obligation to protect the right to life"[195]. The police had made «all reasonable steps to protect the applicants»[196]; the court declared the application inadmissible.

193 *P.F. and E.F. v. The United Kingdom* (AD), 28326/09 (2010), §§ 3 ff. and in particular § 19.

194 *P.F. and E.F. v. The United Kingdom* (AD), 28326/09 (2010), § 34: «The applicants complained that although the police had knowledge that they were suffering Article 3 ill-treatment at the hands of private individuals, they failed in their positive obligation to take all reasonably available measures to end it. In particular, they complained that the police were not entitled to balance an unknown and unspecified risk of potential disturbances elsewhere against the benefits of bringing the ill-treatment that they were suffering to an immediate end. Rather, as soon as the police had knowledge that the applicants were suffering ill-treatment, they came under a positive obligation to take all reasonably available measures to end that treatment».

195 *P.F. and E.F. v. The United Kingdom* (AD), 28326/09 (2010), § 37.

196 *P.F. and E.F. v. The United Kingdom* (AD), 28326/09 (2010), §§ 43 ff. «[…] the police followed a course of action which they reasonably believed would end the protest with minimal risk to the children, their parents and the community at large. The risks which concerned the police were not, in fact, purely speculative. Violence had been erupting throughout the city over the summer, often at great speed and with little prior warning. Moreover, the police had intelligence which suggested that a more direct approach could increase the risk to the parents and children walking to the Holy Cross School, lead to further attacks on Catholic schools and also result in increased violence in north Belfast. […This] is not a case in which the police stood by and did nothing: […To] require the police in Northern Ireland to forcibly end every violent protest would likely place a disproportionate burden on them, especially where such an approach could result in the escalation of violence across the province. In a highly charged community dispute, most courses of action will have inherent dangers and difficulties and it must be permissible for the police to take all of those dangers and difficulties into consideration before choosing the most appropriate response».

2.2.6. Assumptions in case of special responsibility of the state

The positive obligation is intensified when people are under state care. The ECtHR expresses this by requiring states to not only investigate potentially lethal injuries and deaths but also assume state responsibility for their fate[197]:

> «In assessing evidence, the Court adopts the standard of proof ‹beyond reasonable doubt›. However, such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody or in the army, strong presumptions of fact will arise in respect of injuries and death occurring during that detention or service. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.»[198]

There is a special duty to protect human life when the State takes people into custody. It then becomes responsible for their individual well-being.

> The judgment of *Paul and Audrey Edwards v. The United Kingdom* concerned the death of Christopher Edwards. He had been beaten to death in a prison cell by his fellow inmate Richard Linford despite pressing an emergency call button before. «The Court concludes that the failure of the agencies involved in this case (medical profession, police, prosecution and court) to pass information about Richard Linford on to the prison authorities and the inadequate nature of the screening process on Richard Linford's arrival in prison disclose a breach of the State's obligation to protect the life of Christopher Edwards»[199].

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197 To the strong presumption, *cf.* Sicilianos, Positive obligations, p. 39.

198 *Malik Babayev v. Azerbaijan*, 30500/11 (2017), § 68.

199 *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 64.

This duty materialises in particular with regard to the protection of the health and the physical well-being of detainees[200].

> The «authorities must account for the treatment of people who are deprived of their liberty. Where a detainee dies as a result of a health problem, the State must offer both a reasonable explanation as to the cause of death and details regarding the treatment administered to the person concerned prior to his or her death»[201]. Moreover, if prisoners are harmed in the custody of the state, the link between positive and procedural obligation seems particularly close, because «the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation [...].»[202]

In several recent judgments, the EctHR has had to assess infection with the HI-Virus in Eastern European prisons. The court has developed a differentiated jurisprudence. In particular, states have a duty to provide medical care to prisoners and to investigate the infection.

> The right to life is violated if a prisoner remains without further medical attention for more than 10 months after a positive HIV test (and dies a short time later from HIV-related illnesses)[203].

> However, a just possible causal link is not sufficient to breach the positive obligation of the State. Thus, in a case where the applicant could also have infected himself with the virus, the EctHR has not assumed a direct responsibility of

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200 *Shchebetov v. Russia*, 21731/02 (2012), § 44.
As to *Ahmet Çakıcı,* who had become the victim of an unacknowledged detention and serious ill-treatment by state security forces, *cf. Çakıcı v. Turkey*, 23657/94 (1999), § 87: «As Ahmet Çakıcı must be presumed dead following an unacknowledged detention by the security forces, the Court finds that the responsibility of the respondent State for his death is engaged. It observes that no explanation has been forthcoming from the authorities as to what occurred following his apprehension, nor any ground of justification relied on by the Government in respect of any use of lethal force by their agents. Liability for Ahmet Çakıcı's death is therefore attributable to the respondent State and there has accordingly been a violation of Article 2 on that account.»

201 *Karpylenko v. Ukraine*, 15509/12 (2016), § 80.

202 *Shchebetov v. Russia*, 21731/02 (2012), § 44.

203 *Karpylenko v. Ukraine*, 15509/12 (2016), §§ 81, 87 and 92.

the State under Art. 2 ECHR[204]. However, because the state investigation into the infection had not led to any clarification, the procedural obligation of Art. 2 ECHR was violated[205].

Under certain circumstances, however, neither the responsible state nor the injured person can provide a conclusive explanation. «[…In] a situation where the materials in the case file do not provide a sufficient evidential basis to enable the Court to find ‹beyond reasonable doubt› that the […] authorities were responsible for the applicant's contraction of the HIV infection, the Court must conclude that there has been no violation of Article 2 of the Convention on account of the authorities' alleged failure to protect the applicant's right to life.»[206] Even the state's duty to investigate may not be violated, as it does not include a duty to be successful: «The […] facts of the case do not reveal that the authorities did not thoroughly evaluate the medical evidence before them, attempting to draw conclusions from it without accepting too readily any version of events. […The] domestic courts actively responded to the applicant's grievances, directing the course of the investigation. However, with inmate G. refusing to testify, the courts' task of establishing the facts was a complicated one. In these circumstances and given the absence of any evidence, save for the

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204 *Gorelov v. Russia*, 49072/11 (2014), §§ 44 and 47 ff.: The HIV infection «was acquired in detention. The parties, however, disputed the exact way in which the virus had been transmitted. The Government indicated two possible routes for the HIV transmission: the applicant giving himself a large number of tattoos in detention, and the applicant committing self-mutilating acts which involved, inter alia, swallowing sharp objects and cutting his arm. The applicant insisted that the illness was the result of negligence on the part of prison medical staff during invasive medical procedures performed on him. He argued that infected materials or instruments could have been used in those procedures. […] The national authorities did not attempt to identify precisely how the applicant's infection had been acquired. […The] applicant's version of events was unreliable and inconsistent […]. Accordingly, in a situation where the materials in the case file do not provide a sufficient evidential basis to enable the Court to find "beyond reasonable doubt" that the Russian authorities were responsible for the applicant's contraction of the HIV infection, the Court must conclude that there has been no violation of Article 2 of the Convention on account of the authorities' alleged failure to protect the applicant's right to life.»

205 *Gorelov v. Russia*, 49072/11 (2014), § 56: The «Russian authorities did not carry out a prompt, expeditious and thorough investigation of the applicant's infection with HIV. It accordingly holds that there has been a violation of Article 2 of the Convention under its procedural limb.»

206 *Shchebetov v. Russia*, 21731/02 (2012), §§ 48 f.

> applicant's statements, that Mr P. had ever taken a sample of the applicant's blood, their conclusion appears well-founded.»[207]

However, a mere possible threat to physical integrity or life does not seem sufficient, even in the case of such a pronounced state responsibility. After all, instead of a violation of the right to life, a violation of Art. 3 ECHR, *i.e.,* the prohibition of inhuman or degrading treatment, is also possible.

> In the case of *Florea v. Rumania*, a convicted thief with chronic hepatitis and high blood pressure had been transferred to a heavily overcrowded prison. The conditions there were very bad for a sick person. *Gheorghe Florea* had to share a bed with smokers, sometimes even sleeping on the cold concrete floor. The food in the prison was not adapted to his illnesses[208]. The ECtHR underlines the responsibility of the State towards prisoners in general and the possibility of particular vulnerability of detainees. Art. 3 ECHR contains a positive obligation not to subject prisoners to avoidable burdens. In particular, the dignity, health and welfare of prisoners must be taken into account[209].

But the duty to protect prisoners in state custody is not unlimited. Therefore, the ECtHR refuses to hold the state responsible for drug use and the consequences for prisoners. Such behaviour therefore remains the sole responsibility of the persons concerned.

> The Court declared a corresponding case inadmissible: «[... The] fact that while the applicants' son/brother was in prison he had been able to procure and take drugs cannot in itself vest the State with responsibility for the death at issue.»[210]

2.2.7. Limits of the positive obligation

In principle, the state violates its positive obligation under Art. 2 ECHR if it does not provide an effective legal and administrative framework (*cf.* no. III.2.2.2) for the protection of life as a legal asset, if it remains negligent, in particular with regard to

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207 *Shchebetov v. Russia*, 21731/02 (2012), § 57.

208 *Florea v. Romania*, 37186/03 (2010), §§ 8 ff.

209 *Florea v. Romania*, 37186/03 (2010), §§ 50 ff. and 63 f.

210 *Esterina Marro and others against Italy* (AD), 29100/07 (2014), § 49.

unintentional abstract dangers (*cf.* no. III.2.2.3), if it does not act adequately in the case of natural hazards (*cf.* no. III.2.2.4) or if it does not intervene in the case of sufficiently concrete dangers (*cf.* no. III.2.2.5). However, the right to life does not enjoy absolute protection (*cf.* no. III.2.1) and state obligations are not to be understood as "duties of success" (*cf.* no. III.2.2.1). However, it remains to be clarified when the positive obligation actually occurs and where it ends.

a. Knowledge

In order for a positive obligation in this sense to be effective, the ECtHR requires knowledge of the respective dangers or a need to know about them. The Court seems to apply a "differential strictness" in this respect.

Knowledge of potential dangers to life already affects the design of the *administrative and legal framework* to prevent them.

> In the judgment *Brincat and others v. Malta* (*see* no. III.2.2.2), the key question was at what time the authorities knew or should have known of the particular risk of asbestos to workers. Various lines of action were relevant to the ECtHR: in 1986 Malta had adopted the «ILO Asbestos Recommendation and subsequent Convention which contained the minimum standards applicable concerning the use of asbestos»[211]. Although the first state measures to protect workers were taken from 1987 onwards, the regulation did not contain any specific reference to asbestos[212].
>
> To approach the answer of when the authorities should have known of the danger, the ECtHR referred to research which should have been known in Malta: «[…. The] Court must rely on […] objective scientific research, particularly in the light of the domestic context. The Court takes account of the list […] which contains references to hundreds of articles or other publications concerning the subject at issue published from 1930 onwards – many of them taken from reputable British medical journals. The Court observes that medical studies

[211] *Brincat and others v. Malta*, 60908/11 et al. (2014), § 105.

[212] *Brincat and others v. Malta*, 60908/11 et al. (2014), § 108.

> at the then Royal University of Malta were modelled on, and followed closely upon, the corresponding United Kingdom system, with many graduates in medicine continuing their studies in England and Scotland. Particularly in view of this situation [...] it is inconceivable that there was no access to any such sources of information, at least, if by no one else, by the highest medical authorities in the country, notably the Chief Government Medical Officer and Superintendent of Public Health [...]. In fact, according to Maltese law it was precisely the duty of the Superintendent of Public Health to remain abreast of such developments and advise the Government accordingly».[213]

> As to the knowledge of the authorities, the ECtHR referred to a judgment of the Commercial Court of Malta. In 1989, the Commercial Court had awarded compensation to the bereaved family of a worker who died in 1979 as a result of asbestos poisoning[214]. This implied that the authorities were already aware of the dangers of asbestos in the 1970s[215].

The ECtHR seems to set a strict standard of knowledge for the state. The first question to be asked is, what knowledge is potentially available? The Court places this knowledge in the context of the jurisdiction of public authorities. However, the Court separates the question of "need to know" from the question of the relevant moment in time. It is self-evident that states cannot take immediate action when they become aware of any potential threat. But the state's need to know triggers the obligation to *assess* a risk.

> This obligation can practically never be linked to an exact date. But it is somewhat curious that the ECtHR should refer to the Commercial Court's judgment in *Brincat and others v. Malta*. Since the judgment, the authorities have been aware of the dangers of asbestos *with certainty*. In the two decades before the judgment, in our opinion, they *should* have been aware of it.

In the context of possible measures for the concrete aversion of danger – in the case law so far for the preventive avoidance of possible criminal offences – the ECtHR requires

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213 *Brincat and others v. Malta*, 60908/11 et al. (2014), § 106.

214 *Brincat and others v. Malta*, 60908/11 et al. (2014), §§ 10 and 35.

215 *Brincat and others v. Malta*, 60908/11 et al. (2014), § 106.

that a potential perpetrator as well as his or her dangerousness are known (know or need to know). In addition, measures must be available to avert the concrete danger (*see* d).

> For the positive obligation to protect life, «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[s] 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.»[216]

b. Informed consent

It is part of the "differentiated strictness" that risks may to a certain extent be consciously accepted. Acceptance requires an informed consent on the part of the people at risk themselves. Even then, however, the assumption of risk is only permissible to a limited extent.

> For example, in *Vilnes and others v. Norway*, the ECtHR made a distinction between test dives and diving operations generally for long-term damage caused by (professional) deep-sea diving: «it was in the nature of things that test dives, whether they were experimental diving or verification diving […], involved certain risks which made it difficult to compare that kind of activity with North Sea diving operations generally.»[217] While informed consent seemed implicitly possible for test dives, the Court did not accept consent to long-term risks of deep-sea diving; «the divers could not be regarded as having accepted the risk of after-effects that were unknown to them»[218].

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216 *Osman v. The United Kingdom*, 23452/94 (1998), § 116; *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 55; *Kılıç v. Turkey*, 22492/93 (2000), § 63 (individuals); *Kontrová v. Slovakia,* 7510/04 (2007), § 50; *Van Colle v. The United Kingdom*, 7678/09 (2012), § 88; *Turluyeva v. Russia,* 63638/09 (2013), § 91 – quite similarly, in *Mastromatteo v. Italy* (GC), 37703/97 (2002), § 68 and *Opuz v. Turkey,* 33401/02 (2009), § 129 and *P.F. and E.F. v. The United Kingdom* (AD), 28326/09 (2010), § 37 («duty to prevent and suppress offences against the person») – and also *Perevedentsevy v. Russia*, 39583/05 (2014), § 92 and *Malik Babayev v. Azerbaijan*, 30500/11 (2017), § 67.

217 *Vilnes and others v. Norway*, 52806/09 and 22703/10 (2014), § 227.

218 *Vilnes and others v. Norway*, 52806/09 and 22703/10 (2014), § 222.

> The «decompression tables used in diving operations may suitably be viewed as carriers of information which is essential in enabling the divers to assess the health risks involved, in the sense that diving carried out in accordance with the tables would be assumed to be relatively safe, whilst diving which did not respect minimum decompression standards would be deemed unsafe, a perception likely to be reinforced by diving operations being subject to prior administrative authorisation. Thus, the question arises whether, in view of the practices related to the use of rapid decompression tables, the divers received the essential information needed to be able to assess the risk to their health […] and whether they had given informed consent to the taking of such risks.»[219]

The Court stresses the need for sufficient information without which an informed consent cannot be obtained. To this end, it refers to the protection of personality according to Art. 8 ECHR. The Court thus distinguishes between individual and public rights to information.

> The Court affirms «[…] a positive obligation for States, in relation to Article 8, to provide access to essential information enabling individuals to assess risks to their health and lives. [… This] obligation may in certain circumstances also encompass a duty to provide such information, as can be inferred from […] the affirmation of the ‹public's right to information› with reference to the latter in the context of Article 2 […]. It does not follow from the foregoing that this right ought to be confined […] to information concerning risks that have already materialised. In relation to Article 2 […] ‹among [the] preventive measures [to be taken] particular emphasis should be placed on the public's right to information› […], and the position in relation to Article 8 can hardly be different. Nor does it follow that the right in question should not apply to occupational risks […]. [… This] obligation may in certain circumstances also encompass a duty to provide such information.»[220]

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219 *Vilnes and others v. Norway*, 52806/09 and 22703/10 (2014), § 236.

220 *Vilnes and others v. Norway*, 52806/09 and 22703/10 (2014), § 235.

However, states cannot be required to prevent every individual risk or misconduct. This can be illustrated by two cases of tragic deaths in rail transport: *Bône v. France* and *Kalender v. Turkey*.

> Fourteen-year-old *Christophe Bône* had deliberately got off on the wrong side of a train wagon. Human behaviour is sometimes unpredictable. A sufficient legal regime was in place. The victim had ignored general warnings. Leading cause for being fatally hit by a train was the boy's very reckless behaviour[221]. The ECtHR has declared the case admissible.
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> The situation was different for *Kadir and Şükriye Kalender*. The two train passengers were fatally hit by a freight train running on the siding when they got off a wagon. Although there was government regulation to protect passengers, the station did not meet the minimum safety standards. There were no – actually mandatory – platforms and subways. In addition, the passenger train had stopped on a track in the middle because of a blocked track opposite the station building. There was no warning for passengers getting off the train. The lighting was also inadequate. In these circumstances, the ECtHR did not assume that the victims were at fault, but rather that there was a causal link between the numerous and serious breaches of safety rules (ultimately due to their poor enforcement) and the fatal accident[222]. The question of whether passengers would have accepted a (fatal) risk of accident when travelling by train does not even arise.

c. Licensing and supervision responsibilities

In the case of non-intended *abstract hazards*, sufficient precautions can, in our opinion, consist of subjecting activities to a state authorisation and supervision requirement. As far as the state subjects dangerous activities to its legal framework, there is at least a need to know about potential risks as well.

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221 *Bône v. France* (AD), 69869/01 (2001), pp. 2 and 8 f.

222 *Kalender v. Turkey*, 4314/02 (2009), §§ 4 ff. and 45 ff.

The *Grand Chamber's* interpretation of Art. 2 ECHR «is guided by the idea that the object and purpose of the Convention as an instrument for the protection of individual human beings requires its provisions to be interpreted and applied in such a way as to make its safeguards practical and effective.»[223] The safeguards put in place by the state must therefore be both practical and effective.

This can lead to conflicts of interest, which are manifold in the case of state regulation. In our opinion, the ultimate aim is to address questions of proportionality. Then the necessity and suitability of government measures must be taken into particular consideration.

> In technical safety law, the *ALARA principle* has been established[224] in order to maintain a certain safety level *as low as reasonably achievable*. Impossible or completely disproportionate requirements may not be imposed on the performance of activities which are permitted in themselves (*see* d). The alternative consists of prohibitions which, strictly speaking, constitute value decisions (due to their extra-legal justification)[225].

d. Limits of priorities and resources

The *Grand Chamber* has made it clear that the positive obligation to protect human life does not extend to the prevention of any conceivable violation of fundamental rights[226], as «[...] not every claimed risk to life [...] can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materializing.»[227]

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223 *Öneryildiz v. Turkey* (GC), 48939/99 (2004), § 69.

224 Mueller/Zech, Technikrecht, p. 91.

225 Mueller/Zech, Technikrecht, pp. 77 ff. and 87 f.

226 *Mastromatteo v. Italy* (GC), 37703/97 (2002), § 68 («That does not mean [...] that a positive obligation to prevent every possibility of violence can be derived from this provision [...]»). *Cf.* Harris/O'Boyle/Warbrick, European Convention (3th ed.), p. 209.

227 *Mastromatteo v. Italy* (GC), 37703/97 (2002), § 68; *Osman v. The United Kingdom*, 23452/94 (1998), § 116; *Kılıç v. Turkey*, 22492/93 (2000), § 63; *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 55; *Kontrová v. Slovakia,* 7510/04 (2007), § 50; *Opuz v. Turkey,* 33401/02 (2009), § 129; *Turluyeva v. Russia,* 63638/09 (2013), § 91.

In other words, the positive obligation does not require the public authorities to do the impossible or to take (totally) disproportionate measures.

> 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 [...].»[228]

In parallel with the knowledge of a certain risk to life, the Court requires in particular that concrete measures for the protection of life are feasible.

> «The authorities' positive obligations under Article 2 of the Convention are not unqualified: not every presumed threat to life obliges the authorities to take specific measures to avoid the risk. A duty to take specific measures arises only if the authorities knew or ought to have known at the time of the existence of a real and immediate risk to life and if the authorities retained a certain degree of control over the situation [...]. The Court would only require a respondent State to take such measures which are ‹feasible› in the circumstances [...].»[229]

e. Third parties' rights

In the case of concrete danger prevention, dealing with the integrity of other people's behaviour (ultimately their freedom for acting) is a particular challenge. The respect of further basic rights of third parties (*e.g.*, procedural guarantees and especially the

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[228] *Osman v. The United Kingdom*, 23452/94 (1998), § 116; *Kılıç v. Turkey*, 22492/93 (2000), § 63; *Kontrová v. Slovakia,* 7510/04 (2007), § 50; quite similarly, in *Finogenov and others v. Russia*, 18299/03 (2011), § 209 (with further references on the previous jurisprudence); *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (2010), § 65; *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 55; *Opuz v. Turkey,* 33401/02 (2009), § 129 («the scope of the positive obligation»); *Bljakaj and others v. Croatia*, 74448/12 (2014), § 105 (different word order) and also *Denizci and others v. Cyprus*, 25316-25321/94 and 27207/95 (2001), § 375 or *R.R. and others v. Hungary*, 19400/11 (2012), § 29.
Slightly different in the wording *Malik Babayev v. Azerbaijan*, 30500/11 (2017), § 66: «[...] not every claimed risk to life can entail a Convention requirement for the authorities to take operational measures to prevent that risk from materializing».

[229] *Finogenov and others v. Russia*, 18299/03 (2011), § 209. Quite similarly, *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (2010), § 65.

principle of the presumption of innocence when charged with a criminal offence) are necessary barriers for police work.

> «In particular, due regard must be paid to 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 [...].»[230]

Measures directly targeting potential hazards may therefore only be permitted within the framework of applicable law and may be limited[231].

> In the case of *Osman v. The United Kindgom*, a teacher had stalked a student. The teacher lost his job at the school, but continued to stalk the boy. After further strange incidents the (now ex-) teacher executed the boy's father, *Ali Osman*, whom he blamed for the loss of his job[232]. Although the background was known to the authorities, the ECtHR did not find a violation of Art. 2 ECHR: «the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals. In the circumstances of the present case, they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would in fact have produced concrete results»[233].
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> In the case of *Van Colle v. The United Kingdom*, a state responsibility for the violent death of Gilles Van Colle was in question. Van Colle witnessed a rather

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230 *Bljakaj and others v. Croatia*, 74448/12 (2014), § 122.

231 *Osman v. The United Kingdom*, 23452/94 (1998), § 116; confirmed in *Opuz v. Turkey,* 33401/02 (2009), § 129: The point is «[...] 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».

232 *Osman v. The United Kingdom*, 23452/94 (1998), §§ 11 ff.

233 *Osman v. The United Kingdom*, 23452/94 (1998), § 121.

minor crime (theft)[234]. The specific circumstances did not impose any obligation on the State to take special measures to protect Van Colle's life. The «fact that the deceased may have been in a category of person who may have been particularly vulnerable was but one of the relevant circumstances of the case to be assessed, in the light of all the circumstances, in order to answer the first of the two questions which make up the Osman test of responsibility.»[235] The perpetrator, Mr Brougham, had threatened Van Colle in two telephone calls. But the phone calls did not contain an explicit threat of physical harm to Giles Van Colle. Although the perpetrator had set Van Colle's car on fire, this was only found out later. The court took into account the severity of the expected penalty for the theft, the previous behaviour of the perpetrator and the crime statistics[236]. In total, no «decisive stage in the sequence of events leading up to the tragic shooting of Giles Van Colle» was reached[237].

To the extent that a possible violation of the right to life is linked to the assessment of a judicial system (particularly with regard to effective prosecution), the positive obligation (*see* no. III.2.4) arising from the right to life must also be taken into account[238].

2.2.8. Evolution

The obligation of the Convention States to adopt general (abstract) measures to protect human life is closely related to the obligation to protect life under the legal system and is difficult to distinguish from it *prima vista*.

The positive obligation arising from Art. 2 ECHR is necessarily subject to case law. The special characteristic of the case law based on *Öneryildiz v. Turkey* lies in the establishment of a duty to protect with regard to general state action in view of an abstract danger

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234 *Van Colle v. The United Kingdom*, 7678/09 (2012), §§ 6 ff.

235 *Van Colle v. The United Kingdom*, 7678/09 (2012), § 91.

236 *Van Colle v. The United Kingdom*, 7678/09 (2012), §§ 95 ff.

237 *Van Colle v. The United Kingdom*, 7678/09 (2012), § 103.

238 *Kaya and others v. Turkey*, 4451/02 (2006), §§ 35 ff. and *Kılıç v. Turkey,* 22492/93 (2000), §§ 78 ff.; *cf., e.g.,* Harris/O'Boyle/Warbrick, European Convention (3th ed.), p. 210.

(*potential risk*)[239]. The ability of the state to act requires state knowledge of dangerous situations. Measures usually do require evaluating and weighing up legal interests, opportunities and risks. In sufficiently clear cases, the EctHR recognises a violation of Art. 2 ECHR in the case of obvious inactivity of the authorities or obviously unsuitable state measures. However, a causal link is always required between a state behaviour and an interference with the life as a legal asset (*L.C.B. v. The United Kingdom*). In principle, a risk of death (*i.e.,* the possibility of death resulting from a state act or omission) is sufficient for a violation of the fundamental right (*Vilnes and others v. Norway*), but it is not clear whether natural causality is sufficient or whether adequacy has to be taken into account.

The positive obligation also applies to further security measures (*e.g., Budayeva and others v. Russia*)[240] and is binding state law enforcement bodies (*e.g., Kalender v. Turkey*). This ultimately implies the need for anticipatory state regulatory measures (*e.g., Brincat and others v. Malta*). Within the scope of its own possibilities, the state must also plan the use of its resources in advance. Thus, the positive obligation is not only linked to dangerous activities by third parties but also affects the state in the execution of its own responsibilities (*e.g., Osman v. The United Kingdom*). The state may be obliged to avert real and immediate risk or to take the necessary (specific) measures to avoid that risk (*e.g., Bljakaj and others v. Croatia*).

The standard of adequacy established in civil law (liability) becomes blurred in the context of fundamental rights between the need to be aware of a threat and the limit of not imposing an *impossible or disproportionate burden* on the state. The fact that the state may not be required to do the impossible corresponds on one hand to an imperative of logic, but on the other hand, in our opinion, also permits (in the legal sense) a

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[239] In case of *Öneryildiz*, for example, the state was basically at fault for not (preventively) evacuating the slums, which were exposed to an abstract danger; *cf.* Wicks, Right to Life, p. 68.

[240] The obligations may vary depending on the subject matter and may be related to dangerous activities. In the area of mitigative emergency protection, there are recommendations from the International Nuclear Safety Advisory Group (INSAG) of the International Atomic Energy Agency (IAEA), for example, in the area of the operation of nuclear facilities. These relate specifically to Safety Culture (INSAG-4), Strengthening Safety Culture (INSAG-15), Management of Operational Safety in Nuclear Power Plants (INSAG-13), Basic Safety Principles NPP (INSAG-12), Safe Management of the Operating Lifetimes of NPP (INSAG-14). These recommendations are publicly available and thus *known* (need-to-know) to the competent state authorities.

consideration of the actual possibilities of the state. The fact that no disproportionate burden may be imposed on the state opens up scope for a balancing with regard to the principle of proportionality (in the light of the positive obligation, however, the principle of proportionality is, to a certain extent, reversed, in that it is not the restriction of the fundamental right that is assessed, but the measure to protect it). Even with regard to the positive obligation, the protection of human life therefore does not apply absolutely.

Sometimes the principles[241] are confused, and sometimes *risk* and *danger* (in the terminology of risk research also *hazard*) are not clearly distinguished from each other. Ultimately, this does not detract from the great practical importance of the basic right to life. In any case, a state's obligation finds an essential limit in the unpredictability of human behaviour and the principle that nothing impossible or completely disproportionate may be demanded. The case law of the EctHR is designed to provide an external framework but not to impose an excessive burden on national authorities[242]. The field of application of the *obligations of means* remains broad and dependent on both specific risks and knowledge of them. The jurisdiction must not be subject to the temptation to limit general life risks with state omnipotence (*Georgel and Georgeta Stoicescu v. Romania*). Where technical risks (occurring from dangerous activities) are concerned, we believe that measures, including mitigative emergency provisions, can be derived from case law.

2.3. NEGATIVE OBLIGATION

The negative obligation arising from the second sentence of Art. 2 (para. 1) of the ECHR includes first and foremost the *prohibition* of unlawful killing[243]. The direct addressees of this prohibition are state actors. However, the design of the *legal framework* for the use of legitimate state power, including the permissible means of coercion and intervention, is also linked to the negative obligation:

> The positive obligation is first of all relevant for the *general design* of the legal framework in the Convention States – but since the use of force by the state

241 *Bljakaj and others v. Croatia*, 74448/12 (2014), § 108.

242 Sicilianos, Positive obligations, p. 44.

243 *Cf., e.g.,* Jacobs/White/Ovey, European Convention, pp. 150 and 153 ff.; Reid, Practitioner's Guide, 85-003; Leach, European Court, Rz. 6.25.

is concerned with regulating interventions in the area of fundamental rights protection, we consider that the negative obligation should be taken into account to a significant extent.

2.3.1. Prohibition of unlawful killing

Art. 2 ECHR requires protection of human life and prohibits the deliberate killing of human beings (para. 1), but also specifies justification reasons for interference with the fundamental right (para. 2; *see* no. III.2.1). Within the framework of these circumstances, the use of violence must be strictly proportionate, that is to say absolutely necessary[244]. Thus, the negative obligation stands in a certain tense relationship to the positive obligation, especially in the case of regulations on the exercise of potentially lethal means of coercion by the state.

Since *McCann and others v. The United Kingdom*, the EctHR, when examining compliance with the negative obligation, has taken into account the whole circumstances of an individual case: «In keeping with the importance of this provision (Art. 2) 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»[245].

There are also special links between the negative and the procedural obligation (*see* no. III.2.4)[246]. The aim is to identify the legal context of the measures and in particular to clarify the question of absolute necessity[247].

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244 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 149 («stricter and more compelling test of necessity»). *Cf., e.g.,* Reid, Practitioner's Guide, 85-003.

245 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 150.

246 Reid, Practitioner's Guide, 75-004 and 75-016.

247 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 161: «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

2.3.2. Regulations on the use of coercive means

The restriction of the use of potentially lethal force (means of coercion in general and weapons in particular) to situations of absolute necessity must be in line with the principles developed by the EctHR to establish a legal framework for the protection of the right to life[248].

> In its judgment *Tagayeva and others v. Russia* (*see* no. II.2.3) the EctHR requires that «[…] laws and regulations on the use of force should be sufficiently detailed and should prescribe, *inter alia*, the types of arms and ammunition permitted.»[249]

> In *Nachova v. Bulgaria*, the *Grand Chamber* found a violation of the right to life in an excessively extensive regulation on the use of firearms under the rules of the Bulgarian military police: «The […] relevant regulations on the use of firearms by the military police effectively permitted lethal force to be used when arresting a member of the armed forces for even the most minor offence. Not only were the regulations not published, they contained no clear safeguards to prevent the arbitrary deprivation of life. Under the regulations, it was lawful to shoot any fugitive who did not surrender immediately in response to an oral warning and the firing of a warning shot in the air […]. […] Such a legal framework is fundamentally deficient and falls well short of the level of protection ‹by law› of the right to life that is required by the Convention in present-day democratic societies in Europe […].»[250]

From a fundamental rights perspective, sufficiently detailed regulations on the use of potentially lethal means of coercion are necessary. It is controversial whether any (direct) *interference* with the right to life – for example, in the "rescue shot" – must also be regulated expressly in law[251] (*see also* no. IV.3.3.3 and V.4.6.3.a). It remains questionable

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».

248 Skinner, The core of McCann, p. 70.

249 *Tagayeva and others v. Russia*, 26562/07 (2017), § 593.

250 *Nachova v. Bulgaria* (GC), 43577/98 (2005), §§ 99 ff. (quote §§ 99 f.).

251 *Cf.* Melzer, Targeted Killing, pp. 19 f. (referring to the discussion in Switzerland).

to what extent national case law, taking into account the principle of proportionality as a limitation in individual cases, is able to compensate for any shortcomings in written law and regulation[252].

The ECtHR is right not to make a distinction according to which public authorities apply coercive means. This becomes particularly relevant when, for example, units of the armed forces are used in addition to police forces. All state security forces must comply with the standards of the Convention on the use of coercive measures, irrespective of their respective legal basis.

> «Article 2 [...], read as a whole, demonstrates that paragraph 2 [...] does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to ‹use force› which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than ‹absolutely necessary› for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c)»[253].

2.3.3. International standards as benchmarks for the use of force

The need to establish precise legal regulations can (and probably mostly will) already arise from the national legal systems as a requirement for the use of force. In the context of individual cases, the EctHR only examines the legal framework of the respective Convention State[254]. It does not make comparisons between the national legal systems of the Convention States. The Court emphasises the practical importance of the legal and administrative framework and also refers to *international standards*[255] (*see also* no. IV.1.4.2.b). The latter thus serve as a (rough) standard of comparison.

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252 *Cf. Nachova v. Bulgaria* (GC), 43577/98 (2005), § 101 (referring also to §§ 50 ff. and 64).

253 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 148.

254 Rather restrained *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 153; *cf. Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), §§ 154 and 208; *Finogenov and others v. Russia*, 18299/03 (2011), §§ 162 f. and 228; *Tagayeva and others v. Russia*, 26562/07 (2017), §§ 592 ff.

255 *Makaratzis v. Greece* (GC), 50385/99 (2004), § 59 (with reference to the United Nations Force and Fire Armes Principles).

The *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* of the United Nations (UN Basic Principles)[256] are designed to assist states in enacting and reviewing regulations on the use of force.

> *The basic principles (…), which have been formulated to assist Member States in their task of ensuring and promoting the proper role of law enforcement officials, should be taken into account and respected by Governments within the framework of their national legislation and practice, and be brought to the attention of law enforcement officials as well as other persons, such as judges, prosecutors, lawyers, members of the executive branch and the legislature, and the public.*[257]

They refer in the Ingress to the *Universal Declaration of Human Rights*[258] and the *International Covenant on Civil and Political Rights* (ICCPR)[259]. Their main focus is on the use of (fire) arms. The UN Basic Principles are occasionally mentioned by the EctHR under the heading "international law". Their specific meaning for the individual judgments is not evident without further explanation.

In *McCann and others v. The United Kingdom* (1995) they are mentioned under the title "United Nations Instruments"[260]. However, the *Grand Chamber* does not go into more detail in its judgment.

In *Makaratzis v. Greece* (2004) the *Grand Chamber* mentions them under the heading "Relevant International Law and Practice" and uses them as an example of a "legal and administrative framework" for the use of firearms by state security forces[261].

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256 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

257 Preamble of the *UN Basic Principles* (in fine).

258 Universal Declaration of Human Rights, Paris, 10 December 1948.

259 International Covenant on Civil and Political Rights of 16 December 1966.

260 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), §§ 138 ff.; the applicants had invoked the *UN Basic Principles* in the context of the State's duty to investigate (§§ 158 f.)

261 *Makaratzis v. Greece* (GC), 50385/99 (2004), §§ 28 ff. and 59.

In *Nachova v. Bulgaria* (2005) the *Grand Chamber* also mentions them under the heading "Relevant International Law and Practice" and points out that the relevant international standards should be consulted when interpreting Art. 2 ECHR[262].

In *Finogenov and others v. Russia* (2011) the EctHR (First Section) follows this categorisation[263] and uses the *UN Basic Principles* as examples to distinguish between lethal and non-lethal weapons and to assess the regulatory framework[264].

In *Giuliani and Gaggio v. Italy* (2011) the *Grand Chamber* just refers to the *UN Firearmes Principles*[265].

In the judgment in *Tagayeva v. Russia* (2017), the EctHR (First Section) describes the UN Basic Principles as "Relevant International Law and Practice[266]. They are then used to assess the level of detail required on the use of weapons and ammunition[267].

In our opinion, the *UN Basic Principles* cannot be raised to the status of binding (international law) specifications or guidelines for the law-enforcement authorities of the Convention States[268]. However, they establish an international consensus on the

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262 *Nachova v. Bulgaria* (GC), 43577/98 (2005), § 71 ff. and § 96 : «In addition to setting out the circumstances when deprivation of life may be justified, Article 2 implies a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework defining the limited circumstances in which law enforcement officials may use force and firearms, in the light of the relevant international standards ([...] the relevant provisions of the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, [...]).»
Cf. Melzer, Targeted Killing, p. 201.

263 *Finogenov and others v. Russia*, 18299/03 (2011), §§ 162 f. («relevant international and comparative law»).

264 *Finogenov and others v. Russia*, 18299/03 (2011), §§ 202 and 228.

265 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 154.

266 *Tagayeva and others v. Russia*, 26562/07 (2017), §§ 465 ff.

267 *Tagayeva and others v. Russia*, 26562/07 (2017), § 592.

268 *Cf., e.g.,* Casey-Maslen/Connolly, Police Use of Force under International Law, Cambridge 2017, p. 79 (soft law instruments); relativierend Sax, Soldaten gegen Piraten, p. 91; but *cf. also* Melzer, Targeted Killing, pp. 200 f., who, on the basis of the title, assumes a binding effect in the case of *Nachova v. Bulgaria* (footnote 262).

use of force and provide guidance for the adoption of corresponding standards in the national legal systems (as required by Art. 2 ECHR)[269]. However, it must be taken into account (indirectly) that the *UN Basic Principles* have also been incorporated into the case law of the EctHR on Art. 2 ECHR and have gained importance as an international standard in this context.

In response to the terrorist attacks of 9/11 in the United States, the European Council adopted in 2002 the *Guidelines on human rights and the fight against terrorism*. They stress the positive «obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life»[270]. The guidelines are intended to show the Convention States in a supportive manner how the increased fight against terrorist activities can be reconciled in compliance with the Convention's guarantees[271]. They are based on the ECHR as well as judgments of the EctHR and as further sources of the ICCPR and observations of the *United Nations Human Rights Committee*[272]. The guidelines serve as a recommendation for regulation and are not directly applicable (*see also* no. IV.1.3.1).

Moreover, depending on the specific situation, international humanitarian law may apply. The third and fourth parts of the Geneva Convention are particularly relevant[273] (*see* no. III.4).

2.3.4. Excursion: Non Refoulement

In our opinion, the negative obligation is related to the requirement of non-refoulement recognised as *ius cogens*. The cases of expulsion of people to countries where they are threatened with persecution or the death penalty are dealt with by the EctHR under both Art. 2 and Art. 3 ECHR. The focus is on the prohibition of torture (Art. 3 ECHR)[274].

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269 *Cf., e.g.,* Melzer, Targeted Killing, p. 200.

270 *Council of Europe*, Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies, Art. I.

271 *Council of Europe*, Guidelines on human rights and the fight against terrorism, *preface* (p. 5).

272 *Council of Europe*, Guidelines on human rights and the fight against terrorism, *explanations* (p. 16).

273 *Cf. Hassan v. The United Kingdom* (GC), 29750/09 (2014), §§ 33 ff.

274 From recent times *F.G. v. Sweden* (GC), 43611/11 (2016), §§ 111 ff. (on the deportation of a refugee who converted to Christianity during his asylum procedure to Iran); *A.L. (X.W.) v. Russia*, 44095/14

2.3.5. Excursion: "Core contents" of fundamental rights

In national legal systems, the right to life – understood as the prohibition of killing – partly constitutes a *core content* of fundamental rights. A core content of fundamental rights is protected absolutely, *i.e.*, it may not be restricted at all[275].

> In doctrine and jurisprudence, this is interpreted in such a way that the killing of a person may *not directly* be intended. Accordingly, rules on the use of firearms or even the "rescue shot" to avert the most serious dangers are nevertheless considered permissible (*see* no. V.4.6.3).

From a practical point of view, there is no significant difference as to whether absolute protection of the right to life is constitutionally enshrined in a Convention State – or whether interventions are possible according to Art. 2 (para. 2) ECHR but are subject to a strict proportionality test.

2.4. PROCEDURAL OBLIGATION

According to Art. 2 ECHR, states are obliged «to take appropriate steps to safeguard the lives of those within its jurisdiction»[276] (*see* no. III.2.2.2). In connection with the obligation to respect human rights (Art. 1 ECHR), the EctHR has derived from the fundamental right to life the independent content of a *duty to investigate*[277].

> «The lack of an effective investigation itself is the heart of the alleged violation. It has its own distinct scope of application which can operate independently from the substantive limb of Article 2, which is concerned with State responsibility for any unlawful death or life-threatening disappearance […].»[278]

(2016), § 66 (death penalty in China); *Al Nashiri v. Poland*, 28761/11 (2015), § 576; *L.M. and others v. Russia*, 40081/14 et al. (2016), §§ 108 ff. (deportation of two Syrians to Damascus and Aleppo). *Cf., e.g.,* Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), pp. 227 f.

275 Art. 10 para. 1 of the Swiss Federal Constitution (Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999) or Art. 2 para. 2 of the German Constitution (Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949).

276 *Mustafa Tunç and Fecire Tunç v. Turkey* (GC), 24014/05 (2015), § 171.

277 *Cf., e.g.,* Harris/O'Boyle/Warbrick, European Convention (3th ed.), p. 204.

278 *Varnava and others v. Turkey* (GC), 16064/90 (2009), § 136; quite similarly, in *Janowiec and others v. Russia* (GC), 55508/07 and 29520/09 (2013), § 142. Somewhat more restrained in

This is about a «positive obligation of a procedural character»[279]. In the case of a use of force with potentially lethal consequences, the duty to investigate is closely related to the negative obligation, according to which state authorities must refrain from an unlawful, not absolutely necessary use of force.

> The rationale used by the *Grand Chamber* in *McCann and others v. The United Kingdom* for the duty to investigate in the context of a use of force by state agents also applies to other areas of state responsibility, according to the consistent case law of the EctHR (*see* no. VI.4): «The obligation to protect the right to life […], read in conjunction with the State's general duty under Article 1 […] 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 […]»[280] or «when individuals have disappeared, allegedly having been killed, in dubious circumstances. […] The nature and degree of scrutiny which satisfies the minimum threshold of an investigation's effectiveness depends on the circumstances of each particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work»[281].

2.4.1. The duty to investigate in general

The duty to investigate generally requires investigating the circumstances of deaths[282]. In accordance with the purpose of Art. 2 ECHR, an occurrence of a death is not a man-

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our opinion *Šilih v. Slovenia* (GC), 71463/01 (2009), § 159: The «procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of Article 2 it can give rise to a finding of a separate and independent ‹interference› […]. In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date.»

279 *Tagayeva and others v. Russia,* 26562/07 (2017), § 469; *Finogenov and others v. Russia*, 18299/03 (2011), § 268.

280 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 161; quite similarly to *Kaya and others v. Turkey*, 4451/02 (2006), § 33.

281 *Kaya and others v. Turkey*, 4451/02 (2006), § 33.

282 Harris/O'Boyle/Warbrick, European Convention (3th ed.), p. 214; Reid, Practitioner's Guide, 85-003.

datory pre-condition for the existence of the obligation to investigate. According to the case law of the EctHR, the obligation already applies if individuals have disappeared under dubious circumstances and *possibly* have been killed[283] or if they have suffered *life-threatening injuries*[284]. The reasons for this are *prima vista* irrelevant.

> An investigation is always required «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 […]»[285].

The duty to investigate comes into effect as soon as a state becomes aware of possible fatalities. It is then up to the responsible authorities to initiate and advance the investigations on their own initiative.

> «The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life […]. […] the authorities must act of their own motion, once the matter has come to their attention.»[286]

The duty to investigate does not, however, include a duty to succeed (*see* no. III.2.4.2 and 2.4.4).

> «There is no absolute right however to obtain a prosecution or conviction […] and the fact that an investigation ends without concrete, or with only limited, results is not indicative of any failings as such. The obligation is of means only.»[287]

The EctHR is sometimes fully willing to ascertain the relevant facts itself if the facts are not sufficiently provided.

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283 *Kaya and others v. Turkey*, 4451/02 (2006), § 35.

284 *Oyal v. Turkey*, 4864/05 (2010), § 52 (with reference to an HIV infection through a blood transfusion in a hospital).

285 *Mustafa Tunç and Fecire Tunç v. Turkey* (GC), 24014/05 (2015), § 171.

286 *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 69; *Kılıç v. Turkey,* 22492/93 (2000), § 69.

287 *Brecknell v. The United Kingdom*, 32457/04 (2007), § 66.

> «In the absence of reliable findings of fact [...] by national courts, the [Court] has made its own factual determinations, sometimes [...] after time-consuming on-the-spot hearings of witnesses. In determining the facts, after early hesitations, the Court has been prepared to draw inferences from the lack of state cooperation in generally life-threatening situations when determining whether state involvement in killings that do not by any stretch of the imagination fall within the exceptions allowed by Article 2(2) has been proved beyond a reasonable doubt»[288].

2.4.2. Nature of the investigation

The Convention does not specify any generally applicable requirements for the manner of a legally sufficient investigation. The EctHR has remained deliberately broad-minded in its jurisprudence to Art. 2 ECHR.

> «What form of investigation will achieve the purposes of Article 2 may vary depending on the circumstances.»[289]

The most severe way to fulfil the duty to investigate is to conduct a *criminal* investigation. Such an investigation leads to a trial before a criminal court (*cf. also* the then applicable guidelines in Art. 6 ECHR).

> «[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.»[290]

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288 *Cf., e.g.,* Reid, Practitioner's Guide, 85-003 and Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 236.

289 *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 165; *Jaloud v. The Netherlands* (GC), 47708/08 (2014), § 165. Quite similarly (without explicit reference to Art. 2 ECHR), already in *Mastromatteo v. Italy* (GC), 37703/97 (2002), § 90; *Hugh Jordan v. The United Kingdom*, 24746/94 (2001), § 105; *Kelly and others v. The United Kingdom*, 30054/96 (2001), § 94; *McShane v. The United Kingdom*, 43290/98 (2002), § 94; *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 69; *Finucane v. The United Kingdom*, 29178/95 (2003), § 67; *Isayeva v. Russia*, 57950/00 (2005), § 210; *Gongadze v. Ukraine*, 34056/02 (2005), § 175.

290 *McKerr v. The United Kingdom*, 28883/95 (2001), § 134; *Brecknell v. The United Kingdom*, 32457/04 (2007), § 66; *Sylvia Hackett v. The United Kingdom* (AD), 34698/04 (2005), p. 5.

However, the Convention does not guarantee the right to a criminal investigation against *private individuals*[291].

> This was explicitly stated by the *Grand Chamber* in *Calvelli and Ciglio v. Italy*. An emergency patient suffered anaphylactic shock during medical treatment and died as a result: «Even if the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties, the Court has said many times that the effective judicial system required by Article 2 may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to personal integrity is not caused intentionally, the procedural obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case [...].»[292]

There is a certain degree of openness in the nature of the investigation, especially when the death of a person has not been intentional[293].

> In *Öneryildiz v. Turkey* (*see* no. III.2.2.2 with footnote 115 and no. III.2.2.3), the *Grand Chamber* placed the "classic" – but in comparison to each other quite different – possible procedures next to each other in order to clarify the fatal incident: If «the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation to set up an ‹effective judicial system› does not necessarily require criminal proceedings to be brought in every case and may be satisfied if civil, administrative or even disciplinary remedies were available to the victims. [... The] judicial system required by Article 2 must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied where lives are lost as a result of a dangerous activity if and to the extent that this is justified by the findings of

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291 *Šilih v. Slovenia* (GC), 71463/01 (2009), § 194; *Calvelli and Ciglio v. Italy* (GC), 32967/96 (2002), § 51.

292 *Calvelli and Ciglio v. Italy* (GC), 32967/96 (2002), § 51; in general, the statement is also expressed in *Šilih v. Slovenia* (GC), 71463/01 (2009), § 194.

293 *Calvelli and Ciglio v. Italy* (GC), 32967/96 (2002), § 51; *Vo v. France* (GC), 53924/00 (2004), § 90; *Budayeva and others v. Russia*, 15339/02 (2008), § 139.

> the investigation […]. In such cases, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved in whatever capacity in the chain of events in issue. That said, the requirements of Article 2 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law.»[294]

If a duty to investigate has occurred, the death of humans must be investigated within a useful period of time (*see* no. VI.4.2.3).

> It could happen that a state sets up various procedures to clarify the death of a person (of a deceased patient in hospital, for example), but none of them can be completed within a reasonable period of time. If the procedural obligation cannot be fulfilled at all, this constitutes a violation of the ECHR (even though there is no obligation to succeed): «[…] it is for the State to organise its judicial system in such a way as to enable its courts to comply with the requirements of the Convention, including those enshrined in the procedural obligation of Article 2 […]»[295].

> This applies, for example, to deaths that are directly attributable to the realisation of a natural hazard (such as an earthquake). Thus, in *M. Özel and others v. Turkey*, it was indirectly a matter of examining whether the building regulations had been adequate and complied with: «Even in the presence of obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law […]. [… The] length of the proceedings at issue breaches the requirement of a prompt examination of the case, without any unnecessary delays. The criminal proceedings were conducted in such a way

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294 *Öneryildiz v. Turkey* (GC), 48939/99 (2004), §§ 92 ff.

295 *Šilih v. Slovenia* (GC), 71463/01 (2009), § 210; *cf., e.g.,* Reid, Practitioner's Guide, 85-006.

that only two of the accused were finally declared responsible for the events, the other three having benefited from the statute of limitation.»[296]

2.4.3. Particularities of the type of investigation in the health-care sector

The EctHR shows a certain openness with regard to the nature of the investigation, particularly in the case of deaths in the health-care sector. It generally requires states to establish a system of «effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable»[297].

In this respect, depending on the case constellation, case law allows only a claim for damages to be provided for. This comes into question if the causes of a death are due to mere negligence. Insofar as the responsibilities can be clarified in a civil procedure, the state fulfils its duty to investigate.

In *Calvelli and Ciglio v. Italy*, the death of a newborn child was at issue «suffering from serious respiratory and neurological post-asphyxia syndrome induced by the position in which it had become lodged during delivery»[298]. In its judgment, the *Grand Chamber* established fundamental considerations: «In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged.»[299] The *Grand Chamber* points out that a criminal investigation would have been possible in principle. But

296 *M. Özel and others v. Turkey*, 14350/05 et al. (2016), § 197.

297 *Oyal v. Turkey*, 4864/05 (2010), § 54; *Šilih v. Slovenia* (GC), 71463/01 (2009), § 192; *Calvelli and Ciglio v. Italy* (GC), 32967/96 (2002), § 49.

298 *Calvelli and Ciglio v. Italy* (GC), 32967/96 (2002), § 9.

299 *Šilih v. Slovenia* (GC), 71463/01 (2009), § 194; *Calvelli and Ciglio v. Italy* (GC), 32967/96 (2002), § 51.

the complainants did not allege that the death of their child was intentional[300]. Furthermore, a civil settlement had been reached[301].

The *Grand Chamber* also points out that in cases of medical malpractice, the acceptance of compensation generally leads to the loss of victim status: «[…] ‹where a relative of a deceased person accepts compensation in settlement of a civil claim based on medical negligence he or she is in principle no longer able to claim to be a victim›.»[302]

2.4.4. Effectiveness of the investigation

The circumstances of a death or a threat to life can have an impact on the effectiveness of an investigation.

«The nature and degree of scrutiny which satisfies the minimum threshold of an investigation's effectiveness depends on the circumstances of each particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work».[303]

An investigation «should in principle be capable of leading to the establishment of the facts of the case and […] to the identification and punishment of those responsible»[304].

For example, in the case of the killed journalist Kemal Kılıç (on the failure to protect the victim, *see* no. III.2.2.5), the Turkish authorities did carry out an investigation of the crime scene, searched for witnesses and initiated a ballistic investigation. Later, however, no further steps were taken in the investigation. In particular, the witnesses were not heard. A member of Hizbullah, with whose firearm the fatal shots were fired, was arrested, but direct involvement in the crime could not be proven. The question of whether the security forces themselves (*sic!*) were involved in the killing of Kılıç was excluded. «Having

300 *Calvelli and Ciglio v. Italy* (GC), 32967/96 (2002), § 51.

301 *Calvelli and Ciglio v. Italy* (GC), 32967/96 (2002), §§ 51 and 54.

302 *Calvelli and Ciglio v. Italy* (GC), 32967/96 (2002), § 55.

303 *Kaya and others v. Turkey*, 4451/02 (2006), § 35.

304 *Finogenov and others v. Russia*, 18299/03 (2011), § 269.

> regard [...] to the limited scope and short duration of the investigation in this case, the Court finds that the authorities have failed to carry out an effective investigation into the circumstances surrounding Kemal Kılıç's death. It concludes that there has in this respect been a violation of Article 2 of the Convention»[305].

Inaction by the authorities is thus just as unacceptable as obstructing an investigation. In our opinion, beyond the criteria established by the EctHR, there is also a particular duty to preserve evidence in the case of deaths, or in the case of actions that have led to life-threatening situations (*see* no. VI.4).

The effectiveness of an investigation is compromised if there is bias on the part of the investigating officials. According to the completely correct view of the EctHR, bias can also exist in political terms.

> In the case of *Dink v. Turkey* (*see* also no. III.2.2.5), the fatal attack by ultranationalists on a journalist was to be ruled on. The EctHR referred to the insufficient independence of the investigating authorities. It also missed an in-depth investigation into the suspicion of whether one of the police officers involved also belonged to the political camp of the perpetrators (*sic!*). Lorsqu'elles «enquêtent sur des incidents violents, les autorités de l'Etat ont de surcroît l'obligation de prendre toutes les mesures raisonnables pour découvrir s'il existait une motivation raciste et pour établir si des sentiments de haine ou des préjugés fondés sur l'origine ethnique ont joué un rôle dans les événements. Certes, il est souvent extrêmement difficile dans la pratique de prouver une motivation raciste. L'obligation de l'Etat défendeur d'enquêter sur d'éventuelles connotations racistes dans un acte de violence est une obligation de moyens et non de résultat ; les autorités doivent prendre les mesures raisonnables eu égard aux circonstances de la cause [...].»[306] «La Cour constate en outre que les accusations dirigées contre les officiers de la gendarmerie de Trabzon et les fonctionnaires de la police d'Istanbul n'ont été instruites au fond que par d'autres fonctionnaires, tous faisant partie de l'exécutif [...], lesquels ne sont pas complètements indépendants des personnes impliquées dans les événements.

[305] *Kılıç v. Turkey,* 22492/93 (2000), §§ 80 ff. (quote in § 83).

[306] *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (2010), § 81.

> Cette situation constitue en soi une faiblesse des enquêtes en cause.»[307] «Par ailleurs, les soupçons selon lesquels l'un des chefs de la police aurait affiché ses opinions ultranationalistes et soutenu les agissements des accusés de l'assassinat ne paraissent pas avoir fait l'objet d'une enquête approfondie [...]. Or, les autorités de l'Etat auraient dû diligenter pareille enquête pour répondre à leur obligation de prendre toutes les mesures raisonnables pour prévenir les actes inspirés par des motifs de haine fondée sur l'origine ethnique [...].»[308]

In our opinion, the standards applicable to the fulfilment of the duty to investigate are stricter when assessing *dangers* (that were deliberately intended).

> The positive obligation to protect life «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»[309] in itself (also by third parties) or «by the authorities»[310] respective «agents of the State»[311].

If the state is even directly responsible for endangering the lives or for the death of people through action, the standards for clarification are particularly strict (*see* no. VI.4.2.4).

> The «nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. The nature and degree of scrutiny must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work [...]. Where a suspicious death has been inflicted at the hands of a State agent, particularly

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307 *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (2010), § 88.

308 *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (2010), § 90.

309 *Marguš v. Croatia* (GC), 4455/10 (2014), § 122; *Leonidis v. Greece*, 43326/05 (2009), § 67; *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 69; *Kılıç v. Turkey,* 22492/93 (2000), § 78.

310 *Makaratzis v. Greece* (GC), 50385/99 (2004), § 73; *Tagayeva and others v. Russia,* 26562/07 (2017), § 496; *Finogenov and others v. Russia*, 18299/03 (2011), § 268.

311 *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), § 229; *Mocanu and others v. Romania* (GC), 10865/09 (2014), § 317; *Hassan v. The United Kingdom* (GC), 29750/09 (2014), § 62; *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 163; *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 298; *Cyprus v. Turkey* (GC), 25781/94 (2001), § 131; *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 161.

> stringent scrutiny must be applied by the relevant domestic authorities to the ensuing investigation.»[312]

In the case of the use of physical means of coercion (use of force), special demands are made on the independence of the respective investigating authorities.

> «In an investigation into a death for which State agents or authorities are allegedly responsible, it is necessary for the persons responsible for the investigation to be independent from those implicated in the events. This means hierarchical or institutional independence and also practical independence»[313]

Under certain circumstances, a *criminal investigation* may be imperative. Even then, however, the focus of the EctHR is on the nature of the proceedings – and not, for example, on investigating the individual responsibility of the acting officials (the EctHR is not a criminal court)[314]. A possible claim for damages (under civil law) cannot replace an investigation in the case of action by state actors (*e.g.,* in the case of use of force; *see* no. VI.4.5).

> «The investigations required under Articles 2 and 13 of the Convention must be able to lead to the identification and punishment of those responsible.»[315]

From the right to life it also follows that in the event of the use of potentially lethal physical means of coercion (use of force), the state authorities are in any case obliged of their own accord – even without a report or complaint by a third party – to commence the investigation:

> «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.»[316]

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312 *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), § 234.

313 *Mastromatteo v. Italy* (GC), 37703/97 (2002), § 91; quite similarly, in *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 70.

314 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 173.

315 *McKerr v. The United Kingdom*, 28883/95 (2001), § 121.

316 *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 165; *Jaloud v. The Netherlands* (GC), 47708/08 (2014), § 165. Quite similarly (without an explicit reference to Art. 2

Last but not least, the openness regarding the different possible types of investigations as well as different requirements for the depth of an investigation depending on the case constellation make it difficult to develop a generally "strict" doctrine. In particular, the effectiveness of an investigation can strongly depend on the independence of an investigating authority and its objectivity. Ultimately, it is up to state authorities to clarify possible connections themselves and to anticipate possible developments.

2.4.5. Relationship to the positive and negative obligation

The procedural obligation under Art. 2 ECHR applies irrespective of whether a violation of the positive or the negative obligation is also alleged or established at the same time.

> Thus, in the case of the disappeared journalist Hakkı Kaya, the EctHR did not see a substantive violation of Art. 2 ECHR with regard to the disappearance alone: The «actual circumstances in which [Hakkı Kaya] disappeared remain a matter for speculation and supposition and that, accordingly, there is an insufficient evidentiary basis on which to conclude that Hakkı Kaya was, beyond reasonable doubt, abducted and subsequently killed by State agents as alleged by the applicants»[317]. The Court nevertheless found a violation of Art. 2 ECHR due to an insufficient investigation into the circumstances of Hakkı Kaya's disappearance[318]. «The [...] obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 [...], requires by implication that there should be some form of effective official investigation when individuals have disappeared, allegedly having been killed, in dubious circumstances. [...] The mere fact that the authorities were informed of an unexplained disappearance gives rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the matter. The nature and degree of scrutiny which satisfies the minimum threshold of an

ECHR), in *Hugh Jordan v. The United Kingdom*, 24746/94 (2001), § 105; *Kelly and others v. The United Kingdom*, 30054/96 (2001), § 94; *McShane v. The United Kingdom*, 43290/98 (2002), § 94; *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 69; *Finucane v. The United Kingdom*, 29178/95 (2003), § 67; *Isayeva v. Russia*, 57950/00 (2005), § 210; *Gongadze v. Ukraine*, 34056/02 (2005), § 175.

317 *Kaya and others v. Turkey*, 4451/02 (2006), § 33.

318 *Kaya and others v. Turkey*, 4451/02 (2006), §§ 35 ff.

> investigation's effectiveness depends on the circumstances of each particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work»[319].

If there is a duty to investigate, the right to an effective complaint under Art. 13 ECHR must be respected (*see* no. VI.4.4). There is also an obligation to provide information in the case of ill treatment under Art. 3 ECHR[320].

2.5. THE SCOPE OF APPLICATION OF ARTICLE 2 ECHR

The scope of application of the Convention is based on Art. 1 ECHR. This also gives rise to the state's obligations under Art. 2 ECHR in terms of space and time.

> «The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.»

The central pivot is the jurisdiction of the Convention States. In interpreting this notion, the Court sometimes refers to the general rule of interpretation of Art. 31 of the Vienna Convention (in particular para. 1 and para. 3 (c))[321]:

> *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
>
> *There shall be taken into account, together with the context: (…) any relevant rules of international law applicable in the relations between the parties.*

2.5.1. Exercise of sovereign authority (jurisdiction)

The scope of the ECHR is based on the *principle of territoriality*[322]. This means that the Convention guarantees apply in any case and primarily within the Convention States.

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319 *Kaya and others v. Turkey*, 4451/02 (2006), § 33.

320 *Mikheyev v. Russia*, 77617/01 (2006), § 108.

321 *Loizidou v. Turkey*, 15318/89 (1996), § 43; *Banković and others v. Belgium and others* (GC/AD), 52207/99 (2001), §§ 55 ff.; *Hassan v. The United Kingdom* (GC), 29750/09 (2014), §§ 100 ff.

322 *Banković and others v. Belgium and others* (GC/AD), 52207/99 (2001), §§ 67 ff.; *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 131.

The obligations of the Convention States to protect life are also mainly aimed at the respective territories in a spatial dimension – however, under certain circumstances, they can also extend further. The point of reference for a broader application is an *actual exercise* of power by a Convention State beyond its own territory. A spatial extension of the scope of the Convention is not to be assumed lightly; what is required is the actual exercise of control by a Convention State over a certain "foreign" territory (because, for example, it has sent security forces there)[323].

In individual cases, however, a jurisdiction of a Convention State can also arise in the case of extra-territorial *custody* over individuals by its (own) authorities. Such an exercise of jurisdiction does not have a primarily territorial point of reference (in the sense of a spatial extension of the Convention State's authority) and should take place within the permitted framework of international law.

a. Previous cases on the territorial scope of the Convention

The Court has dealt with the territorial scope of the Convention guarantees in particular in the cases of *Loizidou v. Turkey* (Chamber judgment 1996) and *Banković and others v. Belgium* and others (*Grand Chamber* decision 2001). The ECtHR emphasises the special nature of fundamental rights guarantees and seeks to enforce them in accordance with (general) international law (which can have a limiting effect).

> The «principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must [...] take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the

[323] The ECtHR has ruled on the case of the death of Iraqi Tarek Hassan in Iraq and examined the responsibility of the British armed forces. *Hassan v. The United Kingdom* (GC), 29750/09 (2014), § 63: «[...] there is no evidence to suggest that Tarek Hassan was ill-treated while in detention, such as to give rise to an obligation on the respondent State under Article 3 to carry out an official investigation. Nor is there any evidence that the United Kingdom authorities were responsible in any way, directly or indirectly, for Tarek Hassan's death, which occurred some four months after he was released from Camp Bucca, in a distant part of the country not controlled by United Kingdom forces. In the absence of any evidence of the involvement of United Kingdom State agents in the death, or even of any evidence that the death occurred within territory controlled by the United Kingdom, no obligation to investigate under Article 2 can arise.»

> Convention's special character as a human rights treaty [...]. The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part [...].»[324]

In the case *Loizidou v. Turkey* there was a «continuous denial of access to [...] property in northern Cyprus and the ensuing loss of all control over it»[325] to judge (Art. 1 of Protocol No. 1). The relevant issue in this case was the behaviour of the Turkish Republic of Northern Cyprus (TRNC) towards the applicant. The TRNC came into existence after the Turkish invasion of Northern Cyprus in 1974 – it was recognised as a state only by Turkey. Both Turkey (ratification on 18 May 1954) and the Republic of Cyprus (ratification on 6 October 1962) are Convention States (it would not have been possible for the internationally unrecognised TRNC to accede). The ECtHR attributed the TRNC's conduct towards the complainant to Turkey[326]. The criterion for this was the actual exercise of power by Turkish security forces in the TRNC in a fundamental way.

> «It is not necessary to determine whether [...] Turkey actually exercises detailed control over the policies and actions of the authorities of the ‹TRNC›. It is obvious from the large number of troops engaged in active duties in northern Cyprus [...] that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the ‹TRNC› [...]. Those affected by such policies or actions therefore come within the ‹jurisdiction› of Turkey for the purposes of Article 1 of the Convention [...]. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.»[327]

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[324] *Banković and others v. Belgium and others* (GC/AD), 52207/99 (2001), § 57. Similiar already *Loizidou v. Turkey*, 15318/89 (1996), § 43.

[325] *Loizidou v. Turkey*, 15318/89 (1996), § 48.

[326] *Loizidou v. Turkey*, 15318/89 (1996), § 57. However, the case was controversial within the panel; the judgment is accompanied by one *concurring opinion* and five *dissenting opinions*.

[327] *Loizidou v. Turkey*, 15318/89 (1996), § 56; on Turkey's responsibility towards the TRNC authorities for an effective criminal investigation, *see* also *Güzelyurtlu and Others v. Cyprus and Turkey* (GC), 36925/07 (2019), §§ 191 and 258 ff.

Five years later, the *Grand Chamber* did not intervene in the case of *Banković and others v. Belgium and others*. In the decision, the Court denied the ECHR a universal character and required more than a natural causality between state action and the possible damage (that ultimately results) for the existence of an (extra-territorial) jurisdiction.

> During the Kosovo conflict, NATO states conducted a military operation outside an alliance case (Operation *Allied Force*). Air strikes were also conducted against the Serbian heartland. The nightly missile attack on Radio Televizije Srbije in Belgrade on 23 April 1999 killed 16 people and seriously injured another 16[328]. The states concerned by the complaint argued that Art. 1 ECHR did not provide for a "cause-and-effect" notion of jurisdiction. The *Grand Chamber* rejected an extension of the scope of the Convention in the sense that «anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention. [... The] wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure ‹the rights and freedoms defined in Section I of this Convention› can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question and, it considers its view in this respect supported by the text of Article 19 of the Convention. [...] Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949 [...]. Furthermore, the applicants' notion of jurisdiction equates the determination of whether an individual falls within the jurisdiction of a Contracting State with the question of whether that person can be considered to be a victim of a violation of rights guaranteed by the Convention. These are separate and distinct admissibility conditions, each of which has to be satisfied in the afore-mentioned order, before an individual can invoke the Convention provisions against a Contracting State»[329]. After

[328] *Banković and others v. Belgium and others* (GC/AD), 52207/99 (2001), §§ 9 ff.

[329] *Banković and others v. Belgium and others* (GC/AD), 52207/99 (2001), § 75.

> all, the *Grand Chamber* was not «persuaded that there was any jurisdictional link between the persons who were victims of the act complained of and the respondent States. Accordingly, it is not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question»[330].

An «extra-territorial jurisdiction by a Contracting State is exceptional»[331] – but this does not completely rule out the possibility (*argumentum e contrario*). The *Grand Chamber* referred to the possible – in our opinion minimal – exceptions[332], which are in line with general principles of international law (*obiter dictum*).

> «Additionally, [...] other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.»[333]

The ECtHR also remained cautious in *Issa and others v. Turkey*. The case focused on the unexplained deaths of shepherds during a six-week Turkish military operation in northern Iraq[334]. In our opinion, the exercise of effective jurisdiction by Turkey during this period would have been quite possible – but the ECtHR denied it (unconvincingly), since not the *entire area of northern Iraq* had been occupied by Turkey and since Turkey had not exercised *overall control*. The court turned this into a question of evidence and therefore did not address the factual issues in its judgment.

> «The Court does not exclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory

330 *Banković and others v. Belgium and others* (GC/AD), 52207/99 (2001), § 82.

331 *Banković and others v. Belgium and others* (GC/AD), 52207/99 (2001), § 71.

332 *Banković and others v. Belgium and others* (GC/AD), 52207/99 (2001), §§ 67 ff.

333 *Banković and others v. Belgium and others* (GC/AD), 52207/99 (2001), § 73.

334 *Issa and others v. Turkey,* 31821/96 (2004), §§ 15 ff.

> of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey [...]. However, notwithstanding the large number of troops involved in the aforementioned military operations, it does not appear that Turkey exercised effective overall control of the entire area of northern Iraq. This situation is therefore in contrast to the one which obtained in northern Cyprus in the *Loizidou v. Turkey* and *Cyprus v. Turkey* cases [...].»[335]

This leads to the fact that in other than obvious cases it is up to the complainants to prove effective control – and thus the exercise of an effective jurisdiction – of a state over a (under international law foreign) territory.

> «On the basis of all the material in its possession, the Court considers that it has not been established to the required standard of proof that the Turkish armed forces conducted operations in the area in question, and, more precisely, in the hills above the village of Azadi where, according to the applicants' statements, the victims were at that time.»[336]

If the relevant evidence can be provided, the ECtHR is apparently inclined to intervene in extra-territorial cases when potentially lethal means of coercion are applied.

> However, it is not convincing when the Court requires an independent eye-witness for the situation in question or expects the complainants to be able to name the identity of the commander or of the involved military unit in the impugned acts. Even a detailed description of the soldier's uniforms can be difficult in some circumstances[337].

b. Custody over persons

The *Sánchez Ramírez v. France* decision revolved around the arrest of a globally wanted terrorist in Sudan. French officials had arrested Ilich Sánchez Ramírez in Khartoum

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335 *Issa and others v. Turkey,* 31821/96 (2004), § 81.

336 *Issa and others v. Turkey,* 31821/96 (2004), §§ 74 f.

337 *Issa and others v. Turkey,* 31821/96 (2004), § 77.

and immediately brought him to France[338]. The Commission did not enter the case *ratione personae*. In doing so, it emphasised the sovereignty of Sudan, which is not a Convention State, under international law. However, it found that "Carlos the Jackal" was in French custody after his arrest – and that in this respect the ECHR was applicable. Because the custody was exercised in a French (military) aircraft – and thus the principle applied that the flag states have sole jurisdiction over their aircraft – this reasoning was compatible with international law from the outset.

> «The Commission recalls [...] that in so far as the application concerns the circumstances in which the applicant was allegedly deprived of his liberty in Sudan, it is outwith the jurisdiction of the Commission, *ratione personae*, since the European Convention on Human Rights does not bind that State, and would, therefore, have to be rejected as being incompatible with the provisions of the Convention. According to the applicant, he was taken into the custody of French police officers and deprived of his liberty in a French military airplane. [... From] the time of being handed over to those officers, the applicant was effectively under the authority, and therefore the jurisdiction, of France, even if this authority was [...] being exercised abroad [...]. It does not appear [...] that any cooperation which occurred in this case between the Sudanese and French authorities involved any factor which could raise problems from the point of view of Article 5 of the Convention, particularly in the field of the fight against terrorism, which frequently necessitates cooperation between States.»[339]

The *Grand Chamber* dealt with a similar issue almost 10 years later in the judgment of *Öcalan v. Turkey* (albeit only in passing). The leader of the Kurdistan Workers' Party (PKK), Abdullah Öcalan, was arrested by Turkish officials in Kenya on 15 February 1999[340]. In its judgment, the *Grand Chamber* underlined the connection between the

338 *Sánchez Ramirez v. France* (AD), 28780/95 (1996), p. 156.

339 *Sánchez Ramirez v. France* (AD), 28780/95 (1996), pp. 161 f.
But also *see, Ilaşcu and others v. Moldova and Russia* (GC), 48787/99 (2004), § 319: «A State may also be held responsible even where its agents are acting *ultra vires* or contrary to instructions. Under the Convention, a State's authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected.»

340 *Öcalan v. Turkey* (GC), 46221/99 (2005), § 17.

extra-territorial exercise of state power (arrest) and the preservation of Kenya's sovereignty as guaranteed under international law.

> «Irrespective of whether the arrest amounts to a violation of the law of the State in which the fugitive has taken refuge – a question that only falls to be examined by the Court if the host State is a party to the Convention – the Court requires proof in the form of concordant inferences that the authorities of the State to which the applicant has been transferred have acted extra-territorially in a manner that is inconsistent with the sovereignty of the host State and therefore contrary to international law [...]. Only then will the burden of proving that the sovereignty of the host State and international law have been complied with shift to the respondent Government. However, the applicant is not required to adduce proof ‹beyond all reasonable doubt› on this point, as was suggested by the Chamber.
>
> The [...] applicant was arrested by members of the Turkish security forces inside an aircraft registered in Turkey in the international zone of Nairobi Airport. It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the ‹jurisdiction› of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.»[341]

But the argument that Öcalan's detention complies with international law – even without a violation of Kenya's sovereignty – is only superficially convincing. If Öcalan had been detained without the knowledge of the Kenyan authorities or against their explicit protest, a jurisdiction would still have been exercised from a fundamental rights perspective – but it would have been contrary to international law. In other words, the sovereignty under international law of a Non-Convention State does not *per se* preclude jurisdiction by a Convention State. The subject of legal assessment, however, can be which authorities (of which state) are to be attributed which conduct. In our opinion, the detention of individuals by the authorities of a Convention State always falls under its jurisdiction.

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341 *Öcalan v. Turkey* (GC), 46221/99 (2005), §§ 90 f.

c. Recent cases on the territorial scope of the Convention

The *Grand Chamber's* recent judgments on the extra-territorial application of Convention guarantees concern the exercise of sovereign power by European states forces in Iraq in the aftermath of the Third Gulf War. Following incidents since the spring of 2003, complaints were filed by Iraqi citizens before European courts. This raised the question of whether possible violations of Convention guarantees can also be complained of if the relevant facts took place outside the territories of Convention States – or whether the Convention States had exercised a jurisdiction through their troops in Iraq that is attributable within the meaning of Art. 1 ECHR.

> The possibility of states being bound by international fundamental rights guarantees even in an extra-territorial context is increasingly recognised in international law[342]. The *International Court of Justice* «considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory»[343].

The *Grand Chamber* has extended the exceptional extra-territorial scope, in particular in the case of a use of force, with three judgments from the year 2014.

In the judgment *Al-Skeini and others v. The United Kingdom*, various deaths of Iraqi civilians in Iraq involving British soldiers had to be judged. The *Grand Chamber* referred to the Court's previous case law on the extra-territorial application of the ECHR. As a result, it recognised the *possibility* of extending the duty to investigate under Art. 2 ECHR to military operations by Convention States abroad[344].

> Citing, *inter alia*, the judgment *Loizidou v. Turkey*, the *Grand Chamber* pointed out that «as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce

342 *Cf., e.g.,* Lesh, Conduct of hostilities, pp. 101 f.

343 International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, § 111.

344 *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), §§ 161 ff. in conjunction with §§ 34 ff.

effects outside its own territory»[345]. «[… The] Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government […]. Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State»[346].

The *Grand Chamber* seems to be somewhat more open to the factual question of effective control over a territory than the Second Section was 10 years earlier in *Issa and others v. Turkey* (*see* above, III.2.5.1.a): «It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area […]. Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region»[347].

The *Grand Chamber* considered the circumstance of a use of force by representatives of the Convention State to be decisive for the emergence of the duty to investigate. «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 […]. The essential purpose of such an investigation is to secure the effective implementation of

345 *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 133.

346 *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 135.

347 *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 139.

> 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 […]»[348].

The case of *Hassan v. The United Kingdom* was similar. It concerned the fate of an Iraqi arrested by British troops in Iraq. In its judgment, the *Grand Chamber* did not examine a violation of Art. 2 (and Art. 3) ECHR. But it did discuss the scope of application of the Convention. The Court responded to the complaint relating to Art. 5 ECHR (deprivation of liberty) but did not find a violation.

> In April 2003, British troops had liberated the Iraqi city of Basra. At the beginning of May 2003, major combat operations in Iraq were declared over[349]. The senior official of the Iraqi Ba'aht Party, Khadim Resaan Hassan, was on the wanted list of the intervening coalition forces. Instead of him, British troops arrested his brother *Tarek Hassan* on 23 April 2003[350]. Shortly afterwards, U.S. troops took control of the prison camp (Camp Bucca). On 1 September 2003, Tarek Hassan was found «with eight bullet wounds from an AK-47 machine gun in his chest. […]. The identity tag found in his pocket was that issued to him by the United States authorities at Camp Bucca. A death certificate was issued by the Iraqi authorities […], giving the date of death as 1 September 2003, but the sections reserved for the cause of death were not completed. A police report identified the body as ‹Tariq Hassan› but gave no information about the cause of death»[351].

The *Grand Chamber* emphasised in its judgment that for the existence of an extra-territorial jurisdiction of the Convention States, an actual exercise of sovereign power must be required[352]. However, it was not limited to the period of detention by United Kingdom

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348 *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 163; confirmed in *Hassan v. The United Kingdom* (GC), 29750/09 (2014), § 62.

349 *Hassan v. The United Kingdom* (GC), 29750/09 (2014), § 9.

350 *Hassan v. The United Kingdom* (GC), 29750/09 (2014), §§ 10 ff.

351 *Hassan v. The United Kingdom* (GC), 29750/09 (2014), § 29.

352 To further cases of a limited exercise of jurisdiction over *individuals, cf.* Goddard, Applying the ECHR to the Use of Physical Force, p. 410.

troops, but included the later detention at Camp Bucca under U.S. jurisdiction[353]. But there was no evidence that British troops were involved in the death of Tarek Hassan some four months after his release from Camp Bucca.

> There «[…] is no evidence to suggest that Tarek Hassan was ill-treated while in detention, such as to give rise to an obligation on the respondent State under Article 3 to carry out an official investigation. Nor is there any evidence that the United Kingdom authorities were responsible in any way, directly or indirectly, for Tarek Hassan's death, which occurred some four months after he was released from Camp Bucca, in a distant part of the country not controlled by United Kingdom forces. In the absence of any evidence of the involvement of United Kingdom State agents in the death, or even of any evidence that the death occurred within territory controlled by the United Kingdom, no obligation to investigate under Article 2 can arise.»[354]

In the judgment *Jaloud v. The Netherlands*, the *Grand Chamber* dealt with the circumstances of an incident in April 2004 at a checkpoint in Iraq; Dutch soldiers had opened fire on a suspicious car[355]. The Court addressed the question of the Netherlands' jurisdiction over the Iraqi (*sic!*) checkpoint in terms of international law and affirmed that the Dutch soldiers were bound by the ECHR[356].

> «It appears from the Memorandum of Understanding […], that while the forces of nations other than the ‹lead nations› took their day-to-day orders from foreign commanders, the formulation of essential policy – including, within the limits agreed in the form of Rules of Engagement appended to the Memoranda of Understanding, the drawing up of distinct rules on the use of force – remained the reserved domain of individual sending States. Although Netherlands troops were stationed in an area in south-eastern Iraq […] the

353 In its verdict, the *Grand Chamber* declares, «unanimously, the complaints under Articles 2 and 3 of the Convention inadmissible» (§ 1), but holds, «unanimously, that the applicant's brother was within the jurisdiction of the United Kingdom between the time of his arrest and the time of his release from the bus that took him from Camp Bucca».

354 *Hassan v. The United Kingdom* (GC), 29750/09 (2014), § 63.

355 But *cf.* Hampson, Article 2 during armed conflict, pp. 207 ff.

356 *Jaloud v. The Netherlands* (GC), 47708/08 (2014), §§ 10 ff.

> Netherlands assumed responsibility for providing security in that area, to the exclusion of other participating States, and retained full command over its contingent there. [...The] Court cannot find that the Netherlands troops were placed ‹at the disposal› of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were ‹under the exclusive direction or control› of any other State. [...] The checkpoint had been set up in the execution of SFIR's mission [SFIR = Stabilization Force in Iraq], under United Nations Security Council Resolution 1483 [...], to restore conditions of stability and security conducive to the creation of an effective administration in the country. The [...] respondent Party exercised its ‹jurisdiction› within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint. That being the case, the Court finds that the death of Mr Azhar Sabah Jaloud occurred within the ‹jurisdiction› of the Netherlands, as that expression is to be construed within the meaning of Article 1 of the Convention.»[357]

The Court subsequently held the Netherlands liable for breach of the procedural obligation under Art. 2 of the Convention[358].

d. Assessment of the case law

The judgments on the extra-territorial application of the ECHR are controversial within the Court Chambers or Sections courts[359]. In the doctrine, a certain ambiguity is criticised because the *Grand Chamber* does not explicitly distance itself from its *Banković judgment*[360].

The establishment of an extra-territorial effect of Convention guarantees sometimes constitutes a balancing act for the Court between the observance of (fundamental) prin-

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357 *Jaloud v. The Netherlands* (GC), 47708/08 (2014), §§ 147 ff.

358 *Jaloud v. The Netherlands* (GC), 47708/08 (2014), verdict, § 4.

359 *Cf.* the *concurring* and *separate opinions* following the judgments.

360 *Cf.* Goddard, Applying the ECHR to the Use of Physical Force, p. 419 (failure expressely to disavow); more generally and in connection with LOAC, *cf.* Hampson, Article 2 during armed conflict, p. 211 (incoherent).

ciples of international law and the binding of Convention States and their authorities to the guarantees of the ECHR. International law generally assumes that sovereignty is bound to a state territory. The same applies in principle to jurisdiction under Art. 1 ECHR. Therefore, it seems logical to include the specific context of international law in the case of an exceptionally conceivable exercise of sovereign power beyond the borders of the Convention State (which, however, is not convincing, at least in the case of military interventions abroad in violation of international law).

The first exception to the principle of territoriality is undisputed: in the case of international cooperation for the arrest of wanted people, the linking of jurisdiction to the actions of certain authorities of Convention States (in a Non-Convention State) seems not to be problematic as long as such actions take place in accordance with international law. The situation would be different in the case of the abduction of persons from abroad – which would also be inadmissible under international law as a violation of sovereignty. However, in our opinion, it is not a question of territoriality – but of the actions of state actors. From a fundamental rights perspective, it does not matter whether the representatives of a Convention State, with or without the consent of a Non-Convention State, exercise direct coercion on people on its territory. Only acts of the representatives of a Non-Convention States are clearly excluded from the scope of application of the Convention.

Under the second exception, a Convention State deliberately exercises «all or some of the public powers normally to be exercised by [a] Government»[361] outside its own borders[362]. This is particularly evident in the judgment *Loizidou v. Turkey*. Therefore, the extension of the scope of application of the ECHR (here even in the actual territorial sense) seems logical. It remains an open question how far the second exception can extend. Legal difficulties occur when a government does not exist or when a state does not want to exercise the said public powers. If a Convention State operates more as an occupying force[363], it may well be acting (whether permissibly or impermissibly) in accordance with the international law of war (in concrete: The Law of Armed

361 *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 135.

362 *Al-Saadoon and Mufdhi v. The United Kingdom*, 61498/08 (2010), § 128.

363 Goddard, Applying the ECHR to the Use of Physical Force, p. 414.

Conflict, LOAC). Then, legally, there is an elephant in the room. This is probably why the ECtHR – in our opinion correctly – will not distance itself from the *Banković* judgment. If the *Grand Chamber* had ruled on a violation of the right to life, it would have had to judge, at least in fact, an offence committed by NATO states against Serbia (on the relationship between International Humanitarian Law und International Human Rights Law *see* no. III.4).

> In our opinion, the central point in this case is that of the distinction between military and civilian *targets*. If the intervention of the NATO states in the Kosovo war was permissible, and if the television station (in Belgrade) was a legitimate target in this war, then the military action cannot be judged through the back door as an individual fundamental rights case.

The ECtHR seems to want to distinguish between an action of the Convention States outside their own borders as such and the effective exercise of an extra-territorial jurisdiction. Only the latter is capable of activating Convention obligations beyond mere causality.

> However, state action that is "only causal" can be viewed differently under other aspects of international law. The Geneva Conventions (Art. 1 in each of the Conventions) are fundamentally broader in their scope of application[364]. Moreover, Art. 51 of the UN Charter (*e contrario*) prohibits war of aggression.

The ECtHR brings the second exception close to the first. It is then either about the exercise of sovereign power similar to that of a government – or about a direct (physical) influence on a specific individual. The latter is extended (in terms of content) beyond detention to the use of force. Thus, the argumentation of formally upholding the principle of territoriality, which is already somewhat fragile from a fundamental rights perspective for these cases, is called into question. Ultimately, the decisive factor for the Court is the performance of sovereign acts (in conformity with international law) by the authorities of a Convention State. Such acts are included in the scope of Art. 2 ECHR. In our opinion, such a restriction is no longer convincing. Interestingly, the more recent judgments deal with the duty to investigate. But it is irritating to see

[364] *Banković and others v. Belgium and others* (GC/AD), 52207/99 (2001), § 40.

that the preconditions for intervening are linked to questions of evidence. According to the (older) *Issa and others v. Turkey* judgment, it ultimately depends on contingencies whether the ECtHR would intervene in a case to investigate the circumstances of death due to possible extra-territorial violations of the Convention.

> If Turkey's military operation was about the fight against terrorism (against the PKK) on northern Iraqi territory, then in the light of recent case law, we believe that this operation consisted of the performance of sovereign acts against individuals. Outside the framework of the LOAC, Art. 2 ECHR could have been applied (which is already alluded to in the judgment) – but then the requirements for the burden of proof of the applicants should be lowered. Turkey's military operation was not a "humanitarian action".

According to the now well-established case law, the scope of application of the ECHR is to be understood in a broad sense, at least in the case of an armed exercise of authority. The guarantees of Art. 2 ECHR always apply to the respective contracting states when they exercise a certain degree of effective jurisdiction in a certain area[365]. According to the older case law, the same already applied when individuals were taken into custody (the restrictions made earlier now seem obsolete). A restriction of the possibility of extra-territorial jurisdiction of states parties to activities in "failed states" or "marionette states", which are not able to exercise their sovereignty themselves, is not necessary.

The fact that there is, in the end, also a fundamental approach behind the extension was already expressed by the ECtHR in 2010 in the judgment *Al-Saadoon and Mufdhi v. The United Kingdom*:

> «It has been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's ‹jurisdiction› from scrutiny under the Con-

[365] For the scope of the ECHR, *cf.* Lemmens, General Survey of the Convention, in: van Dijk/van Hoof/van Rijn/Zwaak (Eds.), Theory and Practice, pp. 11 ff.

> vention [...]. The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention [...]. For example, in Soering [...], the obligation under Article 3 of the Convention not to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture or inhuman or degrading treatment or punishment was held to override the United Kingdom's obligations under the Extradition Treaty it had concluded with the United States in 1972.»[366]

On the other hand, it is not incumbent on states to establish an effective legal framework abroad to protect the right to life in accordance with the positive obligation. This would, as it were, undermine the principle of state sovereignty under international law.

2.5.2. Temporal scope and effective range

The European Convention on Human Rights came «into force after the deposit of ten instruments of ratification» (Art. 59 para. 3 ECHR)[367] on 3 September 1953[368].

> By this time, Saarland (14 January 1950), Norway (15 January 1952), Sweden (4 February 1952), Germany (5 December 1952), Ireland (25 February 1953), Greece (28 March 1953), Denmark (13 April 1953), Iceland (29 June 1953), Luxembourg (3 September 1953) and the United Kingdom (8 March 1953) had ratified the Convention[369].

By virtue of an explicit provision, the temporal scope of application and effect of the ECHR[370] for these states lay in the future. A retroactive effect behind the entry into

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366 *Al-Saadoon and Mufdhi v. The United Kingdom*, 61498/08 (2010), § 128.

367 On the temporal application of the ECHR, *cf.* Lemmens, General Survey of the Convention, in: van Dijk/van Hoof/van Rijn/Zwaak (Eds.), Theory and Practice, p. 20 f. or Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), pp. 99 ff.

368 https://www.coe.int/en/web/conventions → *full list* (last visited on 4 June 2022).

369 The specific situations in Saarland and Greece are not discussed in detail.

370 On the distinction between the temporal scope (*Geltungsbereich*) of constitutional law and its scope of effect (*Wirkbereich*) *cf., e.g.,* Reto Patrick Mueller, Art. 195 BV, in: Ehrenzeller/Schindler/Schweizer/Vallender (Eds.), St. Galler Kommentar, Art. 195, Rz. 12 ff.

force of the ECHR itself seems impossible[371]. Anything else would mean attributing a *supra-legal* or *extra-legal* content to the Convention's guarantees.

For the Convention States that acceded later, the respective date of ratification applies analogously as the date of entry into force of the Convention obligations[372].

> The same is provided for in Art. 28 of the Vienna Convention on the non-retroactivity of Treaties: *Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.*

Questions about the temporal scope of the obligations arising from the right to life arose in particular for the (possibly retroactive) duty to investigate of the Convention States that acceded later (*see* no. VI.4.2.3).

2.6. SIGNIFICANCE OF ARTICLE 2 ECHR FOR THE USE OF FORCE

When it is a matter of a potentially lethal use of force by a Convention State, the fundamental rights guarantees of Art. 2 ECHR come into full play. The three essential obligations that result from this are directed in particular at state security forces. In anti-terrorist operations, they must be considered in parallel: on the one hand, the principle of the prohibition of killing applies; on the other hand, state measures may be justified in order to protect the right to life of victims – up to and including the use of force against persons adversely affecting public safety (usually perpetrators). The exceptions to the prohibition of killing are tailored to the actions of state security forces (*cf.* the grounds for justification according to Art. 2 para. 2 ECHR)[373].

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371 *Cf. Janowiec and others v. Russia* (GC), 55508/07 and 29520/09 (2013), § 151.

372 The specific situation of Montenegro, Slovakia and the Czech Republic is not discussed. As to the special sitation in Moldova (*Transnistria*), *see Ilaşcu and others v. Moldova and Russia* (GC), 48787/99 (2004), § 454: « In conclusion […], there has been a violation of […] the Convention by the Russian Federation from the time of its ratification of the Convention on 5 May 1998 and by Moldova from May 2001 onwards.»

373 Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), pp. 223 f.

The *positive obligation* requires the creation of a legal framework for state measures that is sufficiently specific and meets a strict standard of proportionality. Insofar as interventions in the right to life are not regulated in special decrees in national legal systems (for example in police laws), criminal law norms form the further legal framework. This can even apply to the specific use of potentially lethal coercive means – for example, to rescue hostages from a situation of immediate danger (to protect human lives)[374].

The *negative obligation* not only prohibits the intentional killing of human beings but also applies in cases of unintentional death[375] and in cases where life is endangered.

The *duty to investigate* is condensed into a duty to conduct an effective investigation. As a general principle, this duty must be fulfilled within the framework of criminal investigations. Alternative investigations – for example, to clarify claims for damages under civil law or disciplinary responsibility – are not sufficient in the case of a potentially lethal use of force.

Even in the case of purely police-law regulations, we believe that a criminal investigation would be required after a use of force by security forces. On the one hand, this is to guarantee the independence of the investigating authority and, on the other hand, not to undermine the legal framework (which exists with criminal law and requires general validity in order to protect the physical integrity of people). Within the scope of the duty to investigate, individual conduct is also examined (for example, by security forces acting specifically or by those in charge of operations) – but ultimately, from the fundamental rights perspective of Art. 2 ECHR, state conduct has to be assessed in its entire breadth and depth.

374 *Cf.* Melzer, Targeted Killing, p. 20.

375 Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), pp. 223 f. (with further references on the jurisprudence).

3. PUBLIC EMERGENCY

The legal system usually establishes norms to regulate everyday life[376]. Dealing with *exceptional situations* is a particular challenge for the democratic state in general, for example when it needs to protect the functioning of its institutions as well as collective legal assets from particular immediate threats.

The normative wording of Art. 2 ECHR does *not in principle* make any gradations of the fundamental rights content or distinctions according to different situations. Although para. 2 contains a variable in need of interpretation with the requirement of an absolute necessity, the entire Article requires unrestricted application. Only the exception of insurrection or riot (para. 2(c)) refers to an emergency situation of the state (*see* no. III.2.1).

Hereafter, the question is examined whether further exceptions can be permissible in connection with the right to life, whether the fundamental rights may be subject to exceptional restrictions beyond Art. 2 para. 2 ECHR – especially in the case of a "terrorist crisis".

3.1. PREREQUISITES AND LIMITATIONS FOR THE SUSPENSION OF CONVENTION GUARANTEES

The suspension of Convention guarantees shall be in accordance with Art. 15 ECHR. With this instrument, more far-reaching restrictions of fundamental rights are possible in principle. Alternative conditions are war or a *public emergency*[377]:

> *In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under*

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376 Under certain circumstances, special situations are already taken into account: such as in the context of self-defence under criminal law or with the creation of special liability provisions. For example, criminal law justifications can also be used to justify interventions in the physical integrity of people.

377 *Cf.* Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), pp. 803 ff.; Reid, Practitioner's Guide, 43-003; Zwanenburg, Peace Operations, pp. 161 f.

> *this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*

Even in these exceptional situations, a formal and a substantive requirement must be met. Art. 15 (para. 3) ECHR requires *formally* that the Convention State concerned informs the Secretary General of the Council of Europe comprehensively about the measures which it has taken and the reasons therefore. This prevents the clandestine suspension of Convention guarantees – even vis-à-vis its own population[378]. In addition, at least a certain degree of transparency and thus legal certainty is created as to which measures a state wants to implement that conflict with the Convention. More important, however, is the *substantive* requirement under Art. 15 (para. 2) ECHR: together with the prohibition of torture, the prohibition of slavery and the prohibition of punishment without law, the right to life is not subject to any derogation even with emergency legislation at hand. Exceptions to this are only permissible in the case of *lawful wars*[379].

> *No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.*

Consequently, restrictions on the fundamental right to life must either be covered by the justification grounds set out in Art. 2 para. 2 ECHR – or be permitted by international humanitarian law (*see* no. III.4).

3.2. THE STATE OF EMERGENCY IN THE EXAMPLE OF THE NORTHERN IRELAND CONFLICT

The ECtHR addressed the meaning of a public emergency in 1961 in the context of the Northern Ireland conflict[380]. Due to the substantive proximity to the present investi-

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[378] *Cf. Council of Europe*, Guidelines on human rights and the fight against terrorism, Art. XV.1.

[379] However, no state has ever invoked the war clause; *cf.* Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 815; further reading *Hassan v. The United Kingdom* (GC), 29750/09 (2014), §§ 101 ff.

[380] *Lawless v. Ireland (No. 3)*, 332/57 (1961).

gation, the significance of Art. 15 ECHR will be examined more closely on the basis of this example[381].

3.2.1. Division of the Island and the Special Powers Act

The Northern Ireland conflict had one of its more recent origins in the *Anglo-Irish War* of 1919 to 1921[382] and the subsequent partition of the island[383]. As early as 1922, the *Special Powers Act*[384] came into force in Northern Ireland to establish "certain regulations for peace and order"[385].

3.2.2. The IRA's border campaign and the public emergency in Ireland

In December 1956, the IRA began its "Border Campaign"; the guerrilla operation "*Harvest*" aimed to reunite the island[386]. After a steady increase in acts of violence against the police, the government of the Republic of Ireland invoked special powers of arrest and detention to avert danger[387].

> In the case of *Lawless v. Ireland (No. 3)* the applicant was «detained without trial, between 13th July and 11th December 1957, in a military detention camp situated in the territory of the Republic of Ireland»[388]. The (then) Commission stated «that Articles 5 and 6 [...] of the Convention provided no legal foundation for the detention without trial [...], by virtue of Article 4 of the Offences against the State (Amendment) Act, 1940», doch die Haft «was founded on

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381 An overview of other cases can be found at Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 807.

382 *Cf., e.g.,* Edwards, Northern Ireland Troubles, pp. 15 f. or van der Bijl, Operation Banner, pp. 7 ff.

383 *Cf.* Dickson, ECHR and the Conflict in Northern Ireland, pp. 8 ff.

384 Actually, Civil Authorities (Special Powers) Act (Northern Ireland).

385 *Cf., e.g.,* Donohue, The Special Powers Acts, ppp. 1089 ff.

386 English, History of the IRA, p. 73; O'Leary, IRA, p. 223.

387 EKMR *Lawless v. Ireland (No. 3)*, 332/57 (1961), § 15 (Facts).

388 EKMR *Lawless v. Ireland (No. 3)*, 332/57 (1961), § 1 (Facts).

> the right of derogation duly exercised by the Irish Government in pursuance of Article 15 [...] of the Convention»[389].

In the light of a general increase in violence by the IRA against the police in Northern Ireland, various incidents on the border, an armed attack on a police accommodation and explosive attacks on railway lines, the Commission considered that a state of emergency existed[390].

> In its rationale, the Commission focused on several factors: «in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly, the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957.»[391]

The fact that the government had nevertheless managed to continue to operate public institutions more or less normally did not militate against the invocation of the state of emergency. For the Commission, the persistence of unlawful IRA activities in the border area and (prospectively) the approach of a historically relevant date were decisive.

> «Whereas, despite the gravity of the situation, the Government had succeeded, by using means available under ordinary legislation, in keeping public institutions functioning more or less normally, but whereas the homicidal ambush on the night 3rd t° 4th July 1957 in the territory of Northern Ireland near the border had brought to light, just before 12th July – a date, which, for historical reasons is particularly critical for the preservation of public peace

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389 EKMR *Lawless v. Ireland (No. 3)*, 332/57 (1961), judgment; in this context to Article 15 ECHR *e.g.,* Warbrick, Prevention of Terrorism, pp. 110 f.

390 EKMR *Lawless v. Ireland (No. 3)*, 332/57 (1961), § 14 (Facts).

391 EKMR *Lawless v. Ireland (No. 3)*, 332/57 (1961), § 28 (Law).

and order – the imminent danger to the nation caused by the continuance of unlawful activities in Northern Ireland by the IRA and various associated groups, operating from the territory of the Republic of Ireland»[392].

In February 1962, the IRA ended its operation and temporarily laid down its arms[393]. This did not solve the conflict – it would take another 36 years before a political agreement was reached.

3.2.3. Troubles and Northern Ireland (Emergency Provisions) Act of 1973

The next and longest phase of the conflict began with the "*Troubles*" of summer 1969 (riots in Belfast and Londonderry, deployment of British troops onto Northern Ireland's streets[394])[395]. The struggle was subsequently conducted at different levels of intensity[396].

The Westminster Parliament enacted the *Northern Ireland (Emergency Provisions) Act of 1973* as a result of the violence. This abolished the death penalty for murder in Northern Ireland (Part I, Sct. 1), greatly expanded the measures against terrorists (Part II: arrest, detention, search and seizure, etc.) and introduced offences against public safety and order (Part III). In addition, the decree provided for decisions by individual judges instead of juries (Part I, Sct. 2 and Schedules). One year later, the *Prevention of Terrorism (Temporary Provisions) Act of 1974* banned organisations and their support (Part I), exclusion orders (Part II) and specific arrest and detention measures (Part III).

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392 EKMR *Lawless v. Ireland (No. 3)*, 332/57 (1961), § 29 (Law).

393 Edwards, Northern Ireland Troubles, p. 11.

394 Edwards, Northern Ireland Troubles, p. 29: Request from the Inspector General of the Royal Ulster Constabulary to Defence Minister Callaghan dated 14 August 1969.

395 *Cf., e.g.,* van der Bijl, Operation Banner, pp. 17 ff.

396 On 21 July 1972, the IRA exploded 22 bombs in Belfast within 75 minutes. The British authorities responded with "Operation Motorman" (occupation of Derry and Belfast by troops).

In *Ireland v. The United Kingdom* (1978), the ECtHR (Court Plenary) was in no doubt that a state of emergency (this time with a focus on Northern Ireland)[397] still existed in view of further developments[398].

> «Unquestionably, the exercise of the special powers was mainly, and before 5 February 1973 even exclusively, directed against the IRA as an underground military force. The intention was to combat an organization which had played a considerable subversive role throughout the recent history of Ireland and which was creating [...] a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province's inhabitants [...]. Being confronted with a massive wave of violence and intimidation, the Northern Ireland Government and then, after the introduction of direct rule (30 March 1972), the British Government were reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of the ordinary law, in the shape of extrajudicial deprivation of liberty, was called for.»[399]

3.2.4. Good Friday Agreement and return to peace

In 1998, the *Good Friday Agreement* was concluded as the basis for the peace that still exists today on the island of Ireland. It was not until 2005 that the IRA was ready to finally lay down its arms. On 31 July 2007, the deployment of troops by the United Kingdom *(Operation Banner)* finally ended.

> Between 1969 and 2006, the IRA was responsible for around 2,000 deaths, the loyalist paramilitaries for more than 1,000 and the security forces for 363[400]. The

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397 *Cf. Ireland v. The United Kingdom* (Court Plenray), 5310/71 (1978), §§ 13 ff.

398 *Ireland v. The United Kingdom* (Court Plenray), 5310/71 (1978), § 205 with reference to § 12: «Up to March 1975 [...], over 1,100 people had been killed, over 11,500 injured and more than £140,000,000 worth of property destroyed during the recent troubles in Northern Ireland. This violence found its expression in part in civil disorders, in part in terrorism, that is organised violence for political ends».

399 *Ireland v. The United Kingdom* (Court Plenray), 5310/71 (1978), § 212.

400 Edwards, Northern Ireland Troubles, p. 9 f.

security forces used different tactics in dealing with terrorists, distinguishing between IRA and loyalist terrorists[401].

The number of direct casualties among the security forces during the entire *Operation Banner* varies. They range from 651 to 763 killed and slightly more than 6,000 wounded[402].

Brexit could lead to a strong pressure on peace in Northern Ireland. A hard border between Northern Ireland and the Republic of Ireland would violate the Good Friday Agreement[403]. In addition, the agreement provides that any change to the Northern Ireland "constitution" is subject to a referendum. In principle, a referendum (albeit not without hurdles) can also decide on the reunification of Northern Ireland with the Republic of Ireland.

If this were to happen, a *reversal* of historical dimensions would take place: The Northern Irish Catholics would then have "their" state on the largely Catholic island at their side – while the Northern Irish Protestants would have to do without direct protection by the government of their majesty in Westminster.

3.3. CHARACTERISTICS OF THE STATE OF EMERGENCY

Art. 15 (para. 1) ECHR allows derogations from the ECHR's guarantees in a time of war or other public emergency (*see* no. III.3.1). The practical significance of the first variant has remained low[404].

It meets the state practice, «that banditry, criminal activity, riots, or sporadic outbreaks of violence and acts of terrorism do not amount to an armed conflict»[405].

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401 Urban, Big Boys' Rules, pp. 238 f.

402 The report of the *Ministry of Defence*, Operation Banner – Analysis, p. 2-12, mentions a number of 697 killed members of the security forces; other sources use different figures; *cf., e.g.,* Edwards, Northern Ireland Troubles, pp. 86 f. and van der Bijl, Operation Banner, p. 232.

403 Birrell/Carmichael, Brexit, pp. 212 ff.

404 *Cf. Hassan v. The United Kingdom* (GC), 29750/09 (2014), § 102 (in connection with extra-territorial military actions).

405 U.K./MOD, Manual of the law of armed conflict (JSP 383), § 3.5.1.

The second variant, on the other hand, has been the subject of legal assessment. The jurisprudence on *public emergency* appears less coherent than it is sometimes portrayed.

3.3.1. The fundamental debate on the Irish–Northern Irish conflict

In *Lawless v. Ireland (No. 3)* (*see* no. III.3.2.2) the Commission considered the second variant to be sufficiently clear:

> The «[...] natural and customary meaning of the words ‹other public emergency threatening the life of the nation› is sufficiently clear; whereas they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed [...].»[406]

The French version of the decision, however, was formulated more narrowly: instead of «crisis or emergency», the decisive passage mentioned «danger exceptionnel et imminent». In the *Greek Case*, the Commission clarified six years later that the English wording in the *Lawless judgment* was incomplete on this essential point and that the French version should therefore be used[407].

Based on the clarification, the Commission has required in the *Greek Case* the following characteristics for the public emergency in particular:

> «(1) It must be actual or imminent.
>
> (2) Its effects must involve the whole nation.
>
> (3) The continuance of the organised life of the community must be threatened.
>
> (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.»[408]

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406 EKMR *Lawless v. Ireland (No. 3)*, 332/57 (1961), § 28 (Law).

407 EKMR, *The Greek Case*, 3321/67 (1968), § 152.

408 The Commission in *The Greek Case*, 3321/67 (1968), § 153 (so already the report of the Sub-Commission, § 113) and in *Brannigan v. The United Kingdom*, 14553/89 (1991; Report), § 47.

In the judgment *Ireland v. The United Kingdom* of 1978, the ECtHR (Court Plenary) could have consolidated the case law on public emergency. In this judgment, the Court explicitly referred to *Lawless v. Ireland* (No. 3) and dealt with the *Greek Case*. However, it refrained from examining the characteristics of the Commission in the sense of a scheme.

> Instead, the Court was concerned with the question of whether the derogation from the obligations under the Convention were «strictly required by the exigencies of the situation»[409]. Whereby he rather retracted his own role: «By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 […] leaves those authorities a wide margin of appreciation.» But the states do «not enjoy an unlimited power in this respect.»[410]

The special measures in Northern Ireland (*see* no. III.3.2.3) were considered to be permissible – in particular the extrajudicial powers of arrest, detention and internment (*cf.* Art. 5 ECHR). In doing so, the ECtHR focused on the nature of the – lethal – threat posed by the IRA to the state and the people of Northern Ireland.

> «Unquestionably, the exercise of the special powers was mainly […] directed against the IRA as an underground military force. The intention was to combat an organization which had played a considerable subversive role throughout the recent history of Ireland and which was creating, in August 1971 and thereafter, a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province's inhabitants […].»[411]

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409 *Ireland v. The United Kingdom* (Court Plenray), 5310/71 (1978), §§ 205 ff.

410 *Ireland v. The United Kingdom* (Court Plenray), 5310/71 (1978), § 207.

411 *Ireland v. The United Kingdom* (Court Plenray), 5310/71 (1978), § 212.

3.3.2. Re-interpretation after 09/11

In a more recent judgment in 2009, *A. and others v. The United Kingdom*, the *Grand Chamber* dealt with reactions to the al-Qaeda attacks in New York and Washington on 09/11 (2001). The government invoked a *public emergency*. In the derogation notice, it stated that British citizens had also been among the victims of the attacks in the U.S.A. (*sic!*), that the threat was still ongoing and – in particular – that there would also be a terrorist threat in the United Kingdom itself.

> «There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.»[412]

The *Anti-terrorism, Crime and Security Act 2001* enacted in response to this led to, among other things, «extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic-law powers.»[413]

In connection with the public emergency, the *Grand Chamber* mentions both the *Lawless v. Ireland judgment (No. 3)* and the characteristics according to the *Greek Case* (although packaged in one sentence – instead of as a list of individual elements). It then discusses in particular when a threat (*in casu* after the attacks on and since 9/11) is imminent:

> «The requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it. Moreover, the danger of a terrorist attack was, tragically, shown by the bombings and attempted bombings in London in July 2005 to have been very real. Since the purpose of Article 15 is to permit States to take derogating measures

412 *A. and others v. The United Kingdom* (GC), 3455/05 (2009), § 11.

413 *A. and others v. The United Kingdom* (GC), 3455/05 (2009), § 11.

> to protect their populations from future risks, the existence of the threat to the life of the nation must be assessed primarily with reference to those facts which were known at the time of the derogation. [...The] case-law has never, to date, explicitly incorporated the requirement that the emergency be temporary, although the question of the proportionality of the response may be linked to the duration of the emergency. Indeed, [...] relating to the security situation in Northern Ireland, demonstrate that it is possible for a ‹public emergency› within the meaning of Article 15 to continue for many years.»[414]

While a threat must already have materialised according to the *"correct" lawless characteristics* («situation de crise ou de danger exceptionnel et imminent»), it can also lie in a latent threat that will only materialise in the future according to the *"wrong" lawless characteristics* («exceptional situation») and more recent case law.

Thus, in *A. and others v. The United Kingdom*, the *Grand Chamber* did not merely develop the interpretation of Art. 15 ECHR "in some ways"[415], but reinterpreted it[416]. In our opinion, an *imminent danger* according to the new interpretation hardly constitutes a real threshold for the suspension of Convention guarantees.

> The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* also seem to be tending in a similar direction[417]. The focus for a "Public Emergency which Threatens the Life of the Nation" under § 39 is on the description of the relevant legal assets (b) and the severity of the threat (a): *A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights (...) only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the state; and (b) threatens the physical integ-*

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414 *A. and others v. The United Kingdom* (GC), 3455/05 (2009), §§ 177 f.

415 Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 816.

416 The doctrine, which adheres to the criteria according to the *Greek Case*, is partially different; *cf., e.g.,* Michaelsen, War Against Terrorism, p. 126.

417 Mentioned in *A. and others v. The United Kingdom* (GC), 3455/05 (2009), § 109.

rity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant. (…)

3.3.3. Present status and scope for assessment of the Convention States

According to Strasbourg practice, states ultimately have a wide margin of appreciation when classifying a situation as a public emergency[418]. The ECtHR has confirmed and thus consolidated its rather frank interpretation of Art. 15 ECHR in measures taken after 09/11 as well as in more recent judgments.

> «The Court reiterates that it falls to each Contracting State, with its responsibility for ‹the life of [its] nation›, to determine whether that life is threatened by a ‹public emergency› and, if so, how far it is necessary to go in attempting to overcome the emergency […]. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.»[419]

In the judgments on the attempted coup by parts of the army in Turkey in the night of 15 to 16 July 2016, the ECtHR gives great weight to the assessment of the *Turkish Constitutional Court* on the concrete assessment of the state of emergency.

> «The Court observes that the Constitutional Court, having examined from a constitutional perspective the facts leading to the declaration of a state of emergency, concluded that the attempted military coup had posed a severe threat to the life and existence of the nation […]. In the light of the Consti-

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418 *Ireland v. The United Kingdom* (Court Plenray), 5310/71 (1978), § 207; likewise, the Commission in *Brannigan v. The United Kingdom*, 14553/89 (1991; Report), § 44.

419 *A. and others v. The United Kingdom* (GC), 3455/05 (2009), § 173; just as recently for example *Mehmet Hasan Altan v. Turkey*, 13237/17 (2018), § 91 and *Şahin Alpay v. Turkey*, 16538/17 (2018), § 75.

> tutional Court's findings and all the other material available to it, the Court likewise considers that the attempted military coup disclosed the existence of a ‹public emergency threatening the life of the nation› within the meaning of the Convention.»[420]

Nevertheless, the ECtHR constantly emphasises that the states' scope for assessment is not unlimited and that it reserves the right to overturn judgments handed down as a *supervisor*.

> «Nevertheless, the States do not enjoy an unlimited power in this respect. The Court [...] is empowered to rule on whether the States have gone beyond the ‹extent strictly required by the exigencies› of the crisis [...]. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation.»[421]

It seems clear that there can be no recourse to emergency clauses without a *specific cause*. In our opinion, an open abuse would already call into question the general "convention capability" of the state in question. Ultimately, the invocation of a state of emergency is a political decision. And the ECtHR – as not only the Turkish cases are showing[422] – is all the more reluctant to do so if a (formally independent) national court has already assessed the situation.

> A practical complication can lie in the fact that complaints in times of emergency reach the ECtHR at all and thus become accessible for assessment[423].

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420 *Mehmet Hasan Altan v. Turkey*, 13237/17 (2018), § 93 and *Şahin Alpay v. Turkey*, 16538/17 (2018), § 77.

421 *Ireland v. The United Kingdom* (Court Plenray), 5310/71 (1978), § 207; just as recently for example *Mehmet Hasan Altan v. Turkey*, 13237/17 (2018), § 91 and *Şahin Alpay v. Turkey*, 16538/17 (2018), § 75; quite similar in *A. and others v. The United Kingdom* (GC), 3455/05 (2009), § 173.

422 *A. and others v. The United Kingdom* (GC), 3455/05 (2009), with reference to the arguments and the decision of the House of Lords.

423 *Cf., e.g.,* Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 806.

In our opinion, a public emergency must not cause overreactions or (unintentionally) lead to a de-nucleation of the rule of law. Therefore, an independent outside view that does not focus on the "need of the time" is particularly valuable.

> Even if a "war against terrorism" is sometimes postulated in politics[424] and media follow this terminology, there is no practice so far on this variant of Art. 15 (para. 1) ECHR (*time of war*)[425].

3.4. SIGNIFICANCE OF THE STATE OF EMERGENCY

The invocation of a public emergency is thus a strongly politically influenced decision of the respective Convention State. Particular attention must therefore be paid to the legal significance of the state of emergency and what this can mean with regard to the Convention guarantees that are firm in a state of emergency.

3.4.1. Expanding state options for action and their political cost

Public emergency expands the repertoire of state measures for handling threatening situations or restoring state order. In lawmaking and ultimately also in the application of emergency laws, the authorities are less bound by fundamental rights restrictions.

In the context of terrorist threats, however, recourse by the state to the emergency clause under Art. 15 ECHR can be counterproductive[426]. Terrorist actions do not serve an end in themselves but aim directly at a media effect and indirectly at a political change (*see* no. III.1 and V.6.1.1). If it becomes evident that a state under the rule of law is no longer able to deal with a terrorist threat by the usual means, this is, at the

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424 Critical of the concept of the "war on terrorism" Warbrick, European Response to Terrorism, p. 992. Critical of the equation between terrorism and organised crime Wardlaw, Linkages, pp. 7 and 22 f.

425 Reid, Practitioner's Guide, 43-005. But *cf. Hassan v. The United Kingdom* (GC), 29750/09 (2014), § 101 on the practice with regard to Art. 5 ECHR in armed conflicts.
According to Warbrick, European Response to Terrorism, p. 1017, the protagonists of the "war on terror" are less interested in implementing "war law" than in applying "not law".

426 Wilkinson, Terrorism versus Democracy, p. 95: "If emergency laws are found to be needed in a particularly serious terrorist conflict the laws must be temporary, subject to frequent review by parliament, and subject to parliament's approval before any renewal."

same time, an admission of weakness. Conversely, this can also be interpreted as evidence of the effectiveness[427] of a terrorist campaign and be instrumentalised to compromise the state.

3.4.2. Restriction of further Convention guarantees

Even in the case of a public emergency, a relativisation through additional restrictions is in principle only possible for those guarantees of the ECHR that are not protected by Art. 15 ECHR.

> This concerns, for example, Art. 8 ECHR, which according to the case law of the ECtHR protects the right to respect for private life (*see* no. IV.2.2) or Art. 5 ECHR, which enshrines guarantees in connection with the detention or arrest of persons. They are therefore both derogable.

The fight against terrorism and other challenges of modern society can and should take place within the usual legal framework. The usual requirements and rules for the restriction of fundamental rights apply (that is why there are fundamental rights!). Also the right to *liberty and security* (heading and first sentence of Art. 5 ECHR) does not convey a positive obligation on the part of states to arrest or detain someone (a dangerous person)[428]. This prevents an over-reaction[429]. Also, even to protect allegedly higher-value legal assets, there is no "entitlement" to resort to public emergency in order to restrict specific fundamental rights.

Even if a Convention State wants to suspend Convention guarantees by invoking the state of emergency, Art. 15 ECHR requires that additional restrictions remain *strictly required by the exigencies of the situation*. In *A. and others v. The United Kingdom,* the *Grand Chamber* has recognised a part of the measures stipulated in the *Anti-terrorism,*

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427 Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 810.

428 Warbrick, Prevention of Terrorism, p. 110, with reference to *Lawless v. Ireland* (No. 3), 332/57 (1961).

429 *Cf., e.g.,* Warbrick, European Response to Terrorism, pp. 1004 f.; Warbrick, Prevention of Terrorism, pp. 89 ff. (with a comparison of the Klass judgment to *Guzzardi v. Italy* [Court Plenary], 7367/76 [1980]).

Crime and Security Act 2001 as «disproportionate in that they discriminated unjustifiably between nationals and non-nationals»[430].

> «[…] In particular, where a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse […]. The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level. [… The] question of proportionality is ultimately a judicial decision […].»[431]

In an early terrorism case, the Commission allowed some flexibility to respond to certain challenges even without a public emergency.

> In the 1970s, the public emergency invoked by the United Kingdom was geographically limited to Northern Ireland. The case of *McVeigh et al. v. The United Kingdom* involved the arrest and detention of three individuals. They had been travelling in the Republic of Ireland and Northern Ireland and had taken a ferry from Dublin to Liverpool, where they were arrested. The British government subsequently did not invoke the public emergency clause. The Commission examined the fundamental rights complained of (Art. 5 and 8 ECHR) without referring to Art. 15 ECHR[432]. However, the Commission emphasised the circumstances of the case. Thus «still [to] take into account the general context of the case, including the purpose of and general background to the legislation whose application is at issue. [… The] Convention must be interpreted and applied in the light of present day conditions […]. The existence of organised terrorism is a feature of modern life whose emergence since the Convention was drafted

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430 *A. and others v. The United Kingdom* (GC), 3455/05 (2009), § 190.

431 *A. and others v. The United Kingdom* (GC), 3455/05 (2009), § 184.

432 EKMR *McVeigh et al. v. The United Kingdom*, 8022/77, 8025/77 and 8027/77 (1981), §§ 5 and 155 f.

> cannot be ignored any more than the changes in social conditions and moral opinion which have taken place in the same period [...].»[433]

In our opinion, the different levels of fundamental rights protection must not be confused with each other, even in the case of special threats. Additional restrictions according to Art. 15 ECHR are primarily based on adapted legal foundations. This involves abstract restrictions that affect a broad circle of fundamental rights holders. A legal compromise between everyday life and public emergency (Art. 15 ECHR) should not be opened. Emergency laws are laws made for extraordinary situations – with spatial, temporal and above all substantive dependencies. It is a different question whether the respective backgrounds are addressed at the subsequent level of the examination of the proportionality of concrete measures. There is a bigger margin for weighing different interests against each other.

3.4.3. Significance for Art. 2 of the ECHR

The right to life (Art. 2 ECHR), the prohibition of torture (Art. 3 ECHR), the prohibition of slavery (Art. 4 para. 1 ECHR) and the prohibition of punishment without law (Art. 7 ECHR) are emergency proof (*see* no. III.3.1). They form fundamental rights *core contents* and as such are not accessible to any restriction[434].

For anti-terrorist operations, the first two exceptions are particularly relevant – although Art. 3 ECHR will not be discussed in detail below. According to the legal wording of the Convention, the whole Art. 2 ECHR (as such) is protected from the prohibition of derogation. The protection of the right to life *per se* in a state of emergency includes all elements of the fundamental right: the positive and negative obligation as well as the duty to investigate. Even measures against terrorism or terrorists do not allow permissible exceptions to Art. 2 ECHR.

> In the case of a "legitimate war", the question would arise whether exceptions to the ban on killing terrorists would be permissible – as long as they are not combatants (*see* no III.4).

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[433] EKMR *McVeigh et al. v. The United Kingdom*, 8022/77, 8025/77 and 8027/77 (1981), § 157.

[434] Schefer, Kerngehalte, p. 150.

As far as emergency-proof fundamental rights guarantees do exist, the ECtHR does not examine questions of state of emergency separately[435]. If both fundamental rights protected by Art. 15 ECHR and "normal" fundamental rights are examined in the same judgment, the Court refers to public emergency in case of the latter[436]. In our opinion, a public emergency has a multiple indirect significance for the right to life: a permissible state of emergency can have an effect on the limits stated in Art. 2 ECHR. It is possible that in the case of a public emergency, the exception for suppressing a riot or insurrection (Art. 2 para. 2 c ECHR) may come into play. Furthermore, the external circumstances can influence an assessment of the absolute necessity of a use of force (*see* no. III.2.2.2). In particular, the general recourse to a use of force in an exceptional situation may be more permissible. In our opinion, a public emergency must not be used as an abstract criterion to justify a use of force or the use of potentially lethal force. Otherwise, public emergency would be incorporated into the interpretation of Art. 2 ECHR – this therefore contradicts the principle of non-derogation of that fundamental right in case of emergency.

Furthermore, the administrative and legal framework, which also serves to guarantee the right to life, changes in a state of emergency. For policing, more far-reaching national rules may apply, which may allow other means or possibilities than in everyday situations.

> These can (and should) minimise recourse to a use of force, for example, by permitting (and at best requiring) surveillance within a broader framework or by restricting other fundamental rights in order to be able to end the state of emergency.

4. INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW

The interpretation of the concept of jurisdiction in accordance with the recent case law of the ECtHR can, under certain circumstances, result in the extra-territorial application of Art. 2 ECHR (*see* no. III.2.5.1). Insofar as this covers acts of Convention States

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435 *A. and others v. The United Kingdom* (GC), 3455/05 (2009), §§ 126 ff. (to Art. 3 ECHR).

436 Art. 5 in conjunction with Art. 15 ECHR; *cf. A. and others v. The United Kingdom* (GC), 3455/05 (2009), §§ 153 ff. (to the right to liberty and security) and §§ 173 ff. (on the public emergency).

in international armed conflicts, an overlapping of *International Humanitarian Law* (IHL) with *International Human Rights Law* (IHRL) is conceivable.

The sometimes delicate and controversial relationship between IHL and IHRL cannot be comprehensively described below, nor can existing conflicts be resolved. However, possible influences of the mixed situation on police action are to be shown. The thesis is followed that what would be prohibited under IHL cannot be permissible under IHRL.

4.1. CHANGING FORMS OF CONFLICT

Conventional wars are waged (according to doctrine) by states or by state armed forces against each other. For warfare in the true sense of the word (*ius in bello*[437]), the Hague Conventions of 1907 in particular lay down external rules. The Geneva Conventions, which were concluded as a reaction to the Second World War, enshrine further principles of international law for armed conflicts. In the present context, the rules for the protection of human life and especially of civilians are in the foreground. The two Additional Protocols of 1977 strengthened the protection of civilians – distinguishing between *international armed conflict* (IAC) and *non-international armed conflict* (NIAC) (*see* no. III.4.2).

Modern armed conflicts or forms of conflict are sometimes very different from conventional interstate wars. In non-international armed conflicts, states do not confront each other directly with their regular armed forces (symmetrical conflict), but irregular non-state actors challenge the state's monopoly on the use of force at various levels (asymmetrical or hybrid conflict)[438].

There is increasing doubt as to whether IHL can claim application to modern forms of conflict between state and non-state actors[439]. This is not only about

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[437] To the distinction between *ius ad bellum* (describing the law governing the decision to wage war) and *ius in bello* (describing the rules applied to conduct in war) *cf., e.g.,* Seifert, Rewriting the RoE, p. 841.

[438] The fact that non-state actors can be supported by foreign states (financially, materially or otherwise) is irrelevant to the form of conflict so far.

[439] On various problems, *cf.* Crane/Reisner, Jousting at Windmills, p. 68 and Blank/Guiora, Teaching old Dogs New Tricks, pp. 61 ff. or Belz, War on International Terror, in particular pp. 113 ff. (from a law and economics perspective).

the legal challenge of binding non-state armed groups to IHL[440], but essentially about a political dilemma: non-state actors – especially para-military groups or larger terrorist organisations – simply have no incentive to comply with IHL. Finally, states (or politics) are no longer willing to do so unilaterally[441].

In our opinion, the question of the applicability of IHL in modern forms of conflict must be distinguished from the question of the scope of application of the ECHR. Guarantees from Art. 2 ECHR apply when there is a jurisdiction according to Art. 1 ECHR. In this respect, a certain schematisation seems quite appropriate.

The *ius in bello* (on classical warfare) is probably the most established and binding part of the *Law of Armed Conflicts* (LOAC)[442]. The LOAC is often equated with IHL. According to the understanding represented here, IHL is to be understood in a broad sense, that is, not only as a body of norms with direct reference to armed conflicts, but as an international legal framework with direct or indirect reference to law enforcement in armed conflicts[443].

As the forms of conflict change, differences between the *ius in bello* and the broader IHL become more apparent. At the same time, especially in the area of law enforcement (particularly by armed forces), interfaces are increasingly emerging between IHL and the human rights law of states or IHRL, which do not exist in the same form for *ius in bello*.

4.2. PROTECTION OF CIVILIANS

IHL as a specific international law presupposes the participation in the conflict of an "armed force of some sort"[444]. The concept of an *armed force* is not limited to regular

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440 Kleffner, Organised Armed Groups, pp. 63 f. and Kleffner Human Rights and International Humanitarian Law, p. 52 (§ 34).

441 Belz, War on International Terror, p. 98.

442 *Cf., e.g.,* Lesh, Conduct of hostilities, p. 101.

443 *Cf., e.g.,* Lesh, Conduct of hostilities, p. 100.

444 Schmitt, Status of Opposition Fighters, p. 126.

armed forces, especially in the context of law enforcement in armed conflicts. It is required that armed forces exercise "a certain degree of control over territory"[445].

The Geneva Conventions are particularly relevant for the treatment of combatants (usually members of the armed forces[446]) and for the protection of the civilian population[447] during warfare. Protocols I and II strengthen the protection of civilians[448].

> The Geneva Conventions of 1949 consist of four parts: The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field *(Geneva Convention I)*, for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea *(Geneva Convention II)*, relative to the Treatment of Prisoners of War *(Geneva Convention III)* and relative to the Protection of Civilian Persons in Time of War *(Geneva Convention IV)*. The Geneva Conventions I–IV have been ratified by 196 states and thus are valid globally[449].
>
> The Conventions were strengthened with the Protocol Additional of 1977 relating to the Protection of Victims of International Armed Conflicts (Protocol I)[450] and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)[451]. This was intended to take account of changing forms of conflict. The two protocols led to a distinction between international and non-international armed conflicts[452].

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445 Schmitt, Status of Opposition Fighters, p. 120; and on the historical background pp. 121 ff.

446 Geneva Convention I.

447 Geneva Convention IV, Protocol I and Protocol II.

448 The protection of the civilian population is already laid down in the Geneva Convention IV with regard to armed conflicts. *Cf., e.g.,* Gillard, Protection of civilians in the conduct of hostilities, p. 158.

449 International Committee of the Red Cross, https://ihl-databases.icrc.org (last visited on 4 June 2022).

450 Protocol I has been ratified by 174 states, including all Council of Europe states except Turkey.

451 Protocol II has been ratified by 169 states, including all Council of Europe states except Turkey.

452 To the examples of the violent Russian annexation of Crimea (armed international conflict) as well as the civil war in Eastern Ukraine (armed non-international conflict) *cf., e.g.,* Reeves/Wallace, Little Green Men, pp. 380 ff.

A key principle[453] of IHL requires a distinction[454] between combatants and civilians[455]. In principle, civilians may neither be attacked nor killed. Conversely, however, they do not enjoy any *combatant privilege* which would allow them to attack enemy combatants in armed conflict. If they commit crimes or offences, they are personally responsible for them and are prosecuted correspondingly.

> This also applies to crimes under the *Rome Statute*. There are partial restrictions to acts of war (*cf.* Art. 8 para. 2 letter d and f), but not in the personal sense to members of armed forces. Even a command responsibility for civilians is conceivable if they exercise effective authority and control (*cf.* Art. 28 on the responsibility of commanders and other superiors).

The term civilians is central to the whole of IHL. Nevertheless, although the Geneva Conventions are using this term, they do not contain any actual definition. Protocol II does not define the status of civilians either[456]. The Protocol I describes it negatively in Art. 50 (para. 1):

> *A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.*

Based on this, the concept of civilians can be interpreted and defined for armed *international* conflict. Correctly, the concept of civilians defined in this way is also used as a connecting factor for the protection of victims of *non-international* armed conflicts.

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453 On the further principles, *cf., e.g.,* Lesh, Conduct of hostilities, p. 100.

454 Art. 48 Protocol I (Basic rule): *In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.*

455 Jensen, Direct Participation in Hostilities, p. 87; Blank/Guiora, Teaching old Dogs New Tricks, pp. 54 f.; further reading Gillard, Protection of civilians in the conduct of hostilities, p. 159.

456 To Protocol II, *cf.* Schmitt, Status of Opposition Fighters, p. 120 (with footnote 11).

Lawful acts of war[457] are directed against military targets, in particular against enemy combatants, who may be attacked and in principle killed. This does not mean, however, that the LOAC, which applies to armed forces, can be used to displace all other IHL – the principle of distinction is precisely opposed to this.

It is a consequence of the principle of distinction that ultimately the definition of a *combatant* under IHL is decisive as to whether or not force (up to and including permitted killing) may be used against a person *without further ado*. Conversely, claims for protection can in principle arise for all people who are not considered combatants[458]. In case of doubt, a possible claim for protection takes precedence (clearly Art. 50 para. 1 Protocol I and for the civilian population para. 3).

4.3. FURTHER INTERNATIONAL TREATIES

Further international conventions are partly linked to the Geneva Conventions. They thus also apply in armed (international or non-international) conflicts and supplement the LOAC accordingly for the obligated states.

For example, the UN *Convention on Certain Conventional Weapons* (CCWC) prohibits the use of special types of weapons. However, according to the explicit wording of Art. 1 (para. 1) CCWC, this only applies to «in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 [...]». Para. 2 adds that the «Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts». The situations mentioned are, at least according to the wording, absolutely excluded.

Thus, the *prohibitions on weapons with non-detectable fragments* (Protocol I), *mines, booby-traps and other devices* (Protocol II), *incendiary weapons* (Proto-

457 Hampson, Article 2 during armed conflict, p. 203 (*e contrario*).

458 Gillard, Protection of civilians in the conduct of hostilities, p. 159. Blank/Guiora, Teaching old Dogs New Tricks, p. 63: "LOAC defines civilians as all persons in an international armed conflict who are not combatants. In non-international armed conflict, civilians are all persons who are not members of armed forces or armed groups."

col III) and *laser weapons* (Protocol IV) as well as the *obligations to eliminate explosive remnants of war* (Protocol IV) as such apply only to armed conflicts.

Moreover, in our opinion, international conventions can determine the relevant legal framework for the use of armed forces for the obligated states even without direct reference to armed conflicts. General prohibitions of weapons, technical equipment, substances or materials are to be borne in mind.

As an example, the *Convention on Cluster Munitions* (CCM)[459] imposes a prohibition of all use, stockpiling, production and transfer of such munitions. Art. 1 (para. 1) sets out the general obligations and scope of application in a very general and broad framework.

Each State Party undertakes never under any circumstances to:

(a) Use cluster munitions;

(b) Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munition;

(c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.

If and to the extent that such international conventions are directly binding on states, they also apply (as an outermost framework) to *policing operations* and the use of force in general. In other words, the international legal framework binds the states as such – regardless of whether they act with armed forces or police security forces.

4.4. PARTIAL COEXISTENCE OF IHRL AND IHL

In the following, it is presumed that IHL does not form a monolithic entity (of law) which would stand alongside IHRL and would displace it in principle[460]. In our opinion, IHL can serve as a general *interpretation guide*, especially on Art. 2 ECHR. However, this is not with the meaning of enabling interference with the right to life, but in the sense of *restricting interference* as the outermost limit. Conversely, according to the

[459] Convention on Cluster Munitions, Dublin, 30 May 2008.

[460] *Cf., e.g.,* Gaggioli Gasteyger/Kolb, Right to Life in Armed Conflicts, pp. 116 ff.

recent case law of the ECtHR, the ECHR can claim application even in *armed conflicts* and thus also have a limiting effect and prevent the abuse of power[461].

4.4.1. Inclusion of international law norms for the interpretation of Article 2 ECHR

Usually, *policing in modern societies* (*see* no. IV.3.1) does not raise any competing issues between IHL and IHRL. Even in the case of hostage-taking or anti-terrorist operations, no link to IHL is usually considered.

> *McCann and others v. The United Kingdom* (1995) concerned a planned and coordinated action by the security forces. The actual use of force against the three civilians (who were walking on terrorist paths) was carried out by members of the SAS, a military unit. The SAS was used within the United Kingdom. The security forces were bound by the national legal and administrative framework. The *Grand Chamber* correctly did not consider the possible use of IHL.
>
> In *Isayeva v. Russia* (2005), the ECtHR does not mention the IHL – although references to it would have been obvious due to the facts of the case (bombing of a village in the context of the Chechen conflict).

Differently, in *Tagayeva v. Russia* (2017), the ECtHR refers to IHL[462] and – tentatively – includes it in its considerations.

> The perpetrators consisted of a group of around 30 terrorists. They had first undergone several weeks of training in Ingushetia before driving a truck about 35 kilometres across the administrative border to Beslan in the republic of North Ossetia in criminal intent[463]. Thus there was no obvious connecting factor for IHL. Neither was there an armed conflict in North Ossetia nor had Russia invoked a state of emergency.

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461 On the argument of preventing the abuse of power, *cf.* – *mutatis mutandis* – UN Human Rights Committee, CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, 31 August 2001, § 3.

462 *Tagayeva and others v. Russia*, 26562/07 (2017), §§ 468 ff.

463 *Tagayeva and others v. Russia*, 26562/07 (2017), §§ 19 and 488.

> The ECtHR is examining the possible application of CCWC Protocol III (Prohibitions or Restrictions on the Use of Incendiary Weapons). Some weapons are deemed to be excessively injurious or to have indiscriminate effects (*see* no. IV.3.3.3 and V.3.4). However, the Court faces difficult questions of proof[464]. Subsequently, it does not deal with the use of inadmissible means of intervention, but reverses the question from the point of view of risk minimisation: «[… The] evidence establishes a prima facie claim that the State agents used indiscriminate weapons upon the building while the terrorists and hostages were intermingled. Accordingly, it seems impossible that it could be ensured that the risk to the hostages could be avoided or at least minimised.»[465]

The reference to Russia's ratification of Protocol I and the CCWC[466] is a first indication that the scope of application of the international legal framework of IHL could be opened. It seems appropriate that the Court attaches little importance to the limitation in the CCWC («in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 […]»). The issue is not the extension of the scope of the CCWC *contra verbis legem*, but the interpretation of Art. 2 ECHR with regard to absolute necessity of the use of force. In our opinion, what is not allowed in armed conflict cannot be considered proportionate outside of situations of war and emergency. The court's statement that the state security forces used indiscriminate weapons remains somewhat in the shadow of the duty to minimise risks. In our opinion, this is just as regrettable as the emphasis on the insufficient national legal framework for the entire operation[467]. The judgment could well have been bolder: in our opinion, the use of certain heavy means was simply inadmissible under international law.

4.4.2. Relevance of the ECHR in armed conflicts?

By interpreting the jurisdiction of the Convention States according to Art. 1 ECHR (*see* no. III.2.5.1), the *Grand Chamber* has "exported" Art. 2 ECHR geographically to areas

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464 *Tagayeva and others v. Russia*, 26562/07 (2017), §§ 587 f.

465 *Tagayeva and others v. Russia*, 26562/07 (2017), § 589.

466 *Tagayeva and others v. Russia*, 26562/07 (2017), § 470.

467 *Tagayeva and others v. Russia*, 26562/07 (2017), § 584 ff.

outside Europe and in terms of content to the domain of IHL. This can increasingly lead to a "co-existence" of IHL and IHRL.

> The UN *Human Rights Committee* underlines the possibility of parallel application of IHL and IHRL for the ICCPR by pointing out that «[…] the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.»[468]

In the judgment *Varnava and others v. Turkey*, the *Grand Chamber* already assumed that there can be a close proximity between IHL and IHRL. The ECtHR seems to assume – correctly in our opinion – that IHL would apply to actual hostilities but that the right to life under Art. 2 ECHR remains applicable as soon as hostilities have moved away or have ended in time.

> The case concerned events related to operations by the Turkish military in (northern) Cyprus in 1974. The disappearance of 9 persons was to be judged. «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 […]. The Court therefore concurs […] in holding that in a zone of international conflict Contracting States are under 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 ICRC to do so.»[469]

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468 UN Human Rights Committee, General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, § 11.

469 *Varnava and others v. Turkey* (GC), 16064/90 (2009), § 185, with reference to the Geneva Convention (I, II, III and IV) and the Protocols (I, II and III).

> In the specific case «these disappearances occurred in life-threatening circumstances where the conduct of military operations was accompanied by widespread arrests and killings. Article 2 therefore imposes a continuing obligation on the respondent Government to account for the whereabouts and fate of the missing men in the present case; if warranted, consequent measures for redress could then be effectively adopted^.»[470] The Government has «not put forward any materials or concrete information that would show that any of the missing men were found dead or were killed in the conflict zone under their control. Nor is there any other convincing explanation as to what might have happened to them that might counter the applicants' claims that the men disappeared in areas under the respondent Government's exclusive control.»[471]

In the judgment *Hassan v. The United Kingdom* (*see* III.2.5.1.c and III.4.4.2), we believe that the *Grand Chamber* went one step further. When examining a (denied) violation of Art. 5 ECHR, it emphasised that the ECHR also applies – contextually – in international armed conflicts.

> «Nonetheless, and consistently with the case-law of the International Court of Justice, the Court considers that, 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. By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty […] should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15 […]. It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted

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470 *Varnava and others v. Turkey* (GC), 16064/90 (2009), § 186.

471 *Varnava and others v. Turkey* (GC), 16064/90 (2009), § 186.

> features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers. [...] As regards procedural safeguards, the Court considers that, in relation to detention taking place during an international armed conflict, Article 5 §§ 2 and 4 must also be interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law.»[472]

This was supported by the rather formal argument that the United Kingdom, as the Convention State concerned, had not invoked the validity of the LOAC.

> The Court «does not consider it necessary for a formal derogation to be lodged, the provisions of Article 5 will be interpreted and applied in the light of the relevant provisions of international humanitarian law only where this is specifically pleaded by the respondent State. It is not for the Court to assume that a State intends to modify the commitments which it has undertaken by ratifying the Convention in the absence of a clear indication to that effect.»[473]

If the scope of application of both IHRL and IHL is established[474], but the respective requirements do not contradict each other in terms of content, no practical difficulties arise (in the absence of a possible collision). For example, torture or inhumane treatment is prohibited on any legal base[475]; for state security forces, this results in corresponding limits to action in each case.

In connection with the assessment of use of force, it must be assumed that Art. 2 ECHR is fundamentally stricter than the regulations according to IHL[476].

> The ECtHR solves the question indirectly via the scope of application of the ECHR by allowing the Convention State's jurisdiction under Art. 1 ECHR to apply

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472 *Hassan v. The United Kingdom* (GC), 29750/09 (2014), §§ 104 and 106.

473 *Hassan v. The United Kingdom* (GC), 29750/09 (2014), §§ 107; *cf., e.g.,* Hampson, Article 2 during armed conflict, pp. 202 f.

474 Hampson, Article 2 during armed conflict, p. 203.

475 Zwanenburg, Peace Operations, p. 163.

476 *Cf.* Zwanenburg, Peace Operations, pp. 163 ff. and generally for the HRL Hampson, Article 2 during armed conflict, p. 202 (more demanding).

> extra-territorially. If a jurisdiction is established, the Convention in principle is applicable – unless the state is at war. For this reason, we do not believe that the Court will depart from the decision in *Banković and others v. Belgium and others* (GC/AD). The judgment forms a necessary dividing line with a core area of IHL. The relevant question is whether the attacked television station was a legitimate military target (*see* no. III.2.5.1). This question is to be answered according to IHL.

Art. 2 ECHR thus requires application when and insofar as the Convention States exercise a jurisdiction (state's authority). This is the case with law enforcement. Whether states do so with their regular armed forces or with other "security forces"[477] is not relevant for a binding obligation to the Convention guarantees. This blurs the boundaries between ordinary policing, which also takes place during armed conflicts, and (direct) participation in the conflict[478]. This is particularly the case when ordinary policing is the responsibility of the armed forces[479].

> It is therefore hardly a coincidence that the three most recent cases related to the situation in Iraq. Operation *"Iraqi Freedom"* (Third Gulf War) began on 19 March 2003. On 14 April 2003, the U.S. declared the war over after the capture of Tikrit (Saddam Hussein's birthplace north of Baghdad). The remaining Iraqi forces were dissolved in May 2003. Various insurgencies followed with several major military operations by the coalition forces.

An exact distinction between IHL and IHRL, the latter including in particular the ECHR and the International Covenant on Civil and Political Rights (ICCPR), can no longer be

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[477] For example, there have been increasing reports in recent times of Convention States intervening in the armed conflicts in Syria and Libya with their military forces.

[478] *Cf.* Hampson, Article 2 during armed conflict, pp. 200 f.

[479] Then there can be *no withdrawal* of the states into the subject area of IHL. In this sense *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), *Concurring opinion* of judge Bonello, § 33: «I believe that it ill suits the respondent Government to argue, as they have, that their inability to secure respect for all fundamental rights in Basra gave them the right not to respect any at all».

clearly drawn[480]. The reasons for the overlapping[481] of IHL and IHRL are complementary and lie both in the further development of the content of IHL and in the regulatory gap of IHRL with regard to modern forms of conflict[482].

In the more recent cases on the territorial extension of jurisdiction before the *Grand Chamber*, the duty to investigate under Art. 2 ECHR was at issue[483]. The duty to investigate (which is – *mutatis mutandis* – also established in LOAC[484]) serves to clarify the exact circumstances of death. The (further) question of lawful or unlawful killing remains open *prima vista* – but it plays an indirect role when it comes to an effective investigation.

> In *Jaloud v. The Netherlands*, seven judges questioned the role of the ECtHR in this regard[485]: «[…] The key question before the Netherlands appeal court was whether the officer should face charges, depending on whether he had or had not acted in compliance with the instruction on the use of force. Under the procedural obligation of Article 2 of the Convention, it is crucial that a judicial authority, in determining whether a serviceman should face further charges or whether he had acted in a justifiable manner within the instructions on the use of force, has the proper information at its disposal. The Arnhem Court of Appeal should have had at its disposal the full witness statements

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480 Critical of the not entirely clear distinction in the ECtHR's case law Hampson, Article 2 during armed conflict, p. 194: The "(…) impression is created that the Court looks at the overall picture and focuses on one particular element as bing problmactic", and in particular on the example of *Isayeva v. Russia*, 57950/00 (2005): "(… Presumably) someone or something could be the lawful target of attack. Who or what could be targeted and on what basis?".
On the "Lex Specialis Approach" (for IHL) *cf., e.g.,* Lesh, Conduct of hostilities, pp. 107 f. or Zwanenburg, Peace Operations, pp. 166 ff.

481 Warbrick, European Response to Terrorism, p. 1006.

482 Warbrick, Prevention of Terrorism, p. 88: "unwillingness to draw the distinction between irregular warfare and recourse to terrorism" (as well as a subtle hint that special rules could have been created for piracy, p. 89).

483 *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 95; *Hassan v. The United Kingdom* (GC), 29750/09 (2014), § 59; *Jaloud v. The Netherlands* (GC), 47708/08 (2014), § 157.

484 Hampson, Article 2 during armed conflict, p. 206.

485 *Cf.* Hampson, Article 2 during armed conflict, p. 209.

that were taken after the incident, but it appears that only a rather selective summary of these were present in the court file. While it cannot be speculated whether the court of appeal would have reached another conclusion had it been in a position to read all of the witness statements, this is a serious flaw in the quality of the investigation. Sofar we agree with the position taken by the majority of the Grand Chamber. However, we respectfully regret that the Grand Chamber also found it appropriate to scrutinise the investigations in Iraq in such a painstaking way that eyebrows may be raised about the role and competence of our Court.»[486]

4.4.3. Wartime emergency as a hinge?

Art. 15 ECHR (*see* no. III.3.1) mentions *time of war* as a possible reason for a derogation of Convention guarantees. The right to life according to Art. 2 ECHR is, however, non-derogable (*see* no. III.3.4.3).

It can be deduced from the judgment *Hassan v. The United Kingdom* (*see* no. III.4.4.2) that the Court would only take IHL into account at all if a Convention State invokes the derogation of Convention guarantees, particularly in non-international armed conflict[487]. Only the invocation of the state of emergency according to Art. 15 ECHR would then open the scope of application of IHL.

In our opinion, the opening of the scope of application of IHL decisively determines whether the heaviest offensive means (*see* no. IV.3.3.3.a) such as artillery and air strikes (against legitimate targets) are permissible[488]. In this respect, IHL can provide the legal basis for a special use of means within a limited framework – provided that combatants are fought and civilians are spared[489].

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[486] *Jaloud v. The Netherlands* (GC), 47708/08 (2014), *joint concurring opinion* der judges Casadevall, Berro-Lefèvre, Šikuta, Hirvelä, López Guerra, Sajó and Silvis, § 5.

[487] *Cf.* Hampson, Article 2 during armed conflict, pp. 203 f.

[488] *Cf.* Hampson, Article 2 during armed conflict, p. 206.

[489] But *cf.* Hampson, Article 2 during armed conflict, pp. 204 ff.

4.5. RELEVANCE OF INTERNATIONAL HUMANITARIAN LAW FOR THE USE OF FORCE

The system of the Geneva Conventions anchors the fundamental distinction between combatants and civilians in international law. The protocols are based on the concept of a distinction between two types of armed conflict. This approach has never been entirely convincing, especially in the case of armed conflicts within states. Depending on the nature of the parties involved and the way in which a domestic conflict is conducted, the application of the legal bases of IHL for a use of force may be controversial or unsatisfactory[490]. According to the jurisprudence of the ECtHR (on the territorial scope of the Convention), Art. 2 ECHR claims its place (*see* no. III.2.5.1).

IHRL and IHL differ from each other: different *standards* apply with regard to the protection of human life as a legal asset, with regard to the maintenance of proportionality and with regard to the duty to investigate[491].

In the context of an *armed international* conflict, it is easier to refer to IHL (or here: the LOAC) and to stress its significance. In the case of a *non-international armed conflict*, this is much more difficult. However, it would be erroneous to assume that in an international armed conflict only the IHL would form the legal framework for military operations. On the contrary, it is precisely the complementarity of IHL, IHRL and the national legal framework that can enable adequate protection of the right to life. The sometimes criticised lack of clarity in the standards does not detract from this: it is undisputed that combatants are legitimate targets of attack in armed conflict. It is undisputed that civilians must be protected.The ambiguity in between is a dogmatic one. In the application of the law, the difference between IHL and IHRL is less pronounced than it might seem in theory. The loss of human life – even of civilians – in *international armed conflict* does not immediately lead to a duty to investigate[492]. But the fulfilment of a duty to investigate according to the

490 *Cf., e.g.,* Lubell/Prud'homme, Impact of human rights law, pp. 112 ff. and 115 ff. or Blank/Guiora, Teaching old Dogs New Tricks, pp. 50 ff.

491 Hampson, Article 2 during armed conflict, pp. 196 f.

492 Hampson, Article 2 during armed conflict, p. 196.

standards of Art. 2 ECHR would be illusory there anyway (*fog of war*) – and obvious cases (where it would effectively apply) are in our opinion most likely war crimes and as such punishable.

IHL allows a wide scope for "actions" – but it also contains clear limits. These limits should and must always apply. What is prohibited under international law in armed conflict may not be permitted in "milder" forms of conflict[493].

In this respect, it is not surprising (and even consistent) that the legal and administrative framework created for policing does not regulate certain forms of violence.

An at least indirect link between IHL and IHRL can be found in the assessment of the absolute necessity for the use of force: under IHRL, a use of force cannot be proportionate if it is based on the use of means prohibited under LOAC. What is recognised as inhumane in armed conflict cannot be considered proportionate in policing in a democratic society. Conversely, the use of means permitted under LOAC does not allow any conclusion to be drawn about proportionality under IHRL[494].

If certain weapons or methods of warfare have been banned in an international convention, it is in our opinion highly questionable whether they can be permissible in a form of policing. The use of banned means in policing raises questions about compliance with the principle of proportionality. These range from the suitability to the necessity to the reasonableness of such a use of force. The justification for the inadmissibility is then not derived from the LOAC, but also from fundamental rights obligations (whether these are anchored internationally or nationally). In our opinion, prohibitions under the LOAC can also form analogous points of reference as "value decisions" for legally assessing the use of force. Even if the scope of the LOAC is not opened

493 *Cf.* Combs, Terrorism in the Twenty-First Century, p. 248.

494 *Cf.* Goddard, Applying the ECHR to the Use of Physical Force, p. 420.

up in the case of policing, the use of such means outside the LOAC can hardly appear permissible[495].

In our opinion, a relativisation of IHL in the face of modern forms of conflict must be refused[496]. It is precisely in the exercise of any coercive means by state authorities – under whatever title and for whatever purpose – that both national and international legal bases must be taken into account. It must be borne in mind that terrorist groups have never been able to achieve their goals (*see* no. III.1). Nevertheless, recourse to such inadmissible or completely disproportionate measures can endanger a democratic order. In this respect, the fight against any form of terrorism is a battle of unequal means. The struggle of law against injustice is always a test of endurance.

Allowing *human rights guarantees* to step back behind IHL altogether would mean granting the opposite side a *de facto* equal status – instead of punishing the crimes of criminal individuals[497]. In the present context, however, these questions do, *prima vista*, not arise. The use of coercive means in the context of normal police activity does not constitute an armed conflict (even if it takes place in the context of combating terrorist activities).

5. CONCLUSION: GUARANTEEING THE RIGHT TO LIFE AS A MANDATE AND A CONSTRAINT

The general guarantee of the right to life has become of great practical importance. With the case law on the positive, the negative and the procedural obligation, Art. 2 as part of the *living instrument* ECHR has three strong manifestations.

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[495] But *cf.* Corn/Watkin/Williamson, Law in War, p. 164 with a "LOAC-perspective" (*i.e.,* with a "reversed sign") note that the "especially complicated question likely to continue to generate different opinions".

[496] But *cf.* Van Creveld, Transformation of War, p. 225: "As the old war convention fades away, a new one will no doubt take its place – the waging of war without such a convention being in principle impossible. The coming convention's function will be the same as it has always been: namely, to define just who is allowed to kill whom, for what ends, under what circumstances, and by what means".

[497] *Cf.* Warbrick, European Response to Terrorism, p. 1017.

The positive obligation requires the creation of a legal and administrative framework, *i.e.,* the use of state regulation as an instrument for the protection of human life. The obligation is far-reaching in terms of content. Ultimately, it also includes the creation of foundations for the fulfilment of the negative and procedural obligation, what requires an effective independent judicial system to be set up. The two particular threads of the positive obligation concern the implementation of the legal and administrative framework: the *dangerous activities* specifically cover abstract dangers caused by civilisation. The fight against *real and immediate risk* concerns concrete obligations to avert immediate dangers.

The *positive obligation* in general and the two threads cannot be clearly separated. In the area of health care (or medical interventions), for example, it is hardly possible to distinguish between the general obligation to create a legal and administrative framework and the regulation of dangerous activities (prevention of danger in abstract). In general, relating preventive state obligations to dangerous activities is proving to be unsatisfactory and pointing in the wrong direction. The reasoning of the ECtHR in its judgments on the earthquake and flood cases illustrates that the duty to adequately establish the legal framework must be understood comprehensively. In contrast, dangerous activities are a special category of regulation of the activities of third parties. This presupposes knowledge of the potential dangerousness of the respective fields of activity. In this respect, dangerous activity must be distinguished from mere risk and subjected to an objective assessment.

Dealing with *potential risk* has at least partially liberated itself from the legal and administrative framework in general: in the case of administrative action to avert danger (policing in modern societies), it applies independently. In this area, however, no unreasonable burden may be imposed on the state. But this burden ultimately refers rather to the knowledge or need to know of a danger than to the use of state resources. If the state knows about a threat, it is obliged to act. However, the impossible cannot be expected.

The *negative obligation* prohibits intentional killing. It itself contains grounds for justification. In particular, the use of coercive means requires appropriate regulation. It is apparent from the grounds for justification that the protection of human life in the

ECHR does not correspond to an absolute right (although, conversely, it would fall short of the mark to describe it as merely a "relative right"). The principle of proportionality is also clearly expressed in the negative obligation.

The *procedural obligation* has a hybrid function. At its core it is the obligation to investigate deaths and potentially fatal situations. However, this is always linked to a review of the legal and administrative framework in a specific individual case. Since violations of every single content can lead to a violation of Art. 2 ECHR, the procedural obligation is of enormous importance. It can serve not only as a catch-all obligation but also as a driving force for the further concretisation of the fundamental right.

The state authorities are obliged to take concrete measures within the framework of general policing when a real and immediate risk materialises. This is the case when a violent action (by perpetrators) takes place and the state authorities know or should have known about it at the same time. In this case, Art. 2 of the ECHR imposes a duty to protect potential victims, but at the same time it demands respect for the perpetrators' right to life[498]. In addition, the state has a procedural obligation to clarify the facts of the case immediately after the situation has been rectified and to establish responsibility.

Whether a state knows about a risk or what it ought to know mainly depends on the nature of a "risk". The materialisation of general life risks is not sufficient for a violation of Art. 2 ECHR. Even in the case of abstract threats, it is necessary to differentiate within the framework of general policing. Here, it is primarily the legislator's duty to take adequate protection measures. The situation is different when special risks consolidate into concrete dangers and then (could) materialise.

> It is questionable whether the case law on *dangerous activities* and *potential risk* will converge in the future. A convergence would inevitably be at the expense of restricting other fundamental rights guarantees. *Absolute* security – or a legal interest in it – does not and can never exist. For a democratic state based on

[498] In the present context, a legal view is followed. The perpetrators are both bearers of the human right to life and perpetrators of the legal order and endangerers of the right to life of third parties. Terrorist acts of violence find no justification in the legal system.
Moreover, it is strongly doubted that " reasons for justification" for terrorist attacks can arise from a political point of view; *cf.* further on the development of the motives of selected groups from the 19th century to the present day Laqueur, Krieg dem Westen, pp. 15 ff.

> the rule of law, the goal of striving for absolute security would be associated with self-sacrifice. In this sense, absolute security is not even worth striving for.

The prevention of threats is carried out on the basis of the legal and administrative framework created for this purpose. All three obligations under Art. 2 ECHR must be taken into account. This applies in particular to the regulation of the use of means of coercion by state actors in all situations – from general police activity (still "ordinary policing") up to the state of emergency. In particular, the states must regulate the use of (fire) weapons.

In the case of state measures against terrorist threats, the right to life according to Art. 2 ECHR and the ECtHR's case law on this subject come into play in all its nuances. In certain situations, it can both require the state to act within the framework of the legal system and at the same time narrowly limit this required action. With regard to a use of force and especially with regard to potentially lethal coercive police measures, the general principles of the legal system also apply when fighting terrorist actors. It can be assumed that states must regulate the use of (fire) weapons in particular within their legal and administrative framework.

> Accordingly, the behaviour of state security authorities must not be directly compared with that of insurgents, terrorists or other criminals[499]. For the former, the legal framework applies in its entirety – it may just be the question of what this means in a particular case. The latter violate legal norms (and moral conventions) – for what they are to be punished.
>
> In *McCann and others v. The United Kingdom*, the ECtHR refused to award damages in addition to legal costs: «[…] having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the Court does not consider it appropriate to make an award under this head. It therefore dismisses the applicants' claim for damages.»[500]

In the case of action against terrorist activities, the grounds of justification according to Art. 2 para. 2 ECHR can come into play in all three variants (*see* no. III.2.3). In this

499 *Cf.* van der Bijl, Operation Banner, p. 231.

500 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), p. 219.

regard, the defence of a third person against unlawful violence (Art. 2 para. 2 letter a ECHR) will be of particular importance. Due to the fact that the fundamental right to life is also fully protected in a state of emergency, the ECtHR's case law on the use of potentially lethal means of coercion applies in principle without restriction[501]. The required absolute necessity has the function of an adjusting screw. It has a special meaning when the purpose of the action of the security forces is to protect the lives of potential victims. The legal rules on the use of force must then be interpreted *accordingly*. The international standards that are not directly applicable, such as the *UN Basic Principles*, can be used as benchmarks for comparison.

The Convention States are in principle obliged to protect people threatened by the phenomenon of terrorism. If and insofar as a general terrorist threat exists (*potential risk*), general measures are to be implemented; they already apply in the area of reconnaissance and assessment of the situation. In order to avoid specific terrorist actions or – more generally – to disrupt terrorist activities, intelligence-led operations can also be considered in the context of threat avoidance (or risk minimisation). Laws and measures for state of emergency gain an indirect significance insofar as they can serve to protect the lives of potential victims. However, other low-threshold measures such as warnings or increased police activities in general can be appropriate. In deriving duties to protect from Art. 2 ECHR and judging anti-terrorist operations, the ECtHR also deals with terrorist acts *per se*; according to the case law, it is the issue for the Convention States «to protect those at risk from irregular violence»[502].

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501 *Cf. Andronicou and Constantinou v. Cyprus*, 86/1996/705/897 (1997); *Collette and Michael Hermsworth v. The United Kingdom*, 58559/09 (2013); *Leonidis v. Greece*, 43326/05 (2009); *Makaratzis v. Greece* (GC), 50385/99 (2004); *McDonell v. The United Kingdom*, 19563/11 (2014); *Mocanu and others v. Romania* (GC), 10865/09 (2014); *Nikolova and Velichkova v. Bulgaria*, 7888/03 (2007); *Perişan and others v. Turkey*, 12336/03 (2010); *Perk and others v. Turkey*, 50739/99 (2006); *Scavuzzo-Hager and others v. Switzerland,* 41773/98 (2006); *Šilih v. Slovenia* (GC), 71463/01 (2009); *Soare and others v. Romania*, 24329/02 (2011); *Trévalec v. Belgium*, 30812/07 (2013).

502 *Cf.* Warbrick, European Response to Terrorism, pp. 994 f.

From the perspective of the Convention guarantees and their application, the fight against terrorism is not about striking a balance[503]. The guarantees apply. They lead to tough obligations on the part of the states: positive, negative and procedural. In this respect, the discussion about *new forms of conflict* is basically irrelevant from a legal point of view. Terrorists are criminals and are to be judged according to the standards of criminal law by the competent judicial authorities of the Convention States. Acts of violence are to be prevented or stopped by the means of police law. However, the *form of violence* plays a central role in the assessment of a threat in general and an endangerment in particular. This raises questions of proportionality for the use of resources and sometimes for the scope of special means. In the case of terrorist threats, the intertwining of positive, negative and procedural obligations is particularly pronounced. Moreover, in anti-terrorist operations, the positive (enjoining) and negative (prohibiting) obligations under Art. 2 ECHR can conflict with each other. Accordingly, the various phases of anti-terrorist operations ultimately also intertwine to a great extent. The actual reasons for a violation of obligations under Art. 2 ECHR by state security forces often lie in the preliminary stages of police operations.

[503] In a previous contribution, Warbrick, Prevention of Terrorism, p. 118 "(...) tried to avoid the usual approach of saying that the problem of accommodating the control of terrorism with the protection of human rights is one of balance. It is, of course, but it is not the function of the Convention institutions to strike that balance for the States".

IV. PRE-OPERATIONAL DUTIES

«A central weakness of much of the debate about how to deal with terrorism is that many of the contributions are clouded by political posturing, moral confusion, and wishful thinking.»

Grant Wardlaw
(The Democratic Framework)

1. CREATION AND DEVELOPMENT OF THE LEGAL AND ADMINISTRATIVE FRAMEWORK

The long-term effect of terrorist actions is decisively reflected in the reactions of the (directly or indirectly affected) public (*see* no. III.1). The shock effect intended by the perpetrators includes confusion and insecurity over the fact that a certain event could happen at all[504].

Insofar as terrorist acts are directed against public security in general, a relatively wide range of forms of action as well as targets can be considered for violent actors. An effective fight against terrorist activities is most likely to succeed if it starts as early as possible. Preventive measures and the reconnaissance of illegal activities are essential prerequisites for the successful implementation of anti-terrorist operations: sufficient knowledge (or at least well-founded assumptions) on violent actors and their intentions and capabilities, as well as about their potential targets, are essential for taking appropriate defensive measures.

The fight against terrorist threats is based on the applicable legal and administrative frameworks of the states. Increasingly, however, there is also an impregnation through international obligations and standards. Pre-operational obligations to fight terrorism can arise from international treaties or in the context of participation in collective security organisations and supranational communities.

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504 Laqueur, Terrorismus, p. 382.

1.1. OBLIGATIONS UNDER INTERNATIONAL TREATIES

In the fight against terrorism, "international law appears a somewhat dubious tool"[505].

International treaties to counter terrorist activities are fragmentary by nature; they can contain both preventive and repressive elements: On the one hand, depending on the type of threat and the assessment of the need for action, states have undertaken to comply with international rules and standards to ensure security in specific areas[506]. On the other hand, states commit under international law to punish certain terrorist acts under criminal law.

Preventive obligations arise from conventions in the areas of aviation[507], the protection of nuclear materials[508] and the protection of such persons protected under international law[509].

Repressive obligations of states can be found in other conventions on international cooperation. For example, the Council of Europe Convention on the Suppression of Terrorism obliges states to either prosecute or extradite suspected terrorists[510]. Substantial measures to counter terrorism in Europe can

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505 Combs, Terrorism in the Twenty-First Century, p. 273.

506 *See* https://www.un.org/counterterrorism → resources → international legal instruments (last visited on 4 June 2022).

507 Convention on offences and certain other acts committed on board aircraft, 14 September 1963; Convention for the Suppression of unlawful seizure of aircraft, 16 December 1970; Convention for the suppression of unlawful acts against the safety of civil aviation, 23 September 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973; Convention on the Physical Protection of Nuclear Material; *cf.* on the content of the Conventions Combs, Terrorism in the Twenty-First Century, pp. 256 ff. or Mueller, Innere Sicherheit Schweiz, pp. 357 f. and on the importance of international cooperation to prevent aircraft hijackings Forest Counterterrorism, p. 6.

508 Convention on the Physical Protection of Nuclear Material; *cf.* Mueller, Innere Sicherheit Schweiz, pp. 489 ff.

509 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973 and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; *see also* Combs, Terrorism in the Twenty-First Century, pp. 260 f.

510 *Cf., e.g.,* Wilkinson, Changing threat, pp. 29 f.

then be found in other agreements and forms of cooperation in the areas of *judicial cooperation* and *extradition*[511].

The International Convention Against the Taking of Hostages is of a *general nature*[512]. It covers the creation of criminal offences (Art. 2 and 5), cooperation between states (Art. 4), dealing with alleged offenders (Art. 6 ff.) and the relationship of the Convention to other international law (Art. 12 ff.).

1.2. COUNTERING TERRORISM WITHIN THE FRAMEWORK OF THE UN

With the Declaration of 24 October 1970, the UN General Assembly has prohibited states from supporting or condoning terrorist activities.

> «Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.»[513]

The declaration aims to outlaw state terrorism and to help dry up safe harbours for terrorist organisations.

A general condemnation of terrorist activities was made in 1985 in a resolution[514].

> The UN General Assembly «[u]nequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardize friendly relations among States and their security»[515].

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511 *Cf., e.g.,* Wilkinson, Changing threat, pp. 30 ff.

512 On the background Combs, Terrorism in the Twenty-First Century, p. 261.

513 UN General Assembly, 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (of 24 October 1970).

514 UN GA Resolution 41/60.

515 UN GA Resolution 41/60, § 1.

States are urged to join international agreements to counter terrorism, to harmonise their national legal frameworks accordingly and to address the root causes of terrorism[516]; further efforts followed[517].

1.2.1. Resolutions of the UN Security Council

In the more recent past, resolutions on combating terrorism have increasingly been adopted by the UN Security Council[518]. The still rather general measures being taken against terrorist activities are aimed in particular at the more recent phenomenon of transnational terrorism[519]. The fight has been intensified after the attacks of 11 September 2001 in New York and Washington.

The UN Security Council resolutions focus on preventing the financing of terrorist acts, but also the support of terrorist activities in a broader sense[520]. States shall in particular take «the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information»[521] and «(...) take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts motivated by extremism and intolerance and to prevent the subversion of educational, cultural, and religious institutions by terrorists and their supporters»[522]. They also underline the need to counter the causes of the rise of terrorist groups (and in particular violent extremism)[523].

This places the UN member states under an obligation to prevent terrorism (*see* no. III.1 on the vague concept of terrorism) at several levels both in general and in specific areas.

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516 UN GA Resolution 41/60, §§ 4 ff.

517 *Cf.* Combs, Terrorism in the Twenty-First Century, p. 269.

518 *See* also Combs, Terrorism in the Twenty-First Century, pp. 269 ff.

519 *Cf.* Marsden/Schmid, Typologies of Terrorism, p. 184.

520 UN Security Council, Resolution 1373 (2001) and Resolution 1624 (2005).

521 UN Security Council, Resolution 1373 (2001), § 2 (b).

522 UN Security Council, Resolution 1624 (2005), § 3.

523 UN Security Council, Resolution 2178 (2014), § 15.

It also includes the classic penalisation and actual punishment of corresponding crimes as well as preventive security measures (for example in border protection).

1.2.2. Counter Terrorism Committee und UN Action Plan

UN Resolution 1373 (2001) establishes the basis for the creation of the Committee of the Security Council (so-called Counter-Terrorism Committee [CTC]); it is «consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise» (§ 6). The CTC is intended to facilitate exchanges between states and between states and international organisations in counter-terrorism matters[524].

A plan of action[525] approved by the UN General Assembly[526] provides in particular for preventive measures in a cross-border context (up to a biometric database or measures in international civil air traffic) as well as technical cooperation. Particular importance is attached to *measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard* (§ IV).

The UN resolutions on counter-terrorism emphasise the need for measures to be implemented in accordance with human rights[527].

1.3. INTERNATIONAL GUIDELINES AND RECOMMENDATIONS

In addition to the more or less hard instruments for countering terrorism at the international level, there is a broader *soft law*, which is the main focus of this study. This can be seen as a kind of international consensus on the use of force to avert danger in general and on the use of potentially lethal force in particular. It contributes to the

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524 UN Security Council, Resolution 2322 (2016), § 19. To the activities of the CTC, *see also* the Report on the activities of the Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate pursuant to Security Council resolution 2322 (2016), annex to Security Council 2017/1065. Rather critical of the CTC Dhanapala, UN's Response to 9/11, pp. 10 ff.

525 Annex to the UN General Assembly, Resolution 60/288 (2006), The United Nations Global Counter-Terrorism Strategy.

526 Resolution 60/288 (2006) adopted by the General Assembly on 8 September 2006.

527 UN Security Council, Resolution 1373 (2001), § 3 (f), resolution 1624 (2005), § 4, resolution 2178 (2014), § 5. Accordingly, the Office of the High Commissioner for Human Rights (OHCHR) is involved in the relevant working groups; *cf.* OHCHR, Human Rights Resolution 2005/80.

interpretation of regulations in the individual states and the further development of the regulatory framework.

In the following the *Guidelines on human rights and the fight against terrorism* and the *Code of Conduct for Law Enforcement Officials* as well as the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* of the United Nations are illustrated selectively.

> For the interpretation of the *Code of Conduct* and the *UN Basic Principles*, the comments of the *Geneva Academy*[528] can be consulted. Their *in-brief* summarises the existing international law and guidelines on the use of force and discusses the influence of UN human rights law on law enforcement authorities[529].

Of the international guidelines and recommendations, the *UN Basic Principles* have the greatest practical relevance for the jurisprudence of the ECtHR.

1.3.1. Council of Europe Guidelines

The *Guidelines on human rights and the fight against terrorism* (*see* no. III.2.3.3) establish general principles for countering terrorism in conformity with fundamental rights. These include, in particular, the state's *positive obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life* (§ I), the emphasis on the principle of *lawfulness* (§ III.1) and the prohibition of torture (§ IV).

According to the Guidelines, restrictions on fundamental *must be defined as precisely as possible and be necessary and proportionate to the aim pursued* (§ III.2). In our opinion, the guiding principles for counter-terrorism measures for the Convention States must also be observed by analogy in the case of a use of force in general.

Additional elements of the guidelines concern special measures and procedural rights.

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528 Geneva Academy, In-Brief No. 6 (November 2016).

529 The *in-brief* addresses the importance of the UN Basic Principles and how existing or new challenges can be met. States should respect the established standards (such as "shoot to stop" or "shoot to kill") also in the fight against terrorism. In future, it will be essential to work out detailed regulations on the necessary and proportionate use of "less lethal weapons".; Geneva Academy, In-Brief No. 6, pp. 3 f. and 30.

In particular, restrictions are possible within the framework of the procedural rights of defence. For example, interception of correspondence between counsel and detained terrorists is considered permissible under certain circumstances (§ IX. 3.[i], § XI. 2.[i].). The use of anonymous statements is considered legitimate if it serves to protect witnesses (§ IX. 3.[iii]). In addition, the right to access to the case documents may be restricted (§ IX. 3.[iii]). However, these limitations must not undermine or erode the substance of the right to a fair trial[530].

Special provisions may apply to detained terrorists: they may be segregated within the prison, separated between different prisons (para. XI. 2.[iii]) or, within the bounds of proportionality, placed in a specially secured environment (para. XI. 2 [ii]).

1.3.2. Code of Conduct for Law Enforcement Officials

The *Code of Conduct for Law Enforcement Officials* (Code of Conduct)[531] of the United Nations sets out minimum standards[532] for law enforcement authorities. The key parameters for the use of force are briefly discussed below.

The notion of law enforcement officials is not always easy to understand. The structure and the organisation of the law enforcement instruments can be an obstacle to a precise definition (depending on each state). According to Art. 1, the term (at least in connection with a use of force) is to be interpreted in a broad sense.

(a) The term ‹law enforcement officials›, includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention.

(b) In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.

530 *Council of Europe*, Guidelines on human rights and the fight against terrorism, explanations, p. 29.

531 Code of Conduct for Law Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979.

532 Code of Conduct for Law Enforcement Officials, Commentary (Article 8).

(c) Service to the community is intended to include particularly the rendition of services of assistance to those members of the community who by reason of personal, economic, social or other emergencies are in need of immediate aid.

(d) This provision is intended to cover not only all violent, predatory and harmful acts, but extends to the full range of prohibitions under penal statutes. It extends to conduct by persons not capable of incurring criminal liability.[533]

The broad interpretation leads to a potentially wide scope of application of the specific principles of the *Code of Conduct*.

The guiding principle[534] is to respect and to protect human dignity and to maintain and uphold the human rights of all persons (Art. 2). Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty (Art. 3). The principle of proportionality should be observed for each type of use of force in the circumstances of each individual case.

The use of firearms is a special type of use of force – to which particularly narrow limits apply (use *ultima ratio*) as well as the obligation to monitor the use of firearms.

(a) This provision emphasizes that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.

(b) National law ordinarily restricts the use of force by law enforcement officials in accordance with a principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of this provision. In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.

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533 Code of Conduct for Law Enforcement Officials, Commentary (Article 1).

534 In the sense of a fundamental importance also of the Code of Conduct for Law Enforcement Officials, Commentary (Article 2).

> *(c) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.*[535]

Furthermore, torture, inhumane treatment or measures of a penal nature must be (actively) prevented (Art. 5). Special duties to protect take effect in the event of danger to persons or injury to their physical integrity (*law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required;* Art. 6).

1.3.3. UN Basic Principles

The United Nations' *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* are not binding (under international law). They are not directly applicable in a state's legal framework but have gained great importance as a standard of comparison in the recent case law of the ECtHR on Art. 2 ECHR (*see* no. III.2.3.3 as well as on specific requirements, no. IV.1.4.2). In particular, this concerns the level of detail of national legal regulations with regard to the use of (potentially lethal) force by state security forces.

a. General provisions

The general provisions (§ 1 – 8) include principles for the use of physical coercion and for the use of firearms in particular. They call for a state regulation of coercive means from an ethical point of view; in addition, the corresponding regulations are to be constantly reviewed – and thus, in our opinion, further developed (§ 1):

> *Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforce-*

[535] Code of Conduct for Law Enforcement Officials, Commentary (Article 3).

> *ment officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review.*

The principle of proportionality requires that various non-lethal and potential lethal means of engagement as well as protective equipment are made available to the emergency forces involved – in our opinion, depending on the situation or the situation itself (§ 2; *see* no. IV.1.4.2.c). The use of firearms must be necessary (*ultima ratio*)[536] – this means that as far as possible it should be avoided (§ 4):

> *Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.*

Insofar as the use of physical coercion in general or of firearms in particular is *unavoidable*, the *UN Basic Principles* establish a further framework for it (§ 5 – 7). Therefore it's essential for states to ensure that the following criteria are established in their legal framework:

- *exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved* (§ 5, lit. a);
- *minimize damage and injury, and respect and preserve human life* (§ 5, lit. b);
- *ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment* (§ 5, lit. c);
- *ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment* (§ 5, lit. d).

Incidents involving the use of force or weapons shall be reported immediately to superiors and arbitrary and abusive use of force shall be sanctioned in accordance with relevant national laws (§ 6 and 7).

[536] Use of the mildest yet most effective available means.

Even under special circumstances, no deviation from these principles is permissible; the only exception is in a state of emergency (§ 8; on the state of emergency as well as on the resistance to emergency of Art. 2 ECHR *see* no. III.3).

b. Special Provisions

The special provisions (§ 9 – 26) describe requirements for the use of force for members of the authorities covered by the *UN Basic Principles* (law enforcement officials).

- This includes that the deliberate use of firearms against people must only be means of last resort *(ultima ratio)*: *intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life* (§ 9; *see* no. V.5.2.1)[537].
- In addition, security forces should identify themselves as such before using weapons and threaten the use of firearms if the circumstances allow it (§ 10 and 11 lit. e).

The *UN Basic Principles* provide *rules and regulations on the use of firearms by law enforcement officials* (§ 11), in particular to

- *specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted* (lit. a);
- *ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm* (lit. b);
- *prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk* (lit. c);
- *regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them* § (11 lit. d);
- *provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty* (lit. f).

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[537] *Cf.* Sax, Soldaten gegen Piraten, p. 92 (in particular on the question of whether a danger to life must be a necessary precondition for the use of firearms).

Furthermore, officials that are allowed to carry guns must undergo a rigorous selection process as well as physical and psychological training. Police ethics and human rights are to be included as central issues in this context. In addition, periodic reviews of skills and fitness (physical and mental) should take place (§§ 18 – 20; *see* no. IV.4).

After the use of firearms, psychological support shall be provided to the persons involved (§ 21; *see* no. VI.2.1); and finally, procedures and clear processes must be defined that allow an independent investigation and judicial review (§§ 22 – 26).

1.4. REQUIREMENTS UNDER ARTICLE 2 ECHR

The ECHR requires a sufficient guarantee in the Convention States' legal and administrative framework for the protection of life as a legal asset (*see* no. III.2.2.2). In order to counter also terrorist activities, both specific (*see* no. III.2.3.2) and general police law as well as the law of intelligence services and criminal law are relevant. National legislators have considerable autonomy in deciding how to structure their legal and administrative framework as a suitable instrument for countering possible terrorist threats. If necessary, (further) obligations under international law must be taken into account[538] (*see* nos. IV.1.1 and1.2).

> Hereinafter, the focus is not on a sociological (-scientist) explanation. Rather, the provisions resulting from Art. 2 ECHR are contextalised on behalf of countering terrorism. Guided by the thesis that the legal framework has the (decisive) steering function[539] – both to enable state measures (in particular the use of force) and to restrict them on the basis of the (here close) binding to the law[540].

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538 The distinction between *monism* and *dualism* is not discussed further.

539 Experts dispute the function and effectiveness of law in countering terrorism; Wilkinson, Terrorism versus Democracy, pp. 113 ff.

540 Wardlaw, Democratic Framework, p. 8: "Security authorities should enjoy the wholehearted support of govemment, but at the price of understanding that their powers are only those contained in the law and that any excursions outside the law will be punished."

1.4.1. The legal guarantee to life as an obligation to counter terrorism?

a. Countering terrorism within the legal and administrative framework

The ECHR – in its interpretation decisively influenced by the case law of the ECtHR – sets the fundamental rights framework for countering terrorism as well[541]. Art. 2 and 3 of the ECHR are non-derogable (*see* no. III.3).

> The recourse to emergency clauses in the face of terrorist threats in the Council of Europe member states is very exceptional. Sometimes the states enact special laws[542]. In the United Kingdom, for example, the *Anti-Terrorism, Crime, and Security Act 2001* was passed after 11 September 2001 and the *Terrorism Act of 2006* after the London attacks[543]. In France, in the German federal states and in Switzerland (confederation and cantons), the terrorist threat posed by dangerous persons is currently integrated into law.

An absolute protection against terrorist threats is not required by Art. 2 ECHR; particularly drastic (effective) measures must always be weighed against the risk of abuse, mistakes and excesses[544]. Threats to the democratic state must be countered with the means of the rule of law. Conversely, however, a complete lack of action in the face of new or changed threats would, in our opinion, be inadmissible.

b. Legal definition of "terrorism"?

It would seem reasonable to direct measures to counter terrorism towards a legitimate goal by means of a legal definition. This would make measures selectively permissible, but beyond that, they would be restricted (in the sense of being inadmissible for areas of application beyond the corresponding definition). From Art. 2 ECHR no obligation follows to define terrorism legally.

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541 Warbrick, European Response to Terrorism, p. 994: The Court shows a "robust (though perhaps not a tough) reaction" to measures to combat terrorist threats.

542 *Cf.* Warbrick, European Response to Terrorism, p. 993.

543 *Cf., e.g.,* Honeywood, Britain's Approach, pp. 31 ff.

544 Warbrick, European Response to Terrorism, p. 1016.

Legal definitions of "terrorism" suffer from the absence of a generally valid *scientific definition* of the term (*see* no. III.1). Since terrorism aims at political change, it differs from ordinary crime in its finality *prima-vista*. However, the violent crime is merely a means to an end under a terrorist motivation. This is another reason why a legal definition of terrorism is open to interpretation. Such an interpretation cannot do without (political) valuation. However, the meaning of terrorism (of whatever kind) must not be allowed to degenerate into a random and meaningless shell[545]. The creation of a *catchall*[546] must just be prevented.

An attempt to define "terrorism" was made in the UK with Art. 1 of the *Terrorism Act 2000*[547]:

> ***Terrorism: interpretation***
>
> *(1) In this Act «terrorism» means the use or threat of action where—*
>
> *(a) the action falls within subsection (2),*
>
> *(b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and*
>
> *(c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.*
>
> *(2) Action falls within this subsection if it—*
>
> *(a) involves serious violence against a person,*
>
> *(b) involves serious damage to property,*

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545 In particular, the tactics and ultimate goals of terrorist groups and other criminal organisations (especially those considered *organised crime*) are completely different. *Cf.* with a spotlight on differences between illegal drugs traffic and terrorismin the 1980s Wardlaw, Linkages, pp. 7 and 22 f.

546 Wardlaw, Democratic Framework, p. 6.

547 *See also* Michaelsen, War Against Terrorism, pp. 119 ff. and of corse *A. and others v. The United Kingdom* (GC), 3455/05 (2009), §§ 88 ff.

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section—

(a) «action» includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) «the government» means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

From a fundamental rights perspective, a legal definition of terrorism appears neither necessary nor advisable[548]. On the one hand, states must be able to recognise possible

[548] Quite similarly, Warbrick, European Response to Terrorism, pp. 1000 ff.; differently Wardlaw, Democratic Framework, p. 8: Each "(…) state must settle on a definition of terrorism. This is a contentious issue, which many see as unresolvable. But it is precisely the lack of precision over definition that allows counter-terrorism policy to go off the rails: to encompass activities that many would not consider terrorism and to promote unnecessary laws on the basis of an inflated threat. There must be at least an attempt to delimit what each country is going to define for itself as terronsm."

threats in general and to assess them in concrete situations. On the other hand, under the aspect of an existing *duty to protect*, the motive of a perpetrator is not relevant.

> Thus, the taking of hostages by an armed perpetrator triggers a state duty to act. Regardless of whether the perpetrators act out of financial interests (bank robbery or extortion) or out of "political" motives.

But the motive of the perpetrator is decisive in the *assessment* of a threat.

> Thus, it is relevant whether a "terrorist" is a potential suicide bomber or whether he is *trying* to escape a situation in a safe way.

Countering terrorist activities is also about the actual nature of a threat: that is, in particular, about methods, targets and means. In our opinion, the law can and must effectively counter the *symptoms* – the *disease* itself can only be overcome politically and socially (*see* no. V.6.1).

c. Special provisions for real and immediate risk

Preventive police means can be used to detect and assess threats. The assessment of a threat also serves to evaluate whether human life is at risk and what the adequate measures are to protect it (on the assessment of the situation *see* no. IV.2).

In cases of concrete danger from third parties (*see* no. III.2.2.5), we believe that additional margins of manoeuvre should be provided within the framework of legal and administrative regulations. These should make it possible *in extremis* to ensure not only the least invasive use of resources possible (*use of miniumum force*) but also the best possible protection of life as a legal interest (*maximum protection*). Whereby life as a legal asset is due to both, to people at risk and to offenders.

The different levels of a legal and administrative framework can overlap. In particular, practical elements of concrete measures are mostly to be regulated internally within the police. However, sufficient references to the democratically legitimised legal framework (in a formal sense) are necessary.

1.4.2. Regulation of the use of force

Terrorist actions usually involve the illegal, (directly or indirectly) media-effective use of violence (*see* no. V.6.1) to challenge the state's monopoly on the use of force (*see* no. III.1). In individual cases, it is usually not possible to counter such violence – for example, by suicide bombers or small armed groups – through negotiation.

What is required are *robust* state countermeasures that can be implemented without delay. This primarily involves the use of physical force and – depending on the circumstances – the use of potentially lethal means. The latter usually involves the use of firearms *ultima ratio* (for the use of *heavy* and *alternative means see* no. V.4.4.3).

a. Comprehensive rules as a principle

According to Art. 2 para. 2 ECHR, the use of force is permissible under certain circumstances. However, the Convention provision itself does not form the legal basis for interfering with the fundamental right, nor should it be interpreted too "broadly". The positive obligation under Art. 2 ECHR needs to be implemented in the legal framework.

> «As the text of Article 2 itself shows, the use of lethal force by law enforcement officers may be justified in certain circumstances. Nonetheless, Article 2 does not grant them *carte blanche*.»[549]

The ECtHR is a fundamental rights court but no general supranational constitutional court. Accordingly, in *McCann and others v. The United Kingdom*, the *Grand Chamber* stated that it «is not the role of the Convention institutions to examine in abstracto the compatibility of national legislative or constitutional provisions with the requirements of the Convention»[550]. Nevertheless, the *Grand Chamber* emphasises the finality of legal regulations.

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549 *Finogenov and others v. Russia*, 18299/03 (2011), § 207; quite similarly, in *Makaratzis v. Greece* (GC), 50385/99 (2004), § 58 («police officers» instead of «lawenforcement officers») and *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 249.

550 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 153, with reference to *Klass and others v. Germany* (Court Plenary), 5029/71 (1978), § 33.

> The «[…] national law must strictly control and limit the circumstances in which a person may be deprived of his life by agents of the State. The State must also […] exercise strict control over any operations which may involve the use of lethal force.»[551]

It can be deduced from the obligations under the Convention that a state's means of *intervention* are in principle to be created for and directed towards *normal situations*[552].

> The ECtHR seems to accept regulatory deficits (only) for exceptional situations – namely insofar as a duty to protect exists vis-à-vis third parties (*see* no. V.1)[553]. In doing so, the Court points to practical problems of insufficient state regulation: «The […] Suppression of Terrorism Act remained silent not only on the types of weapons and ammunition that could be used, but also on the rules and constraints applicable to this choice. It did not incorporate in any clear manner the principles of using force that should be no more than ‹absolutely necessary› such as the obligations to decrease the risk of unnecessary harm and exclude the use of weapons and ammunition that carried unwarranted consequences (see the UN Basic Principles and the Council of Europe Guidelines […]). At the same time, it provided near blanket immunity to the participants of antiterrorist operations from responsibility for any harm caused by them to ‹legally protected interests› […]. It is not surprising that in the absence of clear rules on conducting anti-terrorist operations, references were made to the Army Field Manual, which applied to combat situations in armed conflicts and appeared inappropriate for the situation.»[554]

For the Convention States, it is essentially a matter of regulating the use of force in their legal and administrative framework in general conformity with the Convention. A need for interpretation does not hamper the application of national norms in conformity with the Convention. This involves, for example, regulations on the right to self-defence[555].

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551 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 151.

552 On the importance of Art. 2 ECHR on *policing, cf.* Roche, Operationalising the ECHR, pp. 61 ff.

553 *Finogenov and others v. Russia*, 18299/03 (2011), § 230.

554 *Tagayeva and others v. Russia*, 26562/07 (2017), § 598.

555 *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), § 252.

> In its judgment *Giuliani and Gaggio v. Italy*, the *Grand Chamber* compared the self-defence norm under Art. 52 of the Italian Penal Code[556] with Art. 2 ECHR: «It is true that from a purely semantic viewpoint the ‹need› mentioned in the Italian legislation appears to refer simply to the existence of a pressing need, whereas ‹absolute necessity› for the purposes of the Convention requires that, where different means are available to achieve the same aim, the means which entails the least danger to the lives of others must be chosen. However, this is a difference in the wording of the law which can be overcome by the interpretation of the domestic courts. As is clear from the decision to discontinue the case, the Italian courts have interpreted Article 52 of the CC as authorising the use of lethal force only as a last resort where other, less damaging, responses would not suffice to counter the danger [...].»[557]

When drafting legal regulations, the possible consequences must be foreseen and taken into account in a legally adequate manner. Accordingly, special norms for the use of potentially lethal means of coercion are necessary[558]. The regulations form the framework for the permissible use of coercive means and apply to both spontaneous operations and coordinated actions. Thus, the legal framework influences the permissible tactical behaviour of state officials. Special organisational obligations for coordinated actions may supervene. In our opinion, this also includes the establishment of special *crisis response mechanisms* in the legal frameworks.

> The legal anchoring of *special powers* by the authorities can comply with the principle of legality. However, if these deviate from the usual responsibilities and powers, a confusion of responsibilities sometimes occurs – especially if operations (or campaigns) take place over a longer period of time. The same applies to emergency powers (*see* no. III.3). *Deviations* from the general legal

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556 *Persons who commit an offence when forced to do so by the need to defend their rights or the rights of others against a real danger of unjust attack, provided that the defensive response is proportionate to the attack* (highlighted only here).

557 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 214.

558 To this end, the Court sometimes requires very comprehensive regulations which, according to *Makaratzis v. Greece* (GC), 50385/99 (2004), § 58 have to take into account «even [...] avoidable accidents».

and administrative framework should therefore always be limited in time and content and be particularly simple to handle[559].

b. Special challenges and special requirements

The various fundamental rights of the ECHR usually define the personal and substantive scope of protection in para. 1 and possible restrictions in para. 2. The latter basically require the establishment of a legal basis, *i.e.*, general-abstract norms[560]. Insofar as there is *formal (e.g., written) legal foundation*, interference with fundamental rights also has democratic (usually parliamentary) legitimacy[561].

The ECtHR – surprisingly – allows that a use of firearms is regulated by a Convention State in a (simple) regulation by the executive power[562].

Art. 2 ECHR deviates from the usual structure of the enshrined fundamental rights norms. In this Article, a symbiosis takes place between the positive obligation or legislative mandate (*life shall be protected by law*) and the prohibition of killing (*no one shall be deprived of his life intentionally*) according to para. 1 and a proportionate use of force within the exceptional circumstances of para. 2. The exceptional circumstances in turn presuppose (further) legal regulations.

«In addition to setting out the circumstances when deprivation of life may be justified, Article 2 implies a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework defining the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the relevant international standards».[563]

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559 Quite similarly, Wilkinson, Terrorism versus Democracy, p. 117 (clearly and simply drafted).

560 *Maestri v. Italy* (GC), 39748/98 (2004), § 30: «some basis in domestic law».

561 In national constitutional systems (*e.g.,* in Switzerland), formal legal enactments are partly prescribed in the case of serious infringements of fundamental rights (which is usually assessed by its intensity). The ECHR does not know such a (double) gradation.

562 *Bakan v. Turkey,* 50939/99 (2007), § 51 (*règlement sur les fonctions et compétences de la gendarmerie*); confimed in *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 210.

563 *Leonidis v. Greece*, 43326/05 (2009), § 56.

The requirement of (general-abstract) norms as a pre-condition for the use of force is aimed at controlling *state behaviour* in conformity with the Convention.

> «[… Police] officers should not be left in a vacuum when performing their duties, whether in the context of a prepared operation or a spontaneous chase of a person perceived to be dangerous: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect […]».[564]

> In its judgment *Soare and others v. Romania*, the ECtHR criticised the lack of actual control of the use of firearms by the relevant legislation: «La […] législation applicable était la loi […] relative au régime des armes à feu, complétée par la loi […] sur l'organisation et le fonctionnement de la police. Ces lois énuméraient toute une série de situations dans lesquelles les policiers pouvaient faire usage d'une arme à feu sans avoir à répondre des conséquences de cet usage. Il est vrai que celui-ci n'était légitime qu'en cas de nécessité absolue et d'impossibilité d'utiliser d'autres moyens de contrainte ou d'immobilisation […]. […Le] droit roumain ne contenait aucune autre disposition réglementant l'usage des armes dans le cadre des opérations de police, sauf l'obligation de sommation, et qu'il ne comportait aucune recommandation concernant la préparation et le contrôle des opérations en question […]. […Le] cadre juridique […] ne semblait pas suffisant pour offrir le niveau de protection du droit à la vie ‹par la loi› requis […].»[565]

In a legal regulation, generalisation can be made and further regulatory needs can be taken into account. The ECtHR usually expresses this as a valued statement emphasising the need to prevent abuse.

> «[…] for domestic law to meet the qualitative requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities

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564 *Makaratzis v. Greece* (GC), 50385/99 (2004), § 59; quite similarly, in *Şimşek and others v. Turkey,* 35072/97 and 37194/97 (2005), § 105 («exercising» instead of «performing» and «pursuit» instead of «chase») or *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 249.

565 *Soare and others v. Romania*, 24329/02 (2011), § 132 (and § 137).

> with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise […].»[566]

According to the case law of the *Grand Chamber*, the legal foundations are – *inter alia* – insufficient if they are too lax in terms of content. The Court measures *laxity* against the purpose permitted by the use of force.

> The judgment *Nachova and others v. Bulgaria* concerned the firing of fatal shots by military police at two members of the Bulgarian armed forces. «The […] relevant regulations on the use of firearms by the military police effectively permitted lethal force to be used when arresting a member of the armed forces for even the most minor offence. Not only were the regulations not published, they contained no clear safeguards to prevent the arbitrary deprivation of life. Under the regulations, it was lawful to shoot any fugitive who did not surrender immediately in response to an oral warning and the firing of a warning shot in the air […]. The laxity of the regulations on the use of firearms and the manner in which they tolerated the use of lethal force were clearly exposed by the events that led to the fatal shooting […]. Such a legal framework is fundamentally deficient and falls well short of the level of protection ‹by law› of the right to life that is required by the Convention in present-day democratic societies in Europe […].»[567] The *Grand Chamber* stressed that Art. 2 ECHR required «to secure the right to life by putting in place an appropriate legal and administrative framework on the use of force and firearms by military police»[568]

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566 *Navalnyy v. Russia* (GC), 29580/12 (2018), § 115.

567 *Nachova and others v. Bulgaria* (GC), 43577/98 and 43579/98 (2005), §§ 99 f.

568 *Nachova and others v. Bulgaria* (GC), 43577/98 and 43579/98 (2005), § 102. Although national law would know a "proportionality requirement", this had not been applied in the present case (§ 101).

Statutory regulations that are too schematic also do not meet the requirements of fundamental rights and are – in that sense – too lax as well.

The judgment *Putintseva v. Russia* concerned the use of firearms within the Russian army. The soldier *Valeriy Putintsev* was in custody for unauthorised absence from the troops[569]. During an escape attempt, another soldier fired at him; he «died from the gunshot wound, which had caused injuries to internal organs and extensive bleeding»[570].

The basis for the use of firearms was the «Statute of Garrison and Sentry Service in the Military Forces of the Russian Federation». Art. 201 regulated the use of firearms against prisoners: «A sentry guarding arrestees (detainees) in a disciplinary unit must: […] warn arrestees (detainees) attempting to escape with an order: ‹Stop, or [I] will shoot›, and if the order is not complied with [the sentry] should use a firearm against them.»[571]

«The […] regulation called for nondiscretionary use of lethal force to prevent the escape of a member of the armed forces from detention, to which he could have been sentenced for even a minor disciplinary offence. The Court does not lose sight of the extremely concise wording of the regulation which permitted the use of lethal force. Apart from requiring a general warning that a firearm would be used, Article 201 did not contain any other safeguards to prevent the arbitrary deprivation of life. It did not make use of firearms dependent on an assessment of the surrounding circumstances, and, most importantly, did not require an evaluation of the nature of the offence committed by the fugitive and of the threat he or she posed. […Under] the regulation in question it was lawful to shoot any fugitive who did not surrender immediately in response to an oral warning or the firing of a warning shot in the air […].»[572]

569 *Putintseva v. Russia*, 33498/04 (2012), §§ 6 f.

570 *Putintseva v. Russia*, 33498/04 (2012), § 8.

571 *Putintseva v. Russia*, 33498/04 (2012), § 33.

572 *Putintseva v. Russia*, 33498/04 (2012), § 64.

Although the Court stresses the necessity of a legal basis for the use of force, it does not itself set out any detailed requirements for the content of the norms to be enacted (*see* no. V.3.4)[573]. Even relativising seems the remark that *tailor-made responses* are not possible under (at least extreme) circumstances[574].

The necessary legal framework includes the regulation of the *use and control* of all potentially lethal means of intervention – *especially* (but not only) the use of firearms[575]. The ECtHR emphasises the need to regulate the latter – and that the traditionally toughest and most dangerous means of security forces must be mandatorily covered by a legal regulation.

> Insofar as there is a «laxity of the regulations on the use of firearms» in a national legal system, the question may arise as to whether this can be balanced by a (probably rather general) «proportionality requirement»[576] – the ECtHR leaves the question open[577].
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> Various national legal systems list the permitted (police) means of intervention[578]. The extent to which such regulations are exhaustive is primarily determined by the wording of the respective norm. Explicitly naming the permissible means of intervention complies with the principle of (legal) certainty, but can gradually restrict the scope of action of the forces involved[579]. Strict regulation can

573 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 151.

574 *Tagayeva and others v. Russia*, 26562/07 (2017), § 595.

575 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, §§ 9 ff.; *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), §§ 209 f.

576 *Nachova and others v. Bulgaria* (GC), 43577/98 and 43579/98 (2005), §§ 99 (quote) and 102.

577 *Nachova and others v. Bulgaria* (GC), 43577/98 and 43579/98 (2005), § 102.

578 For example Article 78 of the Polizeiaufgabengesetz (PAG) Bayern of 14 September 1990 (as amended on 25 May 2018); Decreto del Presidente della Repubblica 5 ottobre 1991, n. 359, Regolamento che stabilisce i criteri per la determinazione dell'armamento in dotazione all'Amministrazione della pubblica sicurezza e al personale della Polizia di Stato che espleta funzioni di polizia.

579 Exception clauses could provide a relief. These would state that in special or extraordinary situations, other means not mentioned in the substantive regulation can also be used; for example, if the handling of a situation is not possible in any other way or cannot be done in time. *Cf.*, *e.g.,*

provide a counterpart with indications of weak points of the response forces and the suitability of their own protective equipment.

In our opinion, Art. 2 (para. 1) ECHR imposes a duty to adequately specify the means of action necessary for the performance of police duties. This may involve the creation of categories for firearms, other potentially lethal means of action, means of irritation or destabilising devices (but on the exceptions allowed by the ECtHR *see* d).

Other means used by state security forces, even if not lethal in principle, can nevertheless have a potentially lethal effect if handeled incorrectly. These include tear gas (especially when tear gas granates are fired at short range with launchers) or destabilising agents (tasers, stun grenades or shock grenades).

«Tear gas has been used by police forces in Europe for many years. Regulations on the use of tear gas vary according to the form in which it is used. Tear gas is used either in the form of sprays or grenades shot from a launcher. If the grenade launcher is improperly used, the grenade can kill or cause serious injuries.»[580]

In the judgment *Abdullah Yaşa and others v. Turkey* (albeit under Art. 3 ECHR), the ECtHR found that the law enforcement officials had used tear gas (or the launcher for it) incorrectly and with fatal consequences (*see* no. V.3.4.1). The Court – consistent, in our opinion – draws a line from the deficient (non-existent) legal basis of a means of coercion to the training and legal framework of operations and recognises a violation of the ECHR: «[…At] the time of the facts Turkish law lacked any specific provisions on the use of tear-gas grenades during demonstrations, and did not lay down instructions for their utilisation. Given that during the events […] two persons were killed by tear-gas grenades and that the applicant was injured on the same occasion, it may be deduced that the police officers were able to act very independently and take ill-considered initiatives, which would probably not have been the case if they had been given

for Italy Article 37 of the Decreto del Presidente della Repubblica die 5 ottobre 1991, n. 359, Regolamento che stabilisce i criteri per la determinazione dell'armamento in dotazione all'Amministrazione della pubblica sicurezza e al personale della Polizia di Stato che espleta funzioni di polizia.

580 *Abdullah Yaşa and others v. Turkey,* 44827/08 (2013), § 29.

> appropriate training and instructions. [... Such] a situation is incompatible with the level of protection of the physical integrity of individuals which is required in contemporary democratic societies in Europe»[581].

c. Prinicple of (legal) certainty

As a benchmark for the legal basis allowing any restriction of fundamental rights in qualitative terms, the Court generally emphasises foreseeability. Those *subject to the law* should be able to direct their conduct in accordance with the legal basis and to recognise the consequences of misconduct[582] (*see* no. V.6.2.1).

> «The [...] expression ‹prescribed by law› requires firstly that the impugned measure should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct. [...] The scope of the notion of foreseeability depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed. [... However] clearly drafted a legal provision may be, its application involves an inevitable element of judicial interpretation, since there will always be a need for clarification of doubtful points and for adaptation to particular circumstances. [...].»[583]

The required degree of certainty depends decisively on the respective area of regulation.

> «The level of precision required of domestic legislation [...] depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed [...].»[584]

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581 *Abdullah Yaşa and others v. Turkey,* 44827/08 (2013), § 49.

582 Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 230.

583 *Gorzelik and others v. Poland* (GC), 44158/98 (2004), §§ 64 f. In this sense *Maestri v. Italy* (GC), 39748/98 (2004), §§ 30 f. or *Navalnyy v. Russia* (GC), 29580/12 (2018), § 114.

584 *Maestri v. Italy* (GC), 39748/98 (2004), § 30.

For potentially lethal use of force, the legal basis must prove to be sufficiently precise (*see* no. III.2.3.3), in order to sufficiently control a concrete exercise of a means of coercion as well as entire operations in accordance with the rule of law[585]. The ECtHR is also right to focus on the need for legal certainty for the officials who act – and who may be obliged to act. Ultimately, the question of the imputability of responsibility (to the executive authorities) also originates from the requirement of certainty[586].

Sufficient certainty – taking into account the negative obligation (*see* no. III.2.3) – usually sets limits to the authorities' possibilities for action.

> In the case of *Nachova v. Bulgaria*, the court criticises the insufficiently defined legal basis. This allowed the military police to use potentially lethal force when arresting an armed person suspected of a wrongdoing. The regulations was not publicly accessible. Moreover, it did not contain a clear guarantee that could have prevented arbitrary acts. On the basis of that regulations, it was in principle permitted to shoot at any fleeing person who did not immediately surrender after a call or a warning shot[587]. According to the ECtHR, such a legal basis no longer corresponds to the standard required[588].

The ECtHR as a fundamental rights court – understandably – generally has difficulties in demanding sufficient certainty of norms for the use of force consistently.

> The Court «held that a regulation setting out an exhaustive list of situations in which gendarmes could make use of firearms was compatible with the Convention. The 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».[589]

The *Grand Chamber* avoids to directly discuss the question of the certainty of norms for state actions – instead it refers to the effects of *insufficient legislation* (avoidance of

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585 *Cf. Soare and others v. Romania*, 24329/02 (2011), §§ 132 and 137.

586 *Cf.* Wilkinson, Terrorism versus Democracy, p. 117.

587 *Nachova v. Bulgaria* (GC), 43577/98 (2005), § 99.

588 *Nachova v. Bulgaria* (GC), 43577/98 (2005), § 100.

589 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 210.

a regulatory vacuum)[590]. In the result from the (reciprocal) discussion (*argumentum e contrario*), the legal and administrative framework must be sufficiently defined.

The Court *cannot* compare national regulations with each other. As an alternative, it can make comparisons with international standards, such as the *UN Basic Principles*. These are abstract principles, but as such they indicate the need for regulation and general directions for legal regulation. The *UN Basic Principles* do not require any explicit legal mention of the means of action, with the exception of firearms and ammunition[591].

> In the two more recent judgments *Tagayeva and others v. Russia* and *Finogenov and others v. Russia* the ECtHR points out that «the UN Basic Principles [...] indicate that laws and regulations on the use of force should be sufficiently detailed and should prescribe, inter alia, the types of arms and ammunition permitted»[592]. On this general basis, it is quite prepared to review the legal framework of the use of lethal force for its appropriateness[593].
>
> The «[...] legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect.»[594]

The use of firearms is often treated schematically by courts and legislators. Ultimately, the (abstract) degree of danger of firearms also depends on the ammunition used. In addition to firearms, law enforcement officials can and should have other means of intervention (weapons) at their disposal. The extended means of action include destabilising agents and other basically non-lethal means of irritation.

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590 The phrase "should not be left in a vacuum" is, in our opinion, too feeble.

591 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, § 11 lit. a and c.

592 *Tagayeva and others v. Russia*, 26562/07 (2017), § 592; *Finogenov and others v. Russia*, 18299/03 (2011), § 228.

593 *Tagayeva and others v. Russia*, 26562/07 (2017), §§ 592 ff.; *Finogenov and others v. Russia*, 18299/03 (2011), §§ 228 ff.; *Makaratzis v. Greece* (GC), 50385/99 (2004), §§ 61 ff.

594 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 249.

The UN Basic Principles require diversification (§ 2): *Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.*

d. Extraordinary situation and state of emergency

The Court allows the use of special coercive means in exceptional situations (for which there are no tailor-made legal basis). This is the case even if there is no specific legal basis for these means at all.

In *Stewart v. The United Kingdom*, a 13-year-old boy was hit by a *baton round* during an unpeaceful demonstration[595]. A few days later he died in hospital as a result of the hit[596]. According to the Commission, the soldiers' use of force was in accordance with Northern Ireland law (Section 3 of the Criminal Law Act [Northern Ireland] 1967)[597]. The legal basis for baton rounds as an operational tool was not further investigated.

At the time of the state of emergency in Northern Ireland (*see* no. III.3.2), the Court recognised (in the context of arrests) that the existing legal bases were insufficient to react to real violence.

«Unquestionably, the exercise of the special powers was mainly, and before 5 February 1973 even exclusively, directed against the IRA as an underground military force. The intention was to combat an organization which had played

595 As to the use of *baton rounds, see* Dickson, ECHR and the Conflict in Northern Ireland, pp. 260 ff.

596 *Stewart v. The United Kingdom*, 10044/82 (1984), p. 163.

597 *Stewart v. The United Kingdom*, 10044/82 (1984), § 25 (p. 172).

> a considerable subversive role throughout the recent history of Ireland and which was creating, in August 1971 and thereafter, a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province's inhabitants [...]. Being confronted with a massive wave of violence and intimidation, the Northern Ireland Government and then, after the introduction of direct rule (30 March 1972), the British Government were reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of the ordinary law, in the shape of extrajudicial deprivation of liberty, was called for. When the Irish Republic was faced with a serious crisis in 1957, it adopted the same approach and the Court did not conclude that the ‹extent strictly required› had been exceeded [...].»[598]

The ECtHR does not seem to set a strict limitation for special means of intervention in extraordinary situations. Rather, it measures their admissibility in individual cases against the assessment of an overall situation. In this way, law enforcement officials are granted a margin of discretion for the use of means. The anchoring of means of intervention in the legal and administrative framework thus loses its function as a boundary.

> In the judgment *Finogenov and others v. Russia*, the Court had to judge, among other issues, the use of a narcotic gas. The legal regulation for this could not be conclusively clarified. Moreover, the composition of the gas was also kept secret in the proceedings before the ECtHR.
>
> «The legislative framework for the use of the gas [...] remains unclear: although the law, in principle, allows the use of weapons and special-purpose hardware and means against terrorists [...], it does not indicate what type of weapons or tools can be used and in what circumstances. Furthermore, the law requires that the specific technical methods of anti-terrorist operations be kept secret [...]. The exact formula of the gas was not revealed by the authorities; consequently, it is impossible for the Court to establish whether or not the gas was a ‹conventional weapon›, and to identify the rules for its use. In the circumstances the Court is prepared to admit that the gas was an *ad hoc*

[598] *Ireland v. The United Kingdom* (Court Plenray), 5310/71 (1978), § 212.

> solution, not described in the regulations and manuals for law enforcement officials. This factor alone, however, cannot lead to a finding of a violation of Article 2 of the Convention.»[599]

In our opinion, the conclusion can be drawn that the admissibility of *alternative means* of intervention depends on the nature (finality) of the concrete operation: Insofar as the state is *obliged* to take measures to protect life (*e.g.*, of hostages), this obligation can substitute for the legal basis required *per se*. The duty to act arising from Art. 2 ECHR opens up a scope for acting, which is, however, limited by the principle of proportionality (*see* no. V.4); in addition, we consider that any limits of international humanitarian law must be respected (*see* no. III.4).

1.4.3. Regulating police operations

The ECtHR requires Convention States to regulate police operations. In the final analysis, it is a matter of creating a suitable legal framework and safeguards against arbitrariness and against the abuse of the state's monopoly on the use of force.

> «Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that policing operations must be sufficiently regulated by national law, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force.»[600]

However, the Court does not define what exactly it means by police operations. On the substance, it seems clear that – beyond spontaneous action by police forces – it covers organised operations in particular that therefore must be regulated.

> In our opinion, the concrete regulatory needs that arise from this must be assessed separately by each Convention State. For example, the police organisation in centralised states (such as France) is necessarily different from that in federal states (such as Switzerland or Germany).

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599 *Finogenov and others v. Russia*, 18299/03 (2011), §§ 229 f.

600 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 249; quite similarly, in *Makaratzis v. Greece* (GC), 50385/99 (2004), § 58 and *Nachova v. Bulgaria* (GC), 43577/98 (2005), § 97 and *Kavaklıoğlu and others v. Turkey*, 15397/02 (2016), § 162 (both stressing «adequate and effective safeguards […] against avoidable accident»).

> Regulations for policing operations should, in our opinion, ensure that no legal vacuum arises in individual cases. It must therefore be clarified which authorities function as police authorities and are allowed to exercise coercion on the basis of national police laws. For these authorities, the further requirements of Art. 2 ECHR apply (up to the duty to investigate after the use of weapons). In addition, there are likely to be structural and organisational questions as well as state liability.

The ECtHR distinguishes between *routine police operations* and *large-scale anti-terrorist operations*. In *Finogenov and others v. Russia*, the Court pointed out the uniqueness of the events (when several hundred people were taken hostage by paramilitary forces) – and that defence measures for such situations ultimately *cannot* be regulated (negative justification).

> «The general vagueness of the Russian anti-terrorism law does not necessarily mean that in every particular case the authorities failed to respect the applicants' right to life. Even if necessary regulations did exist, they probably would be of limited use in the situation at hand, which was totally unpredictable, exceptional and required a tailor-made response. The unique character and the scale of the Moscow hostage crisis allows the Court to distinguish the present case from other cases where it examined more or less routine police operations and where the laxity of a regulatory framework for the use of lethal weapons was found to violate, as such, the State's positive obligations under Article 2 of the Convention [...]»[601].

In the judgment *Tagayeva and others v. Russia*, the EctHR also made a quite similar distinction and emphasised the preservation of the capacity of states to act in acute crises (positive reasoning).

> «[...] a difference should be drawn between ‹routine police operations› and situations of large-scale anti-terrorist operations. In the latter case, often in situations of acute crisis requiring ‹tailor-made› responses, the States should be able to rely on solutions that would be appropriate to the circumstances [...]»[602].

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601 *Finogenov and others v. Russia*, 18299/03 (2011), § 230.

602 *Tagayeva and others v. Russia*, 26562/07 (2017), § 595.

This does not mean that the Court would give the states carte blanche. Rather, in its judgment, the EctHR found a fundamental lack of regulation of anti-terrorist operations.

> «The [...] domestic legal framework failed to set the most important principles and constraints of the use of force in lawful anti-terrorist operations, including the obligation to protect everyone's life by law, as required by the Convention. Coupled with wide-ranging immunity for any harm caused in the course of anti-terrorist operations, this situation resulted in a dangerous gap in regulating situations involving deprivation of life – the most fundamental human right under the Convention. In [...] view of the inadequate level of legal safeguards, Russia had failed to set up a ‹framework of a system of adequate and effective safeguards against arbitrariness and abuse of force›. This weakness of the regulatory framework bears a relevance [...] with regard to the proportionality of the force used»[603].

In our opinion, these regulatory deficits are closely related to the actors involved and the (heavy) means used in the storming of school number 1 in Beslan (*see* nos. V.2.2.2 and V.4.4).

Sometimes requirements for police operations are established indirectly through the regulatory requirement for certain means of coercion (*see* no. IV.1.4.2).

> For example, in the judgment *Abdullah Yaşa and others v. Turkey*, the EctHR assessed a general rule on the dispersal of demonstrations under the *directive on the rapid reaction forces*: «[...] Should the crowd fail to disperse despite the warning given, use is to be made, in a gradual manner, of physical force, material force and weapons, depending on the nature of the crowd's movements, the degree of violence, threats or assaults, or of the resistance put up by the offenders. Where dispersal has been planned and is being carried out by use of force, several exit routes must be left for the crowd so that it can disperse. No attempt must be made to disperse the crowd until such exit routes are available.»[604]

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603 *Tagayeva and others v. Russia,* 26562/07 (2017), § 599.

604 *Abdullah Yaşa and others v. Turkey,* 44827/08 (2013), § 27.

From this, no concrete guidelines for the use of tear gas (or the handling of the tear gas launchers) could be derived. After the deadly incidents, Turkey issued a directive regulating the use of tear gas in detail[605]. The tactical behaviour thus regulated with regard to this means of coercion can indirectly influence the design of police operations.

In the judgment *Isayeva v. Russia*, the EctHR first defines which legal category the use of force falls into. In the absence of a declaration of martial law or a state of emergency, the normal legal bases would have had to be applied[606].

Instead, the security forces based their actions in particular on the Army Field Manual, which could not guarantee sufficient protection for the lives of civilians[607]. Whether the regulations meet the requirements of the IHL (*see* no. III.4.2) would, in our opinion, be an additional question to be clarified separately.

1.5. CONCLUDING THOUGHTS

Countering terrorism is a multi-layered and legally challenging task that affects *all states* today. Obligations under international law and international recommendations are both general in nature and specific to certain issues. The obligation to create a solid legal and administrative framework arises independently of the existence of a concrete terrorist threat in an individual Convention State.

At least as far as state regulation is focused on the use of force, a legal definition of "terrorism" is dispensable. Terrorists are criminal perpetrators (with special motifs). In anti-terrorist operations by security forces, the entire repertoire of permissible police means of coercion can be used (something different applies to intelligence activities). The legal system must also adequately enable such a special fulfilment of tasks and control it in accordance with the rule of law.

Those applying the law must not be confronted with a legal vacuum in individual cases and are not allowed to act as "self-directed" enablers; legislators are obliged

605 *Abdullah Yaşa and others v. Turkey,* 44827/08 (2013), § 28.

606 *Isayeva v. Russia*, 57950/00 (2005), § 191.

607 *Isayeva v. Russia*, 57950/00 (2005), § 199.

to create framework conditions in compliance with the principles of the rule of law. The use of coercive police measures is always relevant to fundamental rights. The requirements flowing from the principle of legality are generally high. The use of force in the context of countering terrorism extends to potentially lethal means. Sufficient legal provisions can legitimise the use of coercive means up to firearms and heavy weapons under certain circumstances – but legal rules always and necessarily have a limiting effect[608].

With the *UN Basic Principles* and the *Code of Conduct for Law Enforcement Officials*, there are international standards for the use of governmental force; with the *Guidelines on Human Rights of the Council of Europe*, there is a European consensus on how to countering terrorism. These guidelines can and should be used as a basis for the fulfilment of state responsibilities (*cf., e.g., Makaratzis v. Greece* [GC] to the *UN Basic Principles*[609]). They contribute to the implementation of sufficient legal requirements for the use of force, even at the highest end of the escalation spectrum. In addition, they convey a certain legitimacy to state action and prevent overreactions, even in the face of terrorist threats.

What is expressed as a motive or purpose in the *UN Basic Principles* in particular is condensed into a duty in the light of Art. 2 ECHR. However, the case law of the ECtHR appears somewhat ambivalent in some respects. The Court is not a general "supranational constitutional court"; it therefore does not examine norms detached from individual cases of application of the law (*McCann and others v. The United Kingdom* [GC]); nor does it lay down *per se* explicit provisions which the Convention States would have to implement in their national legal frameworks. The minimum requirements for a use of force resulting from its jurisprudence are formulated cautiously and openly. They leave the states a large margin in the design of the corresponding legal bases.

As a result, there is a need for national regulation for each type of use of force in terms of determining the permissible circumstances and the appropriateness of the

608 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 209.

609 *Makaratzis v. Greece* (GC), 50385/99 (2004), § 59.

use of resources (*Giuliani and Gaggio v. Italy* [GC][610]). The scope of regulations, the admissibility of coercive means as well as their application requirements can vary depending on the concrete state authority (the broad concept of *law enforcement officials* includes regular police forces and police special forces, but also regular military forces or special operations forces under certain circumstances). Regulations must neither be too open nor too far-reaching – their purpose (finality) must always serve the best possible protection of human life (*Nachova v. Bulgaria* [GC] or *Soare v. Rumania*). Therefore, a too strict or too schematic standardisation is also inappropriate (*Putintseva v. Russia*). In our opinion, the effectiveness and appropriateness of state regulations must be reviewed on an ongoing basis: What has already been established may become outdated or is proving to be incomplete in practice (*Makaratzis v. Greece* [GC] und *Leonidis v. Greece*[611]).

In its case law, the ECtHR does not explicitly state an obligation to codify all means of coercion by the police in law. It seems to be stricter in regulating the use of firearms (*Soare and others v. Romania*). Nevertheless, a legal establishment – at least of the most important means of coercion (depending on the possible extent of damage) – is to be recommended. In particular with regard to the requirement of certainty, a distinction between the use of force and the use of firearms appears to be an improper balancing act. Instead, the need for regulation must be resolved according to the category of means of deployment.

Abstract regulations for police use of force are ultimately always aimed at combating a real and immediate risk. According to its earlier case law, the ECtHR also allowed the use of police coercion in extraordinary situations that is not explicitly covered by (formal) law (*Stewart v. The United Kingdom*). Nowadays, it allows the deployment of special means of intervention to avert specific dangers (only) in extraordinary situations (*Finogenov and others v. Russia* und *Tagayeva and others v. Russia*). However, this requires clarification, especially with regard to the principle of proportionality, which is not yet discussed in detail here (*see* no. V.4).

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610 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 209.

611 *Makaratzis v. Greece* (GC), 50385/99 (2004), § 70; *Leonidis v. Greece*, 43326/05 (2009), § 65.

The Court follows an exciting line of reasoning by focusing on operations as a whole (*McCann v. The United Kingdom* [GC]) and further developing the requirements for such operations. This involves legal regulation of both larger police operations (*Giuliani and Gaggio v. Italy* [GC], *Finogenov and others v. Russia*, *Tagayeva and others v. Russia*, *Abdullah Yaşa and others v. Turkey* and *Kavaklıoğlu and others v. Turkey*) and policing in a much broader sense (*Makaratzis v. Greece* [GC] and *Nachova v. Bulgaria* [GC]). The relevant regulations are usually not made by the legislator, but by the acting authorities themselves, which have to undertake preparatory acts and conduct operations (*Armani Da Silva v. The United Kingdom* [GC]).

2. INTELLIGENCE

The basis of state action is the law. The basis of state knowledge in the area of homeland security is a specific picture on the situation. A distinction can and must be made between a common operational picture and a specific situational picture. Situational pictures can be compared with each other and a possible development of the situation can be derived. The situational picture forms an essential basis for planning and decision-making[612].

> The situation analysis must be based on realistic assumptions[613]. Generalisations are sometimes necessary[614]. There is a need for realistic assumptions to be able to at least objectify the basis of state action and thus to be able to guarantee proportionality. In a state governed by the rule of law, improbable but theoretically quite conceivable assumptions (*black swans*[615]) cannot correctly trigger any state (defensive) actions – except in the area of observation and analysis.

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612 *Corresponding* the NATO Standard AJP-2 (Intelligence, 2016), p. 1-1.

613 But history sometimes makes jumps; generally critical of the conclusion from the past to the future (bearing in mind an increasing complexity) Taleb, The Black Swan, pp. 8 ff.

614 Critically again Taleb, The Black Swan, p. 27 (with reference to the "major philosophical problem […] of induction").

615 *Cf.* Taleb, The Black Swan, *passim*; they can be both overestimated and underestimated (p. 77).

2.1. COMMON OPERATIONAL PICTURE AND INTELLIGENCE GATHERING

A *common operational picture* should allow an overview[616]. It addresses both the state leadership (and thus political decision-makers) and the subordinate state authorities. It necessarily leads to a generalisation and a detachment from individual cases. Its strength lies in an analytically convincing presentation of an existing situation (in general) and the identification trends on a rather strategic level.

In assessing the general intentions and capabilities of terrorist actors, particular attention may be paid to the respective ideology or to the "political" motives, the organisational capabilities, the personnel composition and strengths of a grouping, the level of support from third parties (organisations, groupings, states) and financial resources.

> The common operational picture includes, for example, the presentation of findings as to whether certain terrorist groups are active in a state at all – and if so, with what structures, intentions and activities.
>
> For example, the *Tamil Tigers*, who led an armed struggle in Sri Lanka, were also active in Europe in the field of organised crime (*e.g.,* protection rackets) in order to finance the armed struggle in their home country[617].
>
> A strategic trend would be the link between the use of social media and violent actions by individuals. In recent years, perfidious perpetrators around the world have misused new forms of communication to spread their deeds in real time in order to secure a great deal of attention.

Correct operational and tactical decisions cannot be made solely on the basis of a common operational picture. A specific situational picture is required[618]. This breaks down the significance of general findings to concrete circumstances, tactical possibilities of the actors in space and time – also with a view to possible targets of attack (*see* no. IV.2.3.2.c).

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616 In military terms, a common operational picture is essentially about *strategic intelligence*; *cf.* NATO Standard AJP-2 (Intelligence, 2016), p. 3-1.

617 *Cf. Nachrichtendienst des Bundes*, Sicherheit Schweiz 2010 (Jahresbericht 2010), p. 40.

618 In military terms, it is all about *operational intelligence*; *cf.* NATO Standard AJP-2 (Intelligence, 2016), p. 3-1.

Each situational picture is based on intelligence[619]. Indications of a threat must be condensed and verified[620]. The insights gained through analysis[621] are used to *make informed decisions and take action*, in a *timely, clear and actionable* manner[622]. Consideration should be given, for example, to the origin, effective accuracy, possibility of verifying information and the possibility of condensing it into a threat assumption.

In *McCann and others v. The United Kingdom* there was strong evidence of a terrorist attack in Gibraltar. Members of the IRA were identified as being involved, who were known explosives experts and had already been convicted of explosives offences[623]. Intelligence gathered was confirmed by observations of the local police[624]. An advisory group was therefore formed comprising members of the Gibraltar Police, the SAS task force, a special branch inspector (Scotland Yard) and intelligence officers[625]. The authorities have thus made efforts to verify the indications of the possible terrorist attack (specifically an attack on the changing of the guard ceremony in Gibraltar) and to derive a concrete need for action.

The case of *Tagayeva and others v. Russia* was different. In spite of the relevant indications, only insufficient measures had been taken to verify information and to obtain further information[626]. A general terror warning followed from

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619 *See* NATO AAP-06 (Terms and Definitions, 2019), p. 68: "*The product resulting from the directed collection and processing of information regarding the environment and the capabilities and intentions of actors, in order to identify threats and offer opportunities for exploitation by decision-makers.*" On the meaning in particular NATO Standard AJP-2 (Intelligence, 2016), p. 2-2. *Cf.* on this "dazzling" term Schreier, Intelligence-led Operations, p. 47; pragmatical Bolz, Intelligence Requirements in Hostage Situations, p. 62.

620 *Cf.* Warbrick, European Response to Terrorism, pp. 991 f.

621 The essence of intelligence activity is not collecting, but analysing; *cf.* Schreier, Intelligence-led Operations, p. 48.

622 Pokorny/Barysevich/Gundert/Liska/McDaniel/Wetzel, The Thread Intelligence Handbook, pp. viii f. (in general); *cf.* NATO Standard AJP-2 (Intelligence, 2016), p. 2-1.

623 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), §§ 192 f.

624 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 13.

625 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 14.

626 *Tagayeva and others v. Russia,* 26562/07 (2017), §§ 490 f.

the findings of a (merely) general common operational picture – it was difficult to derive specific protective measures being based on this. Apparently, no assessment of the threat to schools on the *day of knowledge* (especially for the school in Beslan with its symbolic designation as *School No. 1*) had been carried out or – if it had been – no sufficient consequences had been drawn from it.

The situation in *Isayeva v. Russia* was superficially apparent: several hundred Chechen fighters had entered the town of Katyr-Yurt after leaving Grozny[627]. The situation – or rather the situational picture – was misinterpreted[628]. Later, measures were taken regardless of the knowledge of the presence of the civilian population (as well as refugees from contested areas): «Once the fighters' presence and significant number had become apparent to the authorities, the operation's commanders proceeded with the variant of the plan which involved a bomb and missile strike at Katyr-Yurt. […] The planes, apparently by default, carried heavy free-falling high-explosion aviation bombs […] with a damage radius exceeding 1,000 metres. According to the servicemen's statements, bombs and other non-guided heavy combat weapons were used against targets both in the centre and on the edges of the village»[629].

In *Giuliani and Gaggio v. Italy*, the authorities had assessed the situation correctly. Precisely because of the great aggressiveness of the globalisation critics, the injured carabinieri were in a (supposedly safer) vehicle. When the security forces had been pushed back by the demonstrators[630], violence erupted against the injured carabiniere, who had not been able to escape timely[631]. The only thing relevant to the self-defence action of the shooting carabiniere in this

627 *Isayeva v. Russia*, 57950/00 (2005), §§ 15 and 185.

628 *Isayeva v. Russia*, 57950/00 (2005), § 187.

629 *Isayeva v. Russia*, 57950/00 (2005), § 190.

630 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 21: «Pictures taken from a helicopter […] show the demonstrators running along […] in pursuit of the law-enforcement officers».

631 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), §§ 186 f. and 22: «The two side windows at the rear and the rear window of the jeep were smashed. The demonstrators shouted insults and threats at the jeep's occupants and threw stones and a fire extinguisher at the vehicle».

> situation was Giuliani's potentially fatal attack on him with the use of a fire extinguisher as a throwing object[632].

Intelligence gathering is about obtaining[633] and processing information[634] as broadly as possible with a view to a specific target – a specific threat.

> This was one of the key findings of the review of the attacks of 11 September 2001 in New York and Washington by the specially created National Commission on Terrorist Attacks Upon the United States (9/11 commission): «The importance of integrated, all-source analysis cannot be overstated. Without it, it is not possible to ‹connect the dots›. No one component holds all the relevant information.»[635]

The broadest possible procurement of information (*all-source intelligence*[636]) and its condensation into intelligence[637] can be carried out by different authorities[638] and can also include open intelligence procurement[639]. Ultimately, the aim is to create an intelligence network[640]. Intelligence work is crucial for dealing with terrorist threats[641].

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632 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), §§ 189 ff. and 23 ff.

633 *U.S. Army*, Field Manual 3-24, § 8-7 (all source intelligence).

634 *U.S. Army*, Field Manual 3-24, §§ 8-2 and 8-19.

635 *The National Commission on Terrorist Attacks Upon the United States*, 9/11 Commission Report, p. 408.

636 *See* NATO AAP-06 (Terms and Definitions, 2019), p. 10: "Intelligence produced using all available sources and agencies".

637 *Data* and *information* are not intelligence; *cf.* NATO Standard AJP-2 (Intelligence, 2016), p. 2-5 and Pokorny/Barysevich/Gundert/Liska/McDaniel/Wetzel, The Thread Intelligence Handbook, pp. 6 f.

638 Using the example of Germany, *see* Gusy, Sicherheitsbehördliche Kooperation, Rz. 20 ff. (cooperation among domestic authorities) and 78 ff. (cooperation of German agencies with foreign countries).

639 To the *intelligence cycle, cf.* Schreier, Intelligence-led Operations, p. 49.

640 *Cf.* Carter/Carter, Law enforcement intelligence, pp. 150 f. – up to observations that something "simply doesn't seem right". With a special focus on the U.S.A. after 11 September 2001 Henry, Coordinated and Strategic Local Police Approach to Terrorism, p. 336.

641 Wilkinson, Terrorism versus Democracy, p. 95: *"The secret of winning the battle against terrorism in an open democratic society is winning the intelligence war: this will enable the security forces, using high-quality intelligence, to be proactive, thwarting terrorist conspiracies before they*

Modern intelligence is complex[642]; it can lead to an organisational overload of the different services.

> In the 9/11 Commission Report, important lessons also concern the *over-complexity*, which manifested itself in (only the keywords mentioned there)[643]:
>
> – structural barriers;
>
> – lack of common standards and practices across the foreign-domestic divide;
>
> – divided management of national intelligence capabilities;
>
> – weak capacity to set priorities and move resources;
>
> – too many jobs;
>
> – too complex and secret.

The intelligence process[644] is not an end in itself. It is both threat- and decision-driven and encompasses various aspects beyond the actual information, data or intelligence gathering itself[645]. To this end, the use of stereotypes – which can be reinforced in a common operational picture – must be prevented: Information must be confirmed, verified and evaluated for a concrete situation[646].

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happen"; in the same sense, but with reference to concrete operations Bolz, Intelligence Requirements in Hostage Situations, p. 68.

642 NATO Standard AJP-2 (Intelligence, 2016), p. 1-1.

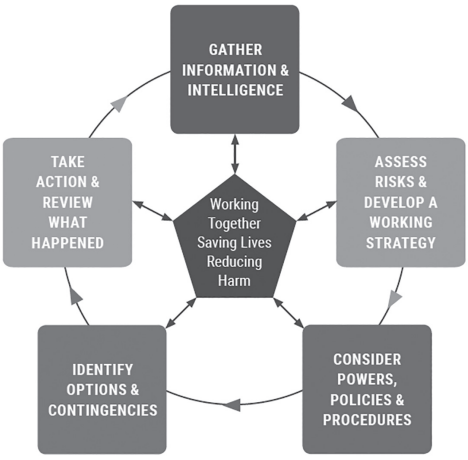
643 *The National Commission on Terrorist Attacks Upon the United States*, 9/11 Commission Report, pp. 408 ff.

644 *Cf., e.g., Joint Chiefs of Staff,* Joint and National Intelligence Support, p. III-2.

645 *Joint Chiefs of Staff,* Joint and National Intelligence Support, p. X: "Intelligence support functions primarily focus on adversary military capabilities, violent extremist organization threat capabilities, centers of gravity, and potential courses of action in order to provide commanders with the necessary information to plan and conduct operations."
NATO Standard AJP-2 (Intelligence, 2016), p. 2-1: "Intelligence provides more than a tool for counting the forces of adversaries or assessing their preparedness to apply capabilities to create lethal effects. Intelligence is an enabling capability whose value is largely realized when conducting planning and operations."

646 *Cf.* Warbrick, European Response to Terrorism, p. 992 with reference that, that the U.S. authorities in the Oklahoma City bombing (1995) first assumed the presence of foreign terrorists and the Spanish authorities in the Madrid bombs (2004) first assumed the presence of ETA.

Not every terrorist attack can be foreseen and not every foreseen attack can be prevented. From a conflict-related point of view, the focus is on minimising the threat[647] – from a tactical point of view, the link from a solid common to a specific situational picture must be made.



Grafik: «Joint Decision Model»;
Quelle: *JESIP*, Interoperability framework, S. 15.

In the case of more complex threats, the aim is, among other things, to evaluate the extent of damage, to enable threat management and to deepen risk analysis.

Intelligence gathering and situation analysis should always be "decision-relevant" (*e.g.*, the *Joint Decision Model* shown opposite).

In the present context, intelligence processes and methods[648] must be geared to a specific threat. In the case of a terrorist threat, the focus is on a threat to life as a legal asset.

How this can be achieved is shown Charters, Countering Terrorism in the Democratic Context, p. 218 using the example of Italy.

647 *Cf.* Charters, Countering Terrorism in the Democratic Context, p. 217.

648 In a military context, *see* NATO Standard AJP-2-7 (Joint Intelligence, 2016), *passim*.

Intelligence activity as a networking task is usually more pronounced in the *military sphere* than in the police sphere. For this reason, military terms are used in this study as well as military examples and sources.

In our opinion, the differences between the military and civilian sectors have little influence on the *method* of situation assessment.

- In the field of *homeland security*, the object is usually not a (military) opponent, but a (civilian) counterparty. The "success" of this counterpart is usually realised in a single action (*e.g.*, the attack on "Charlie Hebdo") – while a military opponent has to carry out various operations until he reaches his (strategic) goal (*e.g.*, the interruption of communication links, the encirclement of barracks as well as the seizure of key terrain to conquer Crimea in 2014).
- In the military context, the *opponent's intention* (often easily to be anticipated) is dominant (*e.g.*, territorial gain). Its means and capabilities are usually known or readily identifiable (*e.g.*, the deployment of rocket artillery in the vicinity of potential battle areas). In the civilian sphere, the focus is on a broader spectrum of threats (in particular, a terrorist opponent has greater flexibility in target selection, but probably also in tactical terms).
- In military fields, coordination and exchange in intelligence activities are not only better established, but also easier to implement (*e.g.*, by using the specialised service channel). As a rule, *data protection* in the sense of fundamental rights does not play a special role – much more the (technically guaranteed) protection of secrets (classification of information).
- Military forces usually have a broad repertoire of – often redundant – reconnaissance means at their disposal in a timely manner (esp. SIGINT, COMINT, IMINT, MASINT, HUMINT, OSINT[649]), which they can use for various purposes[650]. They are less bound or not bound at all to authorisation requirements in their domain. Police agencies are bound to the means

[649] To the *collection disciplines, cf.* NATO Standard AJP-2 (Intelligence, 2016), pp. 3-9 ff.

[650] To *intelligence products, cf.* NATO Standard AJP-2 (Intelligence, 2016), pp. 3-11 ff.

they are allowed within the framework of policing (detention, questioning, etc.); in addition, they are dependent on the reliability and availability of tips from the intelligence services. Sometimes they maintain intelligence agencies themselves.

2.2. STATE RESPONSIBILITY

A *terrorist threat* is strategically directed against a state, against its population or against a specific target group. The states (or their security forces) must be enabled to assess situations correctly (as to the duties to protect according to Art. 2 ECHR respectively *see* nos. III.2.2 and V.5.2.3). This includes the capability to verify and anticipate potential threats to the civilian population and to state institutions, what the intentions of a possible counterparty are and what means it can and will resort to[651]. A distinction can be made between the assessment of *threats* and the assessmants of *risks*[652].

The analysis of a terrorist threat does not deal with "terrorism" *per se*, but with a specific terrorist-motivated counterpart in certain strength, with certain means, with certain capabilities and with certain intentions: "it is vital for governments first to distinguish among types and levels of terrorist threats"[653].

Under certain circumstances, different threats can occur in parallel – or a certain threat has different facets: For example, with regard to the jihadist-motivated attacks in recent times, it is quite correct to point out that these were both planned actions by terrorist networks and actions by "solidary" individual perpetrators – which, however, corresponded to an "overriding agenda"[654]. The degree of connection between "spontaneous" individual perpetrators and terrorist groups – and thus also the degree of "external control" by the latter – can be disputed.

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651 *Cf.* Charters, Countering Terrorism in the Democratic Context, pp. 216 f.

652 Combs, Terrorism in the Twenty-First Century, p. 349.

653 Wardlaw, Democratic Framework, p. 5; quite similarly, Holmes, Counterterrorism Policy, p. 36, which, however, seems to focus more on general political, social and economic circumstances.

654 Hoffman/Reinares, Global Terrorist Thereat – Conclusions, pp. 622 and 630.

This means that the possible identities (perpetrators), their capabilities (from trivial means to highly complex forms of action) as well as possible targets (rather directed at a crowd or evaluated with pinpoint accuracy) of a certain threat vary. Under certain circumstances, actions are coordinated and controlled – at best, there is merely an ideological connection.

> The latter seems to be the case with attacks by the terrorist network known as the *Islamic State* (in Iraq and the Levant; IS) – or those so-called *lonely wolves* who more or less independently carry out attacks in Europe and profess their allegiance to the IS[655].

In order to identify and assess terrorist threats, the use of intelligence means and measures or police surveillance may be unavoidable. In any case, intelligence must be assessed in the respective context[656].

> An example of the need to detect and assess possible threats are *jihad travels* from Europe to the Middle East. IS maintains contacts with supporters in Europe and deploys fighters that it has recruited there in conflict regions[657]. A particular challenge arises when such fighters later return to their European countries of residence or origin.
>
> «The longer foreign terrorist fighters remain in conflict zones, the more likely it is that they will commit acts of terrorism or other serious crimes; embrace violent extremist causes; gain further experience and training; and strengthen networks. Foreign terrorist fighters who remain in destination States may also experience direct military confrontation between foreign Governments

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655 For example, IS sometimes claims originatorship of attacks in Europe at a relatively late stage. One reason for this is probably that the terrorist network first has to carry out its own intelligence investigations – which contradicts central planning and control of activities. But there is no doubt that the banned organisation provides a "home" for misguided individual perpetrators and motivates them with promises of salvation.

656 To processing in the military sense, *cf.* NATO Standard AJP-2-1 (Intelligence Procedures, 2016), pp. 3-10 ff.

657 UN Security Council, Sixth report of the Secretary-General on the threat posed by ISIL (Da'esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat, 2018/80, 31 January 2018, §§ 28 f.

> and terrorist entities. Moreover, the networks that they build in the destination State may subsequently assist them to return or relocate undetected by providing them with fraudulent travel documents, as well as guidance in the use of broken travel patterns. In order to provide comprehensive, long-term solutions to these threats, administrative travel measures can be complemented by cooperation with other States in bringing terrorists to justice.
>
> Administrative travel measures have been abused in some cases, raising concerns about the protection and promotion of international human rights and humanitarian and refugee law. Such abuse can limit the effectiveness of comprehensive strategies to prevent and counter violent extremism that leads to terrorism. Because international human rights law provides protection against refoulement, such measures can never be used in cases where an individual would be at risk of persecution in a country to which he or she is forcibly returned.»[658]

The fundamental rights of both the persons directly affected and third parties must be respected in intelligence gathering and action (also for intelligence gathering) must be taken in a proportionate manner[659]. In the judgment *Klass and others v. Germany*, the ECtHR (*Court Plenary*) ruled in 1978 on the admissibility of secret surveillance practices. The Court laid down essential principles for the structuring of the legal basis (although in particular it did not recognise the right to respect for privacy under Art. 8 ECHR as being violated).

> «[…] Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is,

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658 UN Security Council, Fifth report of the Secretary-General on the threat posed by ISIL (Da'esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat, 2017/467, 31 May 2017, §§ 49 f.

659 *See also* von Bernstorff/Asche, Nachrichtendienst and Menschenrechte, Rz. 6 ff.

> under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime.
>
> As concerns the fixing of the conditions under which the system of surveillance is to be operated, the Court points out that the domestic legislature enjoys a certain discretion. It is certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field [...]. Nevertheless, the Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.»[660]

2.3. IDENTIFICATION AND ASSESSMENT OF THREATS AND RISKS

2.3.1. Risik assessment and risk evaluation

General, local and specific threat indicators can be derived from an intelligence or police threat analysis[661]. The terrorist threat is related to the "political" purpose or objective of a terrorist group.

> For example, the *class-struggle* groups Red Army Faction (RAF) in Germany or Brigate Rosse in Italy kidnapped and murdered high-ranking politicians and business leaders. In contrast, *jihadist-motivated* perpetrators target religious (Jewish institutions or Christmas markets) institutions or events. For other groups with *different backgrounds*, there are completely different targets (such as power lines for ecologically motivated extremists).

With regard to potential targets, risks have to be identified and assessed. The concept of risk is difficult to define (*see* no. III.2.2.1) – it seems easier to deduce a risk figure

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660 *Klass and others v. Germany* (Court Plenary), 5029/71 (1978), §§ 48 f.

661 Combs, Terrorism in the Twenty-First Century, p. 349.

following the probabilistic method[662] and to value the result; the risk figure quantifies a risk (especially in the area of technical risks) as a multiplication of the probability of occurrence and the extent of damage[663].

$$\boldsymbol{Risk}\left\{\frac{consequence}{\substack{unit\\time}}\right\} = \boldsymbol{Frequency}\left\{\frac{events}{\substack{unit\\time}}\right\} \boldsymbol{x\ Magnitude}\left\{\frac{consequences}{event}\right\}$$

The quantification of risks – and thus a risk assessment – is also required in the field of homeland security[664]. In the context of a terrorist threat, a risk evaluation follows in order to identify potential targets[665] and to set the concrete threat into proportion to the possible use of defensive measures [666].

2.3.2. Concretisation of threats and risks

The pre-operational state duty to recognise threats (reconnaissance) is not exhausted in the abstract analysis and presentation of a general operational picture. Rather, it is necessary to break down the knowledge gained in a specific situational picture to the operational and tactical level[667].

a. Reference to the relevant context

Terrorist actions are context-bound and concrete[668]: Specific individuals (in a specific organisational structure or specific connections to each other) target specific locations,

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662 *Cf.* IAEA/INSAG, Probabilistic Safety Assessment (INSAG-6), pp. 2 f. on the historical background using the example of the application of probabilistic analysis methods in nuclear energy (§ 2.1) and for its purposes (§ 2.2).

663 *U.S. NRC*, Rasmussen Report, p. 9. On technical risk analysis in the field of nuclear technology, *see also* Hauptmanns/Herttrich/Werner, Technische Risiken, p. 43.

664 Combs, Terrorism in the Twenty-First Century, p. 350.

665 Combs, Terrorism in the Twenty-First Century, p. 351.

666 Combs, Terrorism in the Twenty-First Century, p. 350.

667 On intelligence activities as "most important dimension of any counterterrorism effort" *cf.* Forest, Counterterrorism, pp. 11 f.

668 Schulz, Challenge to the Democracies, p. 17: "What we have learned about terrorism is, first, that it is not random, undirected, purposeless violence. (…) Terrorists and those who support

specific human targets (especially at-risk individuals) or specific infrastructures with a designated tactic (*see* c)[669].

With the anticipation of possible concrete threats, for example according to their nature (including actors and their tactical possibilities) as well as a possible centre of gravity on potential targets (in time and space) and – above all – media significance of actions the basis is laid for preventive measures and plannable defensive actions (*see* no. IV.3).

b. The opposing party

The starting point for all defence measures is first of all the *assessment of a potential counterpart*. This means identifying a possible perpetrator (individually or as a group) and clarifying their legal status (to the status as a combatant *see* no. V.1.3 and for the protection of civilians no. III.4.2)[670].

Particular attention is to be paid to the identification of a potential counterpart as to whether it is an element of a (wider) network and how strong (respectively how and where) such a network is spreading[671]. This goes along with the need to obtain information on the concrete persons involved themselves and on their status within a groupe of persons[672]. In the case of an identified person, significant indications arise from any previous convictions (criminal record) or from previous behaviour relevant to the police or intelligence services. In a broader sense, however, this includes possible networks abroad (especially conflict areas)[673]. In the broadest sense, social, cultural and religious

them have definite goals; terrorist violence is the means of attaining those goals. Our response must be twofold: We must deny them the means, but above all we must deny them their goals."

669 Traditionally, terrorist actors had carefully selected their victims – often representatives of the state (persons at risk) – currently they are seeking the greatest possible destruction; *cf.* Laqueur, Krieg dem Westen, p. 11.

670 To profiling in general, *see* Bosco/Creemers/Ferraris/Guagnin/Koops, Profiling Technologies and Fundamental Rights, pp. 5 ff. (attempts at definition) and pp. 11 ff. (on the area of tension under fundamental law) and Lynskes, Profiling and data protection, p. 166 (predictive policing).

671 This requires examining whether it is a local, national or international network. The larger a network, the more (financial) resources and options as well as support can be made available to it.

672 The question is whether the opposite side is the leadership of the network, middlemen or the lowest level of the network. Depending on the status of the opposing side, access to and supply of resources can vary greatly.

673 For this purpose, journeys made in the past can serve as an indicator.

affiliations, in particular possible relations to fundamentalist, fanatical or terrorist groups, are to be identified and assessed. In addition to intelligence assessments, however, the evaluation of a potential adversary also includes factual elements such as the general mental and physical state of health of individual persons[674].

In order to derive the presumable *intention* of a possible counterparty, a certain degree of hypothetical assumptions is unavoidable; a concrete intention to harm is usually only clearly recognisable at a late stage. Nevertheless, certain behaviour, especially in combination with information regarding the affiliation to a certain grouping or ideology, can indicate possible intentions. Corresponding findings are used to identify potential targets, the intended damage and the intended "message" of the opposite side (terrorist attacks are not an end in themselves)[675].

Indications about the *capabilities* of a possible opposing party arise in particular from information about the professional backgrounds and/or military backgrounds of specific persons. For example, knowledge and skills in the handling of weapons, dangerous objects or substances can be deduced from corresponding information[676]. Whether and to what extent preparatory acts have been taken already is of particular relevance[677].

If the identity and the threat potential of an opponent party have been established or if there are at least sufficient indications thereof, the corresponding information and findings about the potential perpetrators must be included in the assessment of a situation and of its possible *development*. The more reliable information is available, the more adequately the situation can be assessed[678].

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674 This means, for example, whether psychological problems are known, whether a post-traumatic stress disorder might have occurred or whether other problems have been identified that need to be taken into account.

675 FIP, § 6.5.5.

676 FIP, § 6.5.5.

677 For example, exploring possible targets, access and escape routes, obtaining resources (weapons, explosives, chemicals, protective material, etc.) and the recruiting potential combatants; *see* FIP, § 6.5.5.

678 FIP, § 6.5.5. For more general information on predictive policing, *see* Egbert/Leese, Criminal Futures, pp. 19 ff. and on personal approaches in the field of terrorism, pp. 28 ff.

> For example, it is crucial whether a threat is posed by a lone-actor[679] or by a group or even a complex network of terrorists[680].

Any assessment of a counterparty is subject to a forecasting risk (*see* no. III.2.2.5). The freedom for acting usually lies with the potential perpetrators.

c. Potential targets

Terrorist attacks aim to attract *public attention*. This must be taken into account when assessing possible targets. A distinction can be made between material targets (such as infrastructures or specific objects) and persons. While certain places or objects are less in the focus of terrorist activities and thus less preventive measures by the state are required, other places or objects require increased attention.

> The assumption, sometimes even expressed by representatives of intelligence services, that a very broad field of action is open to terrorist actors (everything everywhere and everytime) is therefore only valid to a very limited extent. Although threat analyses can never be carried out with complete certainty, weightings appear to be quite possible – they are generally necessary.

The *attractiveness* of a target is greater if it is well known, has a symbolic value or has certain other "qualities". In addition, there are *tactical aspects* such as the frequentation of public places, easy access and escape possibilities for victims or the protection of an object. Finally, the possibility of rapid *media dissemination* of possible attacks is an important factor.

> In *Tagayeva and others v. Russia*, the ECtHR emphasised the vulnerability of the victims (schoolchildren). This may have made it easier for the Court to

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679 *Cf.* Khazaeli Jah/Khoshnood, Profiling Lone-Actor Terrorists, p. 41.

680 According to a counter-thesis (which is not shared by the authors) Hankiss, Legend of the Lone Wolf, p. 69: "However far-fetched it may sound, a hypothesis to consider is the possibility that announcing and adopting a strategy with lone perpetrators in the forefront may serve a double purpose as diversive propaganda: spreading fear and insecurity among civilians and misleading police and intelligence forces. This psychological operation is part of large-scale psychological warfare. Thus, feeding the legend of the ‹lone wolf› is probably a means of asymmetric warfare with the aim of maintaining control, keeping the enemy in the dark and provoking reactions."

conclude that there was a breach of pre-operational obligations in this case: «[… It is] established that at least several days in advance the authorities had sufficiently specific information about a planned terrorist attack in the areas […] and targeting an educational facility on 1 September. The intelligence information likened the threat to major attacks undertaken in the past by the Chechen separatists, which had resulted in heavy casualties. A threat of this kind clearly indicated a real and immediate risk to the lives of the potential target population, including a vulnerable group of schoolchildren and their entourage who would be at the Day of Knowledge celebrations in the area. The authorities had a sufficient level of control over the situation and could be expected to undertake any measures within their powers that could reasonably be expected to avoid, or at least mitigate this risk. Although some measures were taken, in general the preventive measures in the present case could be characterised as inadequate. The terrorists were able to successfully gather, prepare, travel to and seize their target, without encountering any preventive security arrangements. No single sufficiently high-level structure was responsible for the handling of the situation, evaluating and allocating resources, creating a defence for the vulnerable target group and ensuring effective containment of the threat and communication with the field teams.»[681]

Potential targets are particularly closely related to the motives of a potential perpetrator.

Thus, it is probably no coincidence that in recent attacks, London Bridge (June 2017)[682], La Rambla (August 2017)[683], the Nice promenade, a Jewish supermarket (January 2015)[684], the Bataclan concert hall (November 2015)[685], a Jewish muse-

681 *Tagayeva and others v. Russia,* 26562/07 (2017), § 491.

682 London as the capital of the United Kingdom; high frequentation of the city centre; good accessibility for the van as a tool of the crime; low possibility of evasion for victims; etc.

683 Long, busy shopping street in the tourist city of Barcelona with easy access for delivery trucks.

684 High symbolism of the kosher supermarket for the Jewish community in Paris; possibility to take hostages and hide there.

685 Symbolic ownership, numerous concert participants, narrow entrances and exits and thus only limited options for victims to escape.

um (May 2014)[686] as well as, for instance, Brussels airport (March 2016)[687] and Christmas markets in Berlin (December 2016)[688] and Strasbourg (December 2018)[689] have been chosen as targets by jihadist perpetrators.

Conversely, for example, it would not make sense for environmental activists who are prepared to use violence to target the above-mentioned places. Their interest lies within completely different hard targets, primarily in the area of critical infrastructures[690]. Such targets have a high symbolic value for these perpetrators and their "followers" or are intended to hurt society in certain areas of life.

Certain objects as well as certain persons are protected under international law (*see* no. IV.1.1). Insofar as obligations exist under international law, states (from the perspective of international law, the receiving states) are, in our opinion, obliged to carry out a permanent assessment of the situation.

In (literal) *spatial* terms, the Vienna Convention on Diplomatic Relations in Art. 22 provides special protection for diplomatic missions, in Art. 30 para. 1 for private premises of protected persons and the Vienna Convention on Consular Relations in Art. 31 for consular representations. In Art. 29 it enshrines the protection of diplomatically protected *persons*.

The purpose was to ensure that adequate protection is possible in case of a threat.

Thus, in the judgment on the 1979 storming of the U.S. Embassy in Tehran, the International Court of Justice (ICJ) stated in general terms that «the Ira-

686 High symbolic value of the museum for the Jewish community in Belgium.

687 High symbolic value of the busy Brussels Airport as the capital airport of Belgium. Brussels is also the site of the NATO headquarters and the seat of the EU Commission.

688 Easily accessible by trucks, densely used square in the German capital with closely placed market stands.

689 High loss rate at a well-attended Christmas market, limited options for victims to escape.

690 On the explosives and property offences committed by *Marco Camenisch*, known as the "eco-terrorist", who shot the border guard *Kurt Moser* in the Puschlav in 1989, *cf.* the judgment of the Swiss Federal Supreme Court BGE 132 IV 102 and the article of the Neue Zürcher Zeitung (NZZ) of 30 November 2006, p. 53.

nian Government failed altogether to take any ‹appropriate steps› to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion»[691]. In order to meet this requirement, it is not only necessary to be able to intervene in good times, but also to assess the situation and to make a plan on the basis of this assessment.

Whether claims to a risk assessment can be derived for individuals beyond protection under international law – *i.e.*, at an individual level – and, based on this, in turn possible claims to protection, depends on various circumstances.

In this respect, the case law of the ECtHR on real and immediate risk should be taken into account (*see* no. III.2.2.5). A terrorist threat against an individual is conceivable – but the Court's case law requires concrete evidence for this in principle[692]. However, the person concerned will only succeed in providing sufficiently conclusive evidence of a threat in the case of threats made against him or her.

For example, when the life of a person is publicly threatened, as in the case of the Indian-British writer *Salman Rushdie*. Because of his book *The Satanic Verses*, the Iranian revolutionary leader Khomeini had called on all Muslims to kill Rushdie in a fatwa on 14 February 1989.

It would at least be very unusual for terrorists to warn their victims by means of concrete threats. However, the state may have such knowledge (*see* no. III.2.2.7) under certain circumstances. Namely, if a general and situational report indicates a particular threat to specific individuals. This will usually require close cooperation between the intelligence services and the police.

During the *German Autumn*, for example, it was possible to assess which representatives of the German state, economy and associations had been particularly

691 ICJ, *United States of America v. Iran*, Judgment of 24 May 1980 (concerning diplomate and consular staff in Tehran), § 63.

692 *Selahattin Demirtaş v. Turkey*, 15028/09 (2015), § 33.

threatened by the RAF (target attractiveness) – or remained so even after the terrorist group was disbanded[693].

d. Temporal aspects

Particular threats are dependent on, or at least shaped by, temporal factors. A special target attractiveness can arise on symbolic dates such as anniversaries or other events.

> «At 9 a.m. on 1 September 2004 school no. 1 in Beslan, North Ossetia, held a traditional Day of Knowledge ceremony to mark the opening of the academic year. Over 1,200 people gathered [...] in the centre of the town, whose population was approximately 35,000. [...] The gathering included 859 schoolchildren, sixty teachers and staff of the school and members of their families [...]»[694].

Especially in the case of an increased terrorist threat, temporal aspects for the assessment of a specific situation must be taken into account in order to be able to draw the right consequences.

> «[...In] July and August 2004 a number of internal directives were issued by the Ministry of Interior and the FSB indicating a heightened terrorist threat in the North Caucasus. Geographically, the risk was located at the border between Ingushetia and North Ossetia, more specifically in the forested area of the Malgobek District in Ingushetia, where the movement and gathering of the illegal armed group had been recorded, and the adjoining areas in North Ossetia, including the Pravoberezhny District. The nature of the threat was described as a terrorist attack involving hostage-taking of a civilian object. Several documents [...] linked the attack with the opening of the academic year and the Day of Knowledge – 1 September, when every school holds a celebratory gathering of all pupils and staff and where many parents and visitors are present. The threat was considered imminent enough to put the local

693 *Horst Herold*, President of the German Federal Criminal Police Office (BKA) from 1971 to 1981, was one of them. In this function, he was at the forefront of the fight against the RAF and in particular developed the grid search. Herold lived in an army base until shortly before his death (https://www.sueddeutsche.de/politik/prantls-blick-der-letzte-gefangene-der-raf-ist-gefluechtet-1.3651463, last visited on 4 June 2022).

694 *Tagayeva and others v. Russia,* 26562/07 (2017), § 21.

> security forces on high alert. On the strength of the above warning, the North Ossetian and Ingushetian Ministries of the Interior ordered the local police to undertake preventive measures. These included provisions for tracking and checking suspicious looking people and vehicles, blocking secondary roads to avoid unsupervised passage between the two republics, warning the local authorities and the school administrators, taking special measures to protect educational facilities, establishing clear communication channels and preparing contingency plans in case of emergency [...]»[695].

Conversely, the inclusion of temporal aspects can also lead to the conclusion that the level of a concrete threat has been reduced. In particular, a possible context to the planning behaviour of the counterparty and its decision-making as well as the possible variants for it must be established. Ultimately, the security forces' options for actions may increse. These are decisive when it comes to assessing the absolute necessity of the deployment of potentially lethal use of force.

> In the judgment *McCann and others v. The United Kingdom*, the *Grand Chamber* also examined the temporal aspects in order to assess the behaviour of the terrorists: «In fact, insufficient allowances appear to have been made for other assumptions. For example, since the bombing was not expected until 8 March when the changing of the guard ceremony was to take place, there was equally the possibility that the three terrorists were on a reconnaissance mission. While this was a factor which was briefly considered, it does not appear to have been regarded as a serious possibility»[696].

2.3.3. Situational picture versus criminal evidence

A situational picture comprises both *intelligence* and *police* components. The information on which it is based, condensed into intelligence, does not have the character of evidence in the sense of criminal procedure[697]. The respective messages are also not collected to this purpose.

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695 *Tagayeva and others v. Russia,* 26562/07 (2017), § 484.

696 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 208.

697 *Cf.* Warbrick, European Response to Terrorism, p. 991.

There is a double connection to possible further investigations: On the one hand, with regard to a criminal investigation against dangerous persons, the aim is to obtain and secure *tangible evidence*. On the other hand, with a view to the proportionality of police measures in particular, the objective is to obtain and document comprehensible bases for decision-making (on the duty to investigate *see* no. VI.4).

2.3.4. Intelligence advantage versus police intervention

To gain a complete common operational or specific situational picture, cooperation between different authorities is usually necessary. In terms of content, this involves both the collection and exchange of information as well as its evaluation[698].

But information gathering, collation and analysis by intelligence services alone is not enough. While the intelligence services have special resources and capabilities, police information and intelligence are usually also of great importance. Due to their routine activities in maintaining security and fighting crime, police forces have an "unrivalled ‹bank› of background information from which contact information can be developed"[699].

However, authorities tend to – or are even legally obliged to – keep information to themselves. In the case of cross-border threats, the exchange of information between different authorities and between different states is indispensable[700].

2.4. DECISION-MAKING

Concrete defence measures are based on decisions by the authorities. A decision is made on the basis of an assessment of a specific situation (or a specific threat)[701]. It can consist of planning an operation or triggering a prepared planning case. Once decisions are made, a complex transition to active action takes place, which is always fraught with gaps in knowledge[702].

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698 *Cf.* Oakley, Combating Terrorism, p. 9 (collection and analysis).

699 Wilkinson, Terrorism versus Democracy, p. 106.

700 *Already* Oakley, Combating Terrorism, pp. 9 f.

701 FIP, § 7.1.1. and – *mutatis mutandis* – Zeitner, Einsatzlehre, p. 89.

702 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 193: «Inevitably [...], the security authorities could not have been in possession of the full facts and were obliged to formulate their policies on the basis of incomplete hypotheses».

> In the military context, a distinction is usually made between the *most dangerous* and the *most probable* possible action by an opponent. In planning and preventive measures, the most dangerous possibility is taken as a reference point. In ongoing operations, the focus is on the most probable action of an opposite side. In both cases, an assessment takes place *ex ante* and on the basis of (evaluated) variants. An solid methodological approach is relevant both practically and legally: An accurate specific situational picture is the essential prerequisite for being able to deploy security forces in a lawful and proportionate manner.

If the authorities decide to act or refrain from acting, this can have various (sometimes unintended) consequences: On the basis of the available information, the probability of an event occurring (and thus the seriousness of a threat) might be judged to be (too) low, and a threat therefore denied. Consequently, the state does not take any concrete preventive measures to avert danger – under certain circumstances it may even be prohibited from doing so (lack of legal basis or lack of proportionality). If a danger materialises, the decision taken was nevertheless legally compliant in our opinion. If, however, the situation was wrongly assessed and a danger materialises, the state can only be held responsible if it could and should have known more. Conversely, if the authorities take measures based on the erroneous assessment of a serious danger, they may be unjustifiably interfering with the fundamental rights of third parties.

> It is the state's responsibility to assess threats – but the opposing party usually has the *power to act*. Only the latter has knowledge of how they want to carry out their deed in concrete terms, what means they will use to do so and – above all – what options they reserve for themselves.
>
> Therefore, it cannot be required that the state authorities take into account any action, no matter how hypothetical, in their decision-making process[703]. A certain degree of assumption (or even guesswork) is also appropriate when

[703] The ECtHR refers (only) to a *disproportionate burden* which cannot be imposed on the state in connection with the positive obligation arising from Art. 2 para. 1 ECHR. *Cf.* from the case law in particular *Finogenov and others v. Russia*, 18299/03 (2011), § 209; *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 254; *Mastromatteo v. Italy* (GC), 37703/97 (2002), § 68.

making decisions. A residual risk regarding the actual occurrence of an event can never be completely ruled out.

The ECtHR allows a certain margin for authorities to base their decisions on assumptions or presumptions when information is incomplete. However, the Court also requires that assessments and assumptions are being reviewed and, if necessary, revised.

In the judgment *McCann and others v. The United Kingdom*, the *Grand Chamber* was right to emphasise a close connection between the intelligence assessment of the behaviour of the three terrorists and the proportionality of the defensive action: «In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence [...].»[704]

Within the *Grand Chamber*, however, this issue was controversial. The Joint dissenting opinion of the nine outvoted judges (the verdict was 10 to 9) emphasised the *ex ante*-view of the authorities and the dominance of the terrorists: «[In] undertaking any evaluation of the way in which the operation was organised and controlled, the Court should studiously resist the temptations offered by the benefit of hindsight. The authorities had at the time to plan and make decisions on the basis of incomplete information. Only the suspects knew at all precisely what they intended; and it was part of their purpose, as it had no doubt been part of their training, to ensure that as little as possible of their intentions was revealed. It would be wrong to conclude in retrospect that a particular course would, as things later transpired, have been better than one adopted at the time under the pressures of an ongoing anti-terrorist operation and that the latter course must therefore be regarded

[704] *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 193: «Inevitably [...], the security authorities could not have been in possession of the full facts and were obliged to formulate their policies on the basis of incomplete hypotheses».

as culpably mistaken. It should not be so regarded unless it is established that in the circumstances as they were known at the time another course should have been preferred»[705].

In our opinion, hypotheses must and may be taken into account in the preparatory phase of operations, as they can, among other things, indicate a possible development of a situation and thus influence appropriate planning[706]. However, in addition to the planning of a main operation, also contingency plannings must be prepared in order to give the authorities involved the greatest possible scope for action or reaction.

In addition, it must always be examined whether the freedom for acting in operations of state security forces actually lies with the endangerers and at what point it is rather to be attributed to the state actors.

3. PLANNING

In its recent jurisprudence, the ECtHR distinguishes between plannable and non-plannable operations, highlights general preparatory acts and includes operational and even tactical issues in its legal considerations. In the case of anti-terrorist operations, it focuses on pre-operational duties of states in the area of planning and decision-making[707].

«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

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705 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), *Joint dissenting opinion* of judges Ryssdal, Bernhardt, Vilhjálmsson, Gölcüklü, Palm, Pekkanan, Freeland, Baka, Jambrek, § 8.

706 FIP, § 7.2.4. and Zeitner, Einsatzlehre, p. 118.

707 *Cf.* Reid, Practitioner's Guide, 85-018 (with reference to *Mansuroğlu v. Turkey,* 43443/98 [2008], §§ 85 ff. and *Giuliani and Gaggio v. Italy* [GC], 23458/02 [2011], §§ 252 ff.).

> 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 [...].»[708]

When planning major police operations, the specific framework conditions determining the execution of the operation must be taken into account. This includes in particular the permissibility and the type of cooperation between state authorities, the respective legal bases, and the continuous and focused gathering of information as well as the mobilisation of human and other resources. Inadequate planning that does not contribute to a reduction of the risk to life as a legal asset is conflicting with the obligations under Art. 2 ECHR[709].

3.1. ADEQUACY OF POLICE CONDUCT

For police action, a distinction can be made between the general police mandate and police duties in special situations. The general police mandate must be fulfilled constantly and be tailored to normal situations. In special situations, particular challenges may require additional or different police resources or specific procedures.

3.1.1. General mandate of the police

The general mandate of police forces is the maintenance of security and order in general[710], the enforcement of the law and the general aversions of dangers[711]. In addition, there are preventive activities, whether through the issuing of permits, through information and education, through training or through increased police presence and control activities.

In order to maintain or restore security, law enforcement officials are granted extended powers. In the case of law enforcement, the use of coercive means in general and of

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708 *Tagayeva and others v. Russia,* 26562/07 (2017), § 563; quite similarly, in *Finogenov and others v. Russia*, 18299/03 (2011), § 214.

709 Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 225 (with reference only to *Ergi v. Turkey,* 66/1997/850/1057 [1998]).

710 ICRC, International rules and standards for policing, p. 23.

711 ICRC, International rules and standards for policing, pp. 20 f.

weapons in particular may be permissible[712]. The general principles for police activity, closely based on the prerequisites for interfering with fundamental rights, apply:

- According to the *principle of legality*, every police activity must be based on a sufficient legal basis (*see* no. IV.1.3 and V.3.4).
- The *adequacy* and *feasibility* of a measure depends on whether the intended outcome can be achieved (or at least promoted) at all (prohibition to take inappropriate measures).
- Under the principle of necessity, it is asked whether interventions in the legal assets of third parties – and in the case of coercive measures in particular in their fundamental rights – are limited to what is necessary (prohibition of disproportionate measures).
- The principle of proportionality requires a balance to be maintained between an interference with legal assets and the desired objective.
- According to the principle of accountability, the implementing authorities at all levels are responsible for their conduct[713].

The guarantees from Art. 2 ECHR already develop a certain depth in the exercise of general police duties. This includes adequately regulating, instructing and monitoring the use of any means of coercion.

> Fundamental shortcomings with regard to special physical coercion were recognised by the ECtHR in the judgment *Saoud v. France*: «[…] Mohamed Saoud a été maintenu au sol pendant trente-cinq minutes dans une position susceptible d'entraîner la mort par asphyxie dite ‹posturale› ou ‹positionnelle›. [… Cette] forme d'immobilisation d'une personne a été identifiée comme hautement dangereuse pour la vie, l'agitation dont fait preuve la victime étant la conséquence de la suffocation par l'effet de la pression exercée sur son corps […]. Enfin, la Cour déplore qu'aucune directive précise n'ait été prise par les autorités françaises à l'égard de ce type de technique d'immobilisation et que, malgré la présence

712 ICRC, International rules and standards for policing, p. 24.

713 Casey-Maslen/Connolly, Police Use of Force under International Law, Cambridge 2017, pp. 82 ff.; ICRC, International rules and standards for policing, p. 18.

sur place de professionnels formés au secours, aucun soin n'ait été prodigué à Mohamed Saoud avant son arrêt cardiaque [...].»[714]

It is an integral part of modern police training to prevent death by asphyxiation – or to take countermeasures if there are signs of it.

3.1.2. Anticipation of exceptional situations, emergency planning and crisis management

No absolute right to avert all violations of fundamental rights can be derived from the ECtHR's case law[715]. In normal situations, or within the framework of the everyday policing, there are hardly any specific duties to protect for the police or for the state beyond the general mandate.

Specific duties to protect can be established in a (special or exceptional) situation of increased risk or a special individual situation. Thus, state duties to protect may arise with regard to particularly endangered objects or possible hotspots (potential targets of attack). The principles for policing in modern societies then already apply to operational planning (*see* no. III.2.2.7). Particular consideration must be paid to the relationship between the binding nature of police actions to the law (principle of legality) on the one hand and the unpredictability of human behaviour on the other.

In addition, prohibitions, rigid limitations or dynamic barriers[716], the possible knowledge of inadequate legal bases, exceptions as well as margins of discretion must be taken into account in the planning. Absolute prohibitions and rigid limitations – such as the prohibition of torture – must be respected under any circumstances. The principle of proportionality, in contrast, represents a dynamic barrier in that the prevailing circumstances are taken into account

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714 *Saoud v. France,* 9375/02 (2007), §§ 102 f.

715 *Mastromatteo v. Italy* (GC), 37703/97 (2002), § 68; *Osman v. The United Kingdom*, 23452/94 (1998), § 116; *Kılıç v. Turkey*, 22492/93 (2000), § 63; *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 55; *Kontrová v. Slovakia,* 7510/04 (2007), § 50; *Opuz v. Turkey,* 33401/02 (2009), § 129.

716 Limitations have a dynamic character when they can be adapted to changing circumstances or offer a wider or narrower margin of manoeuvre depending on the development of a situation.

and, depending on the potential danger, open up greater or lesser margins of manoeuvre.

a. Balancing the eligible obligations

Comprehensive planning of police operations should in particular enable a (better) balance to be struck between different – possibly conflicting – obligations arising from the right to life.

> «When lethal force is used within a ‹policing operation› by the authorities it is difficult to separate the State's negative obligations under the Convention from its positive obligations. In such cases the Court will normally examine whether the police operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force and human losses, and whether all feasible precautions in the choice of means and methods of a security operation were taken [...].»[717]

The ECtHR requires the Convention States to focus not only on an operation as such but also on the wider circumstances and the resources and possibilities available. Where the state exercises (or must be able to exercise) "control", there are high requirements for the planning and management of operations.

> «Accordingly, the Court must take into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination.»[718]

b. Application in anti-terrorist operations

In its first judgment on the planning and conduct of anti-terrorist operations – *McCann and others v. The United Kingdom* (under the title «control and organisation of the

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[717] *Finogenov and others v. Russia*, 18299/03 (2011), § 208.

[718] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 249; quite similarly, in *Makaratzis v. Greece* (GC), 50385/99 (2004), § 58 («even against avoidable accident»).

operation»)[719] – the decisive factor for the *Grand Chamber* was that a confrontation of the three terrorists with the SAS could have had occurred at all.

> «It may be questioned why the three suspects were not arrested at the border immediately on their arrival in Gibraltar and why [...] the decision was taken not to prevent them from entering Gibraltar if they were believed to be on a bombing mission. Having had advance warning of the terrorists' intentions it would certainly have been possible for the authorities to have mounted an arrest operation. [...].»[720]

In the legal considerations, the possibility of the development of a special situation (respectively the anticipation of the terrorist activity in the overall context) played an important role. With sufficient knowledge, the state authorities must interrupt a cause-and-effect relationship early on. In its operational acting, the state takes over the reins of action and is therefore responsible for future events – but it then uses the mildest means that are still effective.

> This may seem unsatisfactory from a criminal law perspective, as the perpetrators could only be convicted for an attempt (and perhaps not even for that). However, the right to life (even of the terrorists) and thus prevention has priority over any need for punishment (repression). Similar questions arise in intelligence operations[721].

In the case of *Isayeva v. Russia*, the ECtHR did not have sufficient documentation on the planning and execution of the specific military operation; the Court concluded that the attack on the village was not a spontaneous act by the security forces[722]. It was decisive for the judgment that the use of fighter aircraft with standard equipment for ground combat must have formed part of the planning.

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719 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), §§ 202 ff.

720 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 203.

721 *Cf.* Jackson, Counterinsurgency Intelligence in a "Long War", pp. 82 ff. (to *disruption operations* and further examples of *indirect prevention of attacks*).

722 *Isayeva v. Russia*, 57950/00 (2005), §§ 182 and 188.

> «The Court regards it as evident that when the military considered the deployment of aviation equipped with heavy combat weapons within the boundaries of a populated area, they also should have considered the dangers that such methods invariably entail. There is however no evidence to conclude that such considerations played a significant place in the planning. [...] Once the fighters' presence and significant number had become apparent to the authorities, the operation's commanders proceeded with the variant of the plan which involved a bomb and missile strike at Katyr-Yurt. [...]»[723]

The violation of Art. 2 ECHR thus did not consist in the military operation itself, but rather went back to the planning. It was not permissible to accept the death of civilians fleeing from Katyr-Yurt (in this case: *Zara Adamovna Isayeva*, *Zelimkhan Isayev*, *Zarema Batayeva*, *Kheda Batayeva* and *Marem Batayeva*)[724].

c. Implications for planning and crisis management

The requirements for planning preparations are high. However, nothing impossible or completely disproportionate is requested of a Convention State[725]. Both contingency and emergency planning as well as special arrangements for crisis management are familiar to states. They have been used for a long time, for example, in military operations or for the protection of their own representations abroad[726].

A state duty to protect relates to a protected asset (in this case life as a legal asset). The object of protection applies both to certain (directly threatened) persons and to a possible multitude of persons threatened by certain possible events (*e.g.,* attempts on "critical infrastructures").

> In this way, a threat can be directed against airports or air traffic, against public transport, against energy infrastructures and the like. In our opinion, a duty to protect can nevertheless exist in the case of general threats – which, from the

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723 *Isayeva v. Russia*, 57950/00 (2005), §§ 189 f.

724 *Isayeva v. Russia*, 57950/00 (2005), § 200.

725 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 249.

726 Oakley, Combating Terrorism, p. 10.

point of view of the object to be protected, are merely indirect. In other words, the threat to a specific person is not necessary (similar to *dangerous activities*) if the materialisation of a threat is sufficiently likely to lead to a violation of the relevant protected interest.

Planning can be based on a (context-related) common operational or special (police) situational picture and a risk assessment (*see* no. IV.2.3). This usually includes an assessment of not only the opposite side and the risks it poses, the probable area of operation and the timing (*see* no. IV.2.3.2) but also the own means and possibilities as well as the legal situation (*see* no. IV.1)[727]. The situational picture finally serves as a basis for minimising the risks for all parties involved as far as possible.

Different concrete measures can be derived from an assessment: For example, controls, restrictions for access or structural measures at target objects; security tests at objects with penetration teams[728]; or measures for operational security (denial of opportunity/collecting information[729]) or for sharpening the attention of personnel (recognition of behaviour patterns and simplified alerting).

In the best case, appropriate action against potentially fatal threats fulfils the *positive obligations* arising from the right to life (*see* no. III.2.2). An intervention with recourse to potentially lethal use of force must, however, equally comply with the *negative obligations* (*see* no. III.2.3).

3.2. FOCUSED COLLECTION, PROCESSING AND DISSEMINATION

Depending on the circumstances, intelligence gathering must be deepened in order to be able to make adequate decisions at all. The specific situational picture can – in a further concretisation – be updated, verified or extended[730].

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727 FIP, §§ 6.4 ff.

728 Combs, Terrorism in the Twenty-First Century, p. 333.

729 Combs, Terrorism in the Twenty-First Century, p. 334.

730 In military terms, it's all about *tactical intelligence*; *cf.* NATO Standard AJP-2 (Intelligence, 2016), p. 3-1.

> Before the storming of School No. 1 in Beslan, two groups of special operation forces had been deployed to observe the object for special intelligence gathering[731].

The collection of information and its condensation into intelligence has a dual character. On the one hand, intelligence activities serve to identify a possible counterparty and to assess its intentions and capabilities in a concrete case. On the other hand, intelligence actions are also part of the repertoire of preventive measures.

> *Intelligence-led operations* have proved particularly effective in the Northern Ireland conflict when they were based on human intelligence (HUMINT)[732]. For covert operations, a special unit of the Royal Army was used, which was quite successful in avoiding direct confrontations with the opposing side[733].

Intelligence operations usually have a high degree of complexity. They are in most cases not spontaneous but require very thorough preparation. Their purpose is not to directly influence an opposing side, but to collect and check facts and to derive knowledge.

Intelligence-led operations[734] differ from conventional police work[735]. Multidisciplinary approaches[736] are used to try to understand the behaviour of the opposite side and, at best, to influence it indirectly.

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731 *Tagayeva and others v. Russia,* 26562/07 (2017), § 138.

732 Cochran, RUC in Northern Ireland, pp. 127 f.: "The actions of the state must be intelligence-led, as accurate intelligence is likely to prove more productive than any use of military force. Within the context of Northern Ireland, human source intelligence was proven to be the most effective and dynamic weapon in the armoury of the security forces."

733 Urban, Big Boys' Rules, p. 243.

734 About the term James, Reinventing intelligence-led policing, pp. 75 f. In the present context, however, the focus is not on *optimisation approaches*, but on the method of targeted, intelligence-based police work, based on *accurate and reliable intelligence* (p. 85).

735 Cochran, RUC in Northern Ireland, p. 125: "Human sources came to be treated as more of a long-term asset rather than a means to achieve a quick fix. This was a significant paradigm shift for the police, given the traditional law enforcement emphasis on closing investigations, successful prosecutions, and public satisfaction."

736 Gemke/Den Hengst/Van Rosmalen/De Boer, Intelligence-led policing, p. 15.

From the conflict in Northern Ireland, the use of trackers is known to be able to trace arms deliveries and distributions (*jarking*[737]). Instead of eliminating discovered IRA depots, weapons therein were marked (what is quite easy to achieve with nuclides). The aim was to uncover the terrorists' structures and logistics routes[738]. A long-term effect of intelligence-led operations can be the demoralisation of terrorist groups[739].

The SAS' prepared defence against the attack of *Loughgall police station* on 8 May 1987 (*see* no. V.5.2.4)[740] was actually the *opposite* of an intelligence-led operation. It is true that the intelligence services and also the SAS had done a good job in correctly anticipating the attack of the IRA group (specific situational picture and situation development possibilities were accurate). However, instead of a successful response to the threat, rather, "clean kills" resulted.

To conduct an intelligence-led operation (and thus possibly to reject other options) is a *leadership decision*. It must be embedded in an overall operational or strategic plan.

3.2.1. Focusing on a threat

Intelligence activities can involve different levels (tactical, operational or even strategic) and increase in complexity in a short time[741]. Therefore, it may be appropriate – especially within the context of organisational structures of the security forces – to form an (ad hoc) task force. Its tasks may include processing intelligence (on intelligence processes *see* no. IV.2.1).

From an operational perspective, it is useful to ensure representation of the various authorities in a *task force* that are already involved or will be involved in the future[742].

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737 About the term Urban, Big Boys' Rules, p. 261 (index).

738 Urban, Big Boys' Rules, pp. 119 ff. and 140.

739 Urban, Big Boys' Rules, p. 245 (with reference to the increasing paranoia and measures to preserve the "integrity" of terrorist groups – both of which weaken them.).

740 Urban, Big Boys' Rules, p. 237.

741 *Cf., e.g.,* Lingel/Rhodes/Cordova/Hagen/Kvitky/Menthe, Improving Intelligence, p. 31.

742 For example, representatives of the authorities and organisations for rescue and security, the secret services, the state security and the military should be present. Under certain circumstances, it would also be helpful to include persons from potentially affected institutions.

Sometimes it is only the direct involvement of other authorities that enables access to different sources within the intelligence network[743] and thus the expansion, verification and consolidation of intelligence – but ultimately, above all, their better assessment and thus a sharpening of the (special) situational picture[744].

> In *McCann and others v. The United Kingdom*, the security authorities had set up a task force. Its main mandate was to carry out the anti-terrorist operation[745].
>
> In *Tagayeva and others v. Russia*, there had been indications of attacks in North Ossetia for weeks (*see* no. IV.2.3.2.d). However, an actual task force does not seem to have been created: «In view of relatively specific advance information, the authorities had a sufficient degree of control over the situation at least in the days immediately preceding the Day of Knowledge. It could thus be reasonably expected that a coordinating structure would be tasked with centralised handling of the threat, preparing adequate responses, allocating resources and securing constant feedback with the field teams. [... Despite] a foreseeable threat to life there was no discernible effort to set up some sort of command centre that could carry out its evaluation and containment.»[746]

With its more recent case law, the ECtHR requires – if appropriate knowledge is available (or is required to be available) – the adaptation of government structures in order to be able to correctly record and assess an identified risk.

> It is not a question of deviating from an existing legal and administrative framework and even infringing the principle of legality. Rather, in our opinion, the obligation of the state authorities is to make use of possible room for manoeuvre and to form an intelligence centre of gravity. In view of existing state duties to protect with regard to the right to life, thinking and acting in *silos* is inadmissible.

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743 *E.g.,* Human Intelligence, Open-Source Intelligence, Communication Intelligence.

744 The aim is to provide all the agencies involved with the relevant intelligence; *cf., e.g.,* Carter/Carter, Law enforcement intelligence, pp. 150 f.

745 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 14.

746 *Tagayeva and others v. Russia,* 26562/07 (2017), § 490.

3.2.2. Intelligence and other preventive measures

If intelligence on a potential (terrorist) threat is aggregated to such an extent that a *real and immediate risk* has to be assumed, the duty to protect leads in principle to a duty to act (*see* no. III.2.2.5).

a. Dissemination of the situational picture or intelligence

The Convention States can fulfil this duty to act by providing the authorities concerned with a situational picture or passing on specific intelligence in a target-oriented manner. Furthermore, special intelligence needs can be defined on this basis and other agencies can be commissioned with corresponding reports.

b. Specific safeguards

If a threat can be limited locally, further options for acting may arise. Specific protective measures (*e.g.,* for objects or mobile or static barriers) or specific missions for surveillance should be considered. In this case, intelligence tasks can be mixed with those relating to the defence against immediate dangers.

c. Specific information

The owners or operators of potential targets can be informed at an early stage about the possibility of attacks and asked to cooperate with the leading authorities. On the one hand, this raises awareness, which in turn can serve to gather information. On the other hand, mitigative measures can be initiated (*e.g.,* planning and further preparations for the evacuation of people).

d. General information versus confidentiality

Depending on the circumstances, information or instructions to the public may be required (well known are the calls for supervision of luggage in special places such as airports or train stations).

However, a certain degree of maintaining confidentiality by the authorities may be appropriate. Especially in the case of anti-terrorist operations, there may be a need to withhold information for tactical motives.

> The ECtHR explicitly recognised this in *Finogenov and others v. Russia*, but placed the examination of the need of confidentiality in an overall context of concrete preparatory measures: «The Court [...] recognises the need to keep certain aspects of security operations secret. However, [...] the rescue operation [...] was not sufficiently prepared, in particular because of the inadequate information exchange between various services, the belated start of the evacuation, limited on-the-field coordination of various services, lack of appropriate medical treatment and equipment on the spot, and inadequate logistics. The [...] State breached its positive obligations under Article 2 of the Convention.»[747]

Consequently, there is a balance to be struck between confidentiality and the need for information of the public.

> In *Isayeva v. Russia*, the information provided to the population by the authorities was insufficient in several respects: «The Court has been given no evidence to indicate that anything was done to ensure that information about these events was conveyed to the population [...]. However, the fact that the fighters could have reasonably been expected, or even incited, to enter Katyr-Yurt clearly exposed its population to all kinds of dangers. [... The] relevant authorities should have foreseen these dangers and, if they could not have prevented the fighters' entry into the village, it was at least open to them to warn the residents in advance.»[748] «The Court is particularly struck by the lack of reliable information about the declaration of the ‹safe passage› for civilians prior to or during the military operation in Katyr-Yurt. No persons were identified among the military or civil authorities as responsible for the declaration of the corridor and for the safety of those using it. No information has been provided to clarify an apparently total absence of coordination between the announcements of a ‹safe exit› for civilians and the very limited, if any, consideration given to this by the military in planning and executing their mission.»[749]

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747 *Finogenov and others v. Russia*, 18299/03 (2011), § 266.

748 *Isayeva v. Russia*, 57950/00 (2005), § 187.

749 *Isayeva v. Russia*, 57950/00 (2005), § 219.

e. Preventive controls

In pre-operational phases, the first tangible measures in the form of police checks or visible presence of security forces may already be required.

> Visible presence of security forces (regardless of possible target locations) as well as selective or systematic controls of persons may demonstrate and highlight increased vigilance. Activities and physical presence can confront potential perpetrators with difficulties or risks in acting and can deter them or, at best, lead to their apprehension[750]. The more precise intelligence about a possible perpetrator and potential targets is, the better the state's resources can be deployed for preventive presence and (crowd) controls.
>
> Nevertheless, there is no guarantee of success. In *Tagayeva and others v. Russia*, checkpoints had been set up at the borders of the federal republics, but due to a lack of human resources there were gaps, especially during rush hours. The terrorists were stopped near the border by Major S. G. of the North Ossetian Ministry of the Interior – but they just disarmed and captured him[751].

f. The extent on preventive measures

Preventive measures must be appropriate to the situation and actually implemented.

> In *Tagayeva and others v. Russia*, the ECtHR cites an expert report. It deduces from the success of the opposing side that (unreasonable) measures were taken by the security forces: While «[…] no security measures could serve as a guarantee against the attackers' success, the presence of security personnel on the roads and at potential targets would have acted as a deterrent and could have impeded the attackers. They considered that the fact that a group of over thirty armed terrorists had been able to travel along the local roads to Beslan, having encoun-

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750 *Cf.* Jackson, Counterinsurgency Intelligence, p. 82 (with reference to *Mark Urban*): "Based on knowledge of a planned terrorist attack, for example, security forces shaped the environment so PIRA would choose to abort the operation. (…) an IRA team sent to assassinate a member of the security forces will not press home its attack if there are several uniformed police, perhaps stopping vehicles to check their tax discs, outside his or her house".

751 *Tagayeva and others v. Russia,* 26562/07 (2017), §§ 19 f. and 278.

> tered only one police roadblock manned by a single officer ‹show[ed] the extent of failure of the authorities to act upon the information available to them›.»[752]
>
> The Court criticises in particular the insufficient implementation of preventive measures and safeguards despite strong indications of attacks: «[…], the information known to the authorities […] can be seen as confirming the existence of a real and immediate risk to life. The Court notes that the experts pointed out that, although the targeted individuals or groups had not been identified with precision, complementary information should have been available to the competent authorities from covert sources and intelligence operations […]. In any event, in the face of a threat of such magnitude, predictability and imminence, it could be reasonably expected that some preventive and protective measures would cover all educational facilities in the districts concerned and include a range of other security steps, in order to detect, deter and neutralise the terrorists as soon as possible and with minimal risk to life.»[753]

The Court thus relies not only on the existence of a threat but also on its degree of severity. The existence of a terrorist threat can therefore oblige the Convention States to take threat-specific preventive measures in general. These obligations reach beyond the usual standard for averting real and immediate risk (on the rather strict standard there, *see* no. III.2.2.5 and III.2.2.7).

Under the specific circumstances of a terrorist threat, questions of proportionality can also be judged differently than general policing in modern societies. In this respect, the limits for interventions in the scope of the fundamental right to life also prove to be *dynamic*.

3.2.3. Dissemination

Anti-terrorist operations depend heavily on the up-to-dateness and availability of intelligence[754]. Relevant information must be accurate even under difficult conditions, and intelligence must reach the decision-making authorities in a timely manner.

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752 *Tagayeva and others v. Russia,* 26562/07 (2017), § 439.

753 *Tagayeva and others v. Russia,* 26562/07 (2017), § 486.

754 Solis, Critical Incident Intelligence Gathering, Coordination and Analysis, p. 91: "The continuous flow of information becomes the lifeblood of a critical incident".

> What is sometimes called the *fog of war* in military operations is known as the initial chaos in police and rescue operations. It is then a matter of getting – and keeping – an overview as quickly as possible, passing on decision-relevant information and making the right decisions[755].

The (horizontal) diffusion of the latest situational picture between the various involved forces on the same level must prove to be just as effective as the vertical transfer of information to authorities on other levels. Comprehensive situational pictures and information synchronisation serve to carry out operations smoothly and without major failures.

What is to be applied in an incident case must be established, checked and practised in advance (especially from an organisational point of view).

> In *McCann and others v. The United Kingdom*, the prior flow of information between the security forces worked well. For example, the authorities involved knew the correct and false (aliases) identities and were also in possession of pictures and precise knowledge of the travel documents of the suspects[756]. The forces on site were informed about the type and manner of the suspected attack (car bomb placed in a Ford Fiesta with remote detonation via the radio antenna) as well as the armament of the suspects. Based on this, they acted.

The knowledge of the situational picture and its interpretation influences significantly the actions of the security forces during operations. They are provided with elements of risk assessment that might significantly determine their subsequent actions. This applies in particular to assessments of the situation on site, where action often has to be taken under time pressure, but in compliance with the principle of proportionality.

> In *McCann and others v. The United Kingdom*, the fatal shots were fired on the basis of faulty *tactical information*[757] and mere *hypothetical assumptions*

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755 *Cf., e.g.,* Solis, Critical Incident Intelligence Gathering, Coordination and Analysis, pp. 95 ff.

756 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 203.

757 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 206: «In particular, it was thought that […] the bomb would be detonated by a radio-control device; that the detonation could be effected by the pressing of a button; that it was likely that the suspects would detonate the bomb if challenged; that they would be armed and would be likely to use their arms if confronted […]».

(interpretation)[758]. Although Art. 2 ECHR was violated by the operation[759], the Court did not find any misconduct on the part of the soldiers, as their actions appeared necessary on the basis of the available knowledge (*see* no. V.4.2)[760].

The ECtHR focuses on the assessment of an on-site situation from a perspective *ex ante* based on internal information by the acting authorities obtained with *honest belief*. This does not mean, however, that the Court would already abandon the examination of state responsibility on this ground.

3.3. MEANS OF INTERVENTION

In Europe, terrorist attacks are exceptional. Anti-terrorist operations by state security forces are rare. More frequent are raids on persons who are considered to be very dangerous to other people or serious criminals with a violent nature. The deployment of resources for anti-terrorist operations is thus also a question of the strategic orientation of police forces. Personnel and material resources must be procured, provided, trained and deployed well in advance of any operations.

3.3.1. In general

In the case of terrorist threats, the personnel and material means of deployment are measured both against the legal assets threatened and against the means and capabilities of the potential perpetrator.

Especially in urban areas, it has become a particular challenge when terrorist groups operate in very small teams (three to five people)[761] – or when there are activities of lone perpetrators. Although they are hardly able to achieve anything politically, micro-groups and lone perpetrators can cause considerable damage – their particular dangerousness also lies in the fact that they can remain largely undetected beforehand[762].

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758 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), §§ 207 f.

759 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 213.

760 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 200.

761 *See also* Laqueur, Terrorismus, pp. 383 f.

762 Laqueur, Terrorismus, p. 384.

> It should be quite easy for lone perpetrators to conceal their intentions and to make the decision to carry out (or abort) an attack. However, the view sometimes expressed that terrorists can strike at any time and anywhere is in most cases misleading. Firstly, this can contradict the intention of a group; secondly, terrorists are precisely *not omnipotent*, but act from a position of weakness (*see* no. IV.2.3.2). The possibilities of the opposing party are also always measured in terms of concrete defensive or protective measures[763].

There is no such thing as absolute security – comprehensive protection against terrorist attacks is impossible. However, states must put themselves in a position to intervene with security forces if there are precise indications of terrorist activities or if there is a generally heightened threat situation.

3.3.2. Personnel resources

In its jurisprudence on the *use of force* in police operations, the ECtHR only rarely addresses the personnel strength of security forces. The Court usually avoids an assessment of the chosen approach or an evaluation and qualification of the resources available.

> The case of *Giuliani and Gaggio v. Italy* did not concern an anti-terrorist operation, but the guarantee of security during the holding of the G8 Summit in Genoa. Therefore, the Court examined the positive obligation under Art. 2 ECHR according to the general standards (*see* no. III.2.2.5 und III.2.2.7). The «obligation in question must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, 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»[764].
>
> Around 18,000 police were deployed to secure the summit[765]. The *Grand Chamber* also examined «the planning and control of a policing operation» for the

[763] *E.g.,* it is possible to protect endangered objects or zones with structural and personnel measures.

[764] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 245.

[765] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 255.

police operation[766]. The number of personnel was based on the assessment of the situation and appears to have been appropriate. The ECtHR did not assess the amount of resources in its judgment and did not find any other violations of the Convention in the organisation and planning of the operation[767].

As far as can be seen, the ECtHR has only dealt with the assessment of the concrete means of preventing terrorist attacks (*i.e.,* in the pre-operational phase according to the view expressed here) in the judgment *Tagayeva and others v. Russia*. It was probably easy for the Court to make an assessment because the disproportion between the threat and the specific protective measures taken was manifestly obvious.

There were indications of a terrorist threat in North Ossetia (*see* no. IV.2.3.2.d). For the preventive "protection" of more than 1000 people at the school enrolment ceremony at School No. 1 in Beslan, only one unarmed policewoman with no means of communication of her own was deployed[768] (this book is dedicated to this policewoman, *Fatima D.*[769]). In contrast to the increased level of threat, only the most minimal security precautions had been taken: «It thus transpires that the local police were not fully apprised of a real and foreseeable threat of a major terrorist attack against an academic establishment within their zone of responsibility and did not take sufficient preventive or preparatory measures to reduce the inherent risks […]. There is no information that any warning was given to the civilian authorities or the school administration. It is obvious that no warning whatsoever was issued to those who had attended the ceremony […].»[770]

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766 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 249.

767 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 262.

768 *Tagayeva and others v. Russia,* 26562/07 (2017), § 489.

769 *Tagayeva and others v. Russia,* 26562/07 (2017), § 284: «Police officer Fatima D. gave detailed submissions about the hostage-taking and subsequent events. According to her, a second police officer had failed to arrive at the school. At about 8.50 a.m. one mother told her that a strange truck had been parked nearby. When she went out to check, she heard a suspicious noise. She ran to the staffroom on the first floor to alert the police but as soon as she took the telephone, she was surrounded by several fighters wearing camouflage uniforms.»

770 *Tagayeva and others v. Russia,* 26562/07 (2017), § 489.

> The lack of human resources ultimately enabled the terrorists to reach the target location undetected and in relatively large numbers (over 30 people): The «local police had insufficient resources to ensure a constant inspection that would be commensurate with the threat [...]. As a result of these gaps in security, at a relatively busy time in the morning, over thirty armed terrorists unimpededly covered a distance of at least 35 kilometres from the administrative border in Khurikau to Beslan. They also had no problems entering the district centre with a population of about 35,000 – the largest town in the vicinity – and arriving in the centre where the school no. 1 was located.»[771]

When planning anti-terrorist operations, it must be ensured that sufficient manpower is available for preventive measures and the execution of an operation itself as well as for its aftermath (care). The required level of resources may be determined on the basis of existing empirical values and available information on the nature of the threat.

Under certain circumstances, special forces can perform equally well or better with a smaller number of personnel. An *excessive* deployment of forces can complicate operational planning, result in higher demands on communication and leadership during operations, and lead to conflicts of responsibility and demarcation.

In recent decades, special units within the police corps have been created around the world[772]. So-called *SWAT teams* (Special Weapons And Tactics) are specially equipped and trained. They usually have very precise and also heavy means, sometimes war equipment, at their disposal.

3.3.3. Means of intervention and coercion

Besides the human resources, the material means must also be included in the planning of police operations. Both o*ffensive* means of coercion and *defensive* means[773], each with specific characteristics, can be considered.

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771 *Tagayeva and others v. Russia,* 26562/07 (2017), § 488.

772 Punch, Shoot to kill, pp. 84 f.; Turner/Hahn Fox, Public servants or police soldiers?, pp. 123 f.; Hughes, Military's Role, pp. 37 ff.

773 *Cf.* Wilkinson, Changing threat, p. 49 (security technologies such as the lacest explosive detection equipment).

However, this dichotomy is not meant to be schematic. The recourse of certain means must always be based on the concrete situation and their specific type of use.

a. Offensive means

Pepper or tear gas sprays, batons, tasers depending on the case, handguns as well as firearms (from pistols to automatic weapons) are part of the standard police equipment. The range of these weapons is limited. In anti-terrorist operations, this repertoire is sometimes no longer sufficient[774]. Various other types of firearms[775], but also destabilising devices (tasers or irritants), can be used as additional means of intervention.

The *UN Basic Principles* stipulate a broad range of means of action; non-lethal weapons are explicitly enclosed in this arsenal (§ 2, *see* no. IV.1.4.2.c). Giving the intervention forces a choice of different *offensive means* with potentially lethal or non-lethal effects for the use of force increases their options for taking action. Coercive means of different levels of force and different effects ensure that the principle of proportionality is respected in different situations. With a graduated arsenal, the likelihood of fatal or serious physical injury can be reduced – but at the same time, absolute limitations become porous.

> Conversely, it could be argued that the repertoire of means of coercion available to police forces should be limited to avoid creating a borderline between the permissible use of lethal means of coercion (in particular the use of firearms, which is usually regulated by law) and the impermissible (because disproportionate) use of force. In our opinion, such an argumentation would contradict the duties to protect under Art. 2 ECHR. Police forces may be obliged to use force to protect life as a legal asset – even in extreme cases they must be able to act proportionately.

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774 The type and manner of the attack matters considerably in this context. For example, an "amok driver" can be stopped with these means. It should be borne in mind, however, that the optimal operational distance and effectiveness of a handgun is approximately 7 to 20 metres. The type of ammunition used is also relevant.

775 Examples are rubber bullet launchers, assault rifles, sniper rifles and modified rifles for special ammunition.

Non-lethal means of coercion include, for example, batons, pepper sprays, tear gas, tasers, and rubber and plastic bullets as well as water cannons. Their use leads to a lower risk of death when viewed objectively (deterministically). Depending on the type of means used, there is also a lower risk of injury to uninvolved persons than with the use of firearms (ricochets and shots through a target)[776].

Depending on the way they are used and the consequential damage, even less invasive means of coercion can nevertheless have lethal effects. Therefore, instead of non-lethal restraints, the term *less lethal weapons* is sometimes used[777]. The handling of all means of intervention – *i.e.,* not only the special weapons – requires adequate training and, for certain means of coercion, at best a restriction to their use by specialists.

Heavy means of intervention are usually weapons and equipment of war. Among other things, assault rifles (larger calibres, range and penetrating power) or grenade launchers may be considered. The reasons for providing heavy weaponry also lie in the relationship between the deployment possibilities of military and police units. When the deployment of military units in the homeland shall be avoided, the need for a limited "*militarisation*" of the police forces (by their means) becomes more pronounced[778].

The *type of ammunition* used is relevant for all firearms. Depending on the type of ammunition, there are different degrees of risk and different effects for the intended target and the wider surroundings.

> The use of deforming ammunition, for example, poses a lower risk of injury to uninvolved third parties – but the penetrating power of the projectiles in the target is relatively low[779]. If, in contrast, more powerful or even special

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776 Geneva Academy, In-Brief No. 6, p. 15.

777 Geneva Academy, In-Brief No. 6, p. 14.

778 Punch, Shoot to kill, p. 85 (with the U.S.A. an an example); critical of this development Turner/Hahn Fox, Public servants or police soldiers?, pp. 123 f. and 135 (with special reference to the U.S.A., but also to a quote of *Sir Robert Peel* im House of Commons 1814, "that the semi-militarized Royal Irish Constabulary 'made the people look upon them as their adversaries rather than as their protectors'"). On this problem in Switzerland, *c.f., e.g.,* Mueller, Innere Sicherheit Schweiz, pp. 346 f.

779 *See also* https://www.ruag.com → products & services → ammotec → defence & law enforcement → pistol and submachine gun ammunition (last visited on 4 June 2022).

ammunition[780] is used, the risk of injury to bystanders increases. The choice of a type of ammunition must be made in application of the principle of proportionality (*see* no. V.4.3 and V.4.4).

b. Shoot to stop in particular

The *UN Basic Principles* mention the purposes of the use of firearms in terms of exclusivity (concerning self-defence and assistance to self-defence, *see* no. V.5.2). Even then, the use of firearms shall only be lawful under strict conditions. In particular, necessity is required in the specific situation – *i.e.,* no weaker but still effective means may be available (for example, non-lethal means) or other measures (for example, persecution) may be feasible (§ 9).

> *Law enforcement officials shall not use firearms against persons except (…) to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.*

It is presupposed that security forces using firearms do not act *subjectively* in the intention to kill, but only to prevent (life-) threatening acts by perpetrators – which requires the existence of an imminently dangerous situation[781].

c. Shoot to kill in particular

According to the recommendation of the *UN Basic Principles* (§ 9), the use of firearms as a measure of last resort is explicitly permissible if the lives of third parties are threatened and it is not possible to avert a danger in any other way[782] – for instance, for the liberation of hostages.

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[780] For example, AP SX cartridges (calibre 4.6x30), which penetrate titanium and kevlar, among other things, and have an ideal operational distance of up to 100 metres. *See also* https://www.ruag.com → products & services → ammotec → defence & law enforcement → personal defence weapon ammunition (last visited on 4 June 2022).

[781] Geneva Academy, In-Brief No. 6, pp. 12 f.

[782] Geneva Academy, In-Brief No. 6, p. 13.

A shot to kill is thus only permissible to avert imminent danger. Otherwise, it is not absolutely necessary. Accordingly, a shot to protect can be permissible in particular in anti-terrorist operations[783].

d. Defensive means

Defensive means serve to protect the intervention forces and third parties. These include, for example, bullet-proof waistcoats and helmets, portable and mobile protective shields or armoured transport vehicles.

According to the *UN Basic Principles*, the intervention forces should be equipped with protective means; a higher level of protection of the security forces might reduce the need for the use of force and in particular the use of weapons (§ 2):

> It *(...) should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.*

As part of the planning process, it must be ensured that sufficient defensive resources are available. It should be taken into account that different equipment is required depending on the spatial structure of the operations area. Outside a sector of immediate danger[784], lower protective measures may be sufficient. Comparatively high protective measures must be taken for the intervention forces where they may come into contact with the opposite party directly or there is a high probability of them doing so. The level of training as well as the familiarity in handling with the protective material must be considered in the planning[785].

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783 Geneva Academy, In-Brief No. 6, p. 14: "Unless a suspect is honestly believed to be on the point of pulling the trigger of a firearm aimed at a hostage's head, or about to detonate a bomb, it asserts that intentional lethal use of force is not strictly unavoidable to protect life."

784 For example, in the case of a large-scale cordoning off of the area of operation.

785 If the forces do not know how to handle the protective material and what restrictions are associated with it (*e.g.,* reduced mobility due to its heavy weight), this can lead to unnecessary delays or even jeopardise the anti-terrorism operation.

e. Qualification depending on a situation

The use of means must be generally necessary and proportionate. In principle, any means of coercion may be dangerous; even non-lethal means of coercion can lead to fatal injuries under certain circumstances in practical use[786].

> For example, in the judgment *Abdullah Yaşa and others v. Turkey*, it was relevant that a tear gas launcher had been used in a direct shot (instead of an arcing shot) and hit *Abdullah Yaşa* on the nose from the front, injuring him[787]. Two other people, *T. Atakkaya* and *M. Mızrak*, were even killed by the use of tear gas grenades[788].
>
> Whether the use of tear gas (if carried out correctly) is an offensive or defensive measure depends on the specific situation. Tear gas can also be used in riots to prevent further escalation or threat to police forces or other persons. In particular, tear gas in itself is always a milder means than the use of firearms (also in individual self-defence situations; *see* no. V.5.2.1).

Under all circumstances, any danger to bystanders must be excluded[789]. Even with careful use and sufficient protective measures, there is always a residual risk of physical harm or even lethal consequences for bystanders.

3.3.4. Logistics

Police operations are associated with logistical tasks. Under certain circumstances, these can be performed by the acting authorities themselves (autonomous).

> During anti-terrorist operations, it must be ensured, among other things, that sufficient operational resources as well as special and additional equipment are available to the forces involved. In addition, beverages and nutrition are needed to cover basic needs.

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786 Punch, Shoot to kill, p. 85.

787 *Abdullah Yaşa and others v. Turkey,* 44827/08 (2013), §§ 47 f.

788 *Abdullah Yaşa and others v. Turkey,* 44827/08 (2013), § 6.

789 *Tagayeva and others v. Russia*, 26562/07 (2017), § 590.

For larger operations, the involvement of other authorities is often required.

> For example, to ensure that areas are cordoned off, the transport of people or the provision of medical resources or rescue forces.

The engagement of additional logistical means requires a certain degree of coordination, both within the respective organisations and within the framework of an overall operation.

> For example, medical assistance is not limited to mere rescuing. For larger operations, zones must be marked out, assembly points set up, triage points established, the transport of people and goods to and from the site made possible, and material made available. In addition, a certain power of endurance may have to be ensured.

Accordingly, the requirements of Art. 2 ECHR are to be met not only by the law enforcement authorities but also by all government agencies involved.

> In the judgment *Finogenov and others v. Russia*, the ECtHR does refer to planning failures – but in reality, it is the actions of the emergency services which were brought into focus. In our opinion, they are the addressees of fundamental rights obligations: «[… The] original evacuation plan did not appear to contain any instructions as to how information on the victims and their condition was to be exchanged between members of various rescue services. Several doctors testified during the investigation that they had not known what kind of treatment the victims had already received – they had to take decisions on the basis of what they saw […]. Whereas it is clear that many people received no treatment at all, it is not excluded that some of them received injections more than once, which might in itself have been dangerous. It does not appear that the victims who received injections were somehow marked to distinguish them from those who had not received injections.»[790]

State duties to protect occur particularly when heavy use of force – and thus possible physical injury – is to be expected. Consequently, a sufficient number of rescue forces

[790] *Finogenov and others v. Russia*, 18299/03 (2011), § 248.

and medical personnel as well as medicines and medical equipment must be made available (*cf.* on special forces no. V.3.2.2). This requires prior planning and prior allocation of resources.

> Besides sufficient human and material resources such as medical material, blankets, tents are needed. Furthermore, the facilities that are relevant for patient care must be informed and involved in advance so that the necessary staffing and material arrangements can be made. Finally, the availability of sufficient means of transport and the use of the shortest possible access routes to the hospitals are crucial. If possible, transport routes should be kept free of traffic.

3.4. CREATING THE CONDITIONS FOR COMMAND AND CONTROL

Anti-terrorist operations are usually large-scale events. The security and emergency forces must have a clear command structure. The police may not be able to handle such an event on their own and may need the support of other state actors, especially of emergency services (first responders). The *Guidelines of the European Council* stress the importance of close cooperation among public authorities in special situations, which is often crucial for success.

> «Measures taken to fight terrorism must be planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force and, within this framework, the use of arms by the security forces must be strictly proportionate to the aim of protecting persons against unlawful violence or to the necessity of carrying out a lawful arrest.»[791]

During an operation, it must be clear at all times who is in overall charge. Moreover, it is also important to ensure *adequate* coordination and leadership. Particular consideration must be given to the legal bases, tasks and responsibilities, which can diverge depending on the state actors involved. Depending on scenarios, the cooperation of the emergency forces as well as questions of leadership and coordination must (at least in principle) be clarified and practised in advance.

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[791] *Council of Europe,* Guidelines on human rights and the fight against terrorism, Art. VI.2. *Cf.* Fidler, Police in Counterinsurgency, pp. 339 f.

The failures in the fields of an overall command and control of the rescue forces as well as planning were addressed in detail by the ECtHR in *Finogenov and others v. Russia* and *Tagayeva v. Russia – i.e.,* for two spectacular hostage rescue operations.

In *Finogenov and others v. Russia*, the Convention State provided insufficient documentation to the ECtHR. Based on the documents given insight on, the Court drew conclusions about the planning and coordination of the rescue operation following the storming of the Moscow theatre.

> «The Government did not produce any documents containing a comprehensive description of the plan of the evacuation, either because such a plan never existed or because it had been destroyed. However, even if such a written plan never existed, some preparations were made [...]. In particular, (1) rescue workers were deployed around the theatre; (2) the admission capacity of several hospitals was increased; (3) two or three special medical teams were stationed nearby; (4) some additional equipment was installed in the city hospitals, (5) additional medics were mobilised and attached to those hospitals which were supposed to receive the hostages in the first instance; (6) ambulance stations were warned about the possible mass deployment of ambulances, (7) doctors in the field received instructions on sorting the victims on the basis of the gravity of their condition.
>
> Those measures were apparently based on the assumption that in the event of an escalation of the situation most victims would be wounded by gunshot or by an explosion [...]. The Court must examine whether the original plan was in itself sufficiently cautious.
>
> It appears that the original plan of the evacuation provided for the deployment of hundreds of doctors, rescue workers and other personnel to assist the hostages, whereas little was done to coordinate the work of those different services.
>
> [... The] provisions in the original plan for on-the-field interaction between the various services participating in the rescue operation (the MCUMT, Centre for Disaster Medicine, doctors on ordinary ambulance teams, doctors from the city hospitals, the Rescue Service, special squad officers, ordinary policemen, etc.)

> appear to be insufficient. The Court accepts that each service might have had its own chain of command, means of communication, standard protocols, etc. However, the absence of any centralised coordination on the spot was noted by many witnesses [...]. [...] The video of the evacuation creates the impression that everyone involved acted on his or her own initiative, at least at the outset. The contacts between field workers appear to be sporadic; no clear separation of tasks among members of various services and even within the same service can be seen. Only one or two individuals are doing something which can be described as ‹coordination› at the theatre entrance, but they appear to be military personnel. Further, there is no information about how instructions were passed in real-time mode from the crisis cell to the field coordinators, and from coordinators to field workers, or how situation reports were collected and transmitted back to the crisis cell.»[792]

Further indications suggested that the rescue operation was inadequate due to insufficient coordination[793]. In particular, the insufficient exchange of information between the various actors, the late start of the evacuation, the limited coordination of various emergency forces on the ground, the insufficient medical care and the lack of aid at the operation site as well as generally insufficient logistics led to a violation of the duty to protect from Art. 2 ECHR[794].

For the judgment *Tagayeva v. Russia*, the initial situation was quite similar. The ECtHR slightly sharpened its examination and also examined the formal management of the entire operation (overall command) – from the decision-making processes up to the conclusion of the operation as a whole (duty to investigate).

> The «absence of formal leadership of the operation resulted in serious flaws in the decision-making process and coordination with other relevant agencies. To give a few examples of this lack of coordination, the North Ossetian Emercom [Ministry of Emergency Situations] – the agency responsible for evacuations

792 *Finogenov and others v. Russia*, 18299/03 (2011), §§ 244-247.

793 *Finogenov and others v. Russia*, 18299/03 (2011), §§ 248 ff.

794 *Finogenov and others v. Russia*, 18299/03 (2011), § 266.

> and the fire services – were not informed of the true number of hostages, were not instructed to keep fire engines on standby near the school despite a clear risk of fire arising out of explosions, and did not equip the firemen with protective gear to access the zone of the operation […]. The health services were not informed by the OH [operative headquarters] of the number of hostages, which was three times higher than the officially announced figure. […]. No plan for a rescue operation, however general, was prepared and communicated to the responsible services until two and a half days after the unfolding of the crisis […]. No sufficient provisions were made for forensic work, body storage and autopsy equipment, which later contributed to difficulties with identifications and prevented the circumstances of the victims' deaths from being fully established. […].»[795]

In the absence of clear leadership and inadequate coordination between the various operational organisations, the ECtHR found a violation of the right to life of the victims. The decisive issue was not the failure during the actual operation – but the negligence beforehand.

> The «Russian authorities failed to take such feasible precautions, in particular because of the inability of the commanding structure of the operation to maintain clear lines of command and accountability, coordinate and communicate the important details relevant to the rescue operation to the key structures involved and plan in advance for the necessary equipment and logistics. This constitutes a breach of Article 2 of the Convention.»[796]

The positive obligation resulting from the right to life requires the diligently planning of police operations and the creation of favourable conditions for coordination in the event of an operation. In the end, life-threatening risks must be minimised or eliminated as far as possible. In addition to clear command structures, appropriate rescue arrangements are also necessary for this purpose.

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795 *Tagayeva and others v. Russia,* 26562/07 (2017), § 569.

796 *Tagayeva and others v. Russia,* 26562/07 (2017), § 574.

4. SELECTION AND TRAINING

The demands on police forces in everyday life are continuously increasing. On a personal level, members of security forces and especially police forces are required to have not only basic legal but also basic medical and psychological as well as basic knowledge in social areas. In addition, knowledge of human nature, social competence and mental strength are presumed. Members of the security forces must be carefully selected, trained and educated accordingly.

4.1. SELECTION OF MEMBERS OF INTERVENTION FORCES

The *UN Basic Principles* contain a concise recommendation (§ 18). But its implementation in practice is probably not that easy[797]:

> *Governments and law enforcement agencies shall ensure that all law enforcement officials are selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. Their continued fitness to perform these functions should be subject to periodic review.*

The ECtHR emphasises the personal qualifications of members of state security forces within the context of Art. 2 ECHR. In particular, the Convention States have a duty of careful selection and examination of personal ability in relation to a person's duties or functions.

> In the judgment *Abdullah Yilmaz v. Turkey*, the ECtHR assessed the conduct of a military superior. The conscript soldier *Maşallah Yılmaz* had been repeatedly mistreated by his superior, the professional sergeant Murat Avcil. Sergeant Avcil had already been punished three times for indiscipline[798]. Soldier Yılmaz shot himself after a mistreatment in front of Avcil, who did not even try to prevent

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[797] *Cf.* as an example on the personal requirements for certain functions from the area of the operation of nuclear facilities, *mutatis mutandis*, the recommendations of the International Nuclear Safety Advisory Group (INSAG) of the International Atomic Energy Agency (IAEA): Especially Safety Culture (INSAG-4) and Strengthening Safety Culture (INSAG-15).

[798] *Abdullah Yılmaz v. Turkey,* 21899/02 (2008), §§ 8 and 66

the act[799]. The Court found a violation of Art. 2 ECHR specifically in the fact that with Avcil, a personally unsuitable person had been given leadership responsibility: La «[…] règlementation régissant les sergents spécialistes […], telle qu'elle a été appliquée en l'espèce, s'est avérée défaillante concernant l'encadrement et l'aptitude professionnels du sergent Avcil ainsi que ses devoirs et responsabilités face à des situations délicates telles que celle en cause. Aussi, les autorités compétentes ne sauraient passer pour avoir fait tout ce qui était en leur pouvoir pour protéger la victime contre les agissements abusifs de ceux dont il relevait.»[800]

The judgment *Aydan v. Turkey* concerned a gendarme with an automatic firearm firing into a crowd; the gendarme had been overwhelmed by a severe stress situation[801]. La «[…] Cour rappelle que, selon le principe no 18 des Principes de base des Nations Unies de 1990, les responsables de l'application des lois doivent présenter les qualités morales et les aptitudes psychologiques et physiques requises pour le bon exercice de leurs fonctions […]. Il en va de même, a fortiori, pour les forces de l'ordre qui exercent leurs fonctions dans une région où régnait à l'époque des faits une tension extrême et où on pouvait s'attendre à de tels troubles.»[802]

The Court correctly distinguishes between the conduct of members of security forces on duty and their private conduct off duty. The two spheres can be linked – especially when carrying weapons off-duty[803].

In the judgment *Gorovenky and Bugara v. Ukraine*, the ECtHR judged the case of a member of the police force who had killed two people with his service weapon. «The incident […] occurred during a private trip which did not concern a planned police operation or a spontaneous chase […] Therefore, D.'s private acts of serious criminal character cannot, in principle, engage the State's re-

799 *Abdullah Yılmaz v. Turkey,* 21899/02 (2008), §§ 6 ff. and 66.

800 *Abdullah Yılmaz v. Turkey,* 21899/02 (2008), § 70.

801 *Aydan v. Turkey*, 16281/10 (2013), § 97.

802 *Aydan v. Turkey*, 16281/10 (2013), § 99.

803 *Cf.* Reid, Practitioner's Guide, 85-014.

> sponsibility under the substantive limb of Article 2 of the Convention only because he happened to be its agent»[804]. Nevertheless, the Court included the conduct of the authorities in relation to the carrying of the service weapon in its considerations: «[…It] was acknowledged by the national authorities on several occasions that D.'s superiors had failed to appropriately assess his personality and, despite previous troubling incidents involving D., had allowed him to carry a weapon, which had led to the incident in question […]. Moreover, the national law expressly forbids issuing guns to police officers who do not have appropriate equipment for their safe storage, and it was acknowledged by the internal investigation that it had never been checked where D. had stored his gun at home. [… The] States are expected to set high professional standards within their law-enforcement systems and ensure that the persons serving in these systems 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. […The] police officer, who deliberately shot two persons with his police gun, was issued with the gun in breach of the existing domestic regulations, since it was not checked where he would be keeping it when off duty, and his personality was not correctly assessed in the light of his previous history of disciplinary offences.»[805]

The Court thus recognises the responsibility of the Convention States if members of security forces are allowed (not prohibited, respectively) to make use of their extended (official) possibilities (such as carrying weapons) while off duty – at least if there are indications of "personal risks". In our opinion, this ultimately involves a duty of supervision and action on the part of state authorities over their members.

> In practice, the implementation of this obligation is demanding. To prevent the carrying of weapons off duty, the state as an employer can, for example, provide preventive measures such as lockable weapon lockers at the workplace or issue internal directives; these can stipulate whether and how weapons may

804 *Gorovenky and Bugara v. Ukraine*, 36146/05 and 42418/05 (2012), § 31.

805 *Gorovenky and Bugara v. Ukraine*, 36146/05 and 42418/05 (2012), §§ 35 ff.

be carried outside of official duties. Differences can be considered depending on the function and scope of tasks of the members of security forces.

For members of the police forces, not every accusation of misconduct could generally lead to the revocation of the personal weapon (and transfer of the person to internal service). Even if there are allegations of likely offences related to life as a legal asset, such an automatism does not appear to be necessary. However, the respective authorities have the responsibility to carefully examine all allegations and take precautions with regard to future behaviour. If, on the other hand, there is obvious misconduct (such as an excess of violence) or if there are strong indications of a mental problem (especially drug abuse or taking psychotropic drugs), immediate action is imperative.

Cases in which members of the security forces have been convicted of offences against life as a legal asset by a final court decision appear to be more difficult. Depending on the conditions of employment, such persons may then no longer be fit for duty (on the responsibility of the state towards members of the security forces in the event of loss of fitness for duty, *see* no. V.5.1.3). The decision regarding the continuation of the employment relationship shall be taken by the responsible appointing authority. Among other things, the severity of the offence committed, the level of punishment and possible previous convictions must be taken into account.

In addition, after a conviction (or, depending on the circumstances, at the time of the examination of the case), the mental condition of the person concerned shall be assessed. This involves an examination of the effective fitness for operational service. This means whether the person is generally capable of fulfilling official duties in a dutiful manner. The physical capacity to act may be restricted by a previous stress (*e.g.,* by a conviction or a traumatic experience) in the sense of a chilling effect[806]. Or the person concerned is (operationally) no longer able to act or is blocked (*e.g.,* black out). It is the responsibility of the authorities

[806] For example, a person with a criminal record may no longer take appropriate action in certain situations – even though it would be legal and proportionate – and thus endanger himself or herself and others present.

to check or guarantee the employment criteria and the operational capability of the employees with regard to a danger to others as well as to themselves[807].

4.2. EDUCATION, TRAINING AND RETRAINING

Besides the personal and character ability of members of the security forces, their professional qualification is of course also relevant. The *UN Basic Principles* recommend specific training, which in our opinion is broadly defined (§ 20):

> *In the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms.*

The ability of security forces to act in a proportionate manner and to use special means and tactics depends to a large extent on their personal skills. Depending on the complexity of possible forms of deployment, education and training must take place in relation to specific situations and scenarios[808]. Especially in connection with use of force, also legal and medical aspects are relevant.

A use of force may only be used appropriately and for a short time as necessary; in addition, emergency forces must be able to respond adequately to the most common mental health symptoms. The health status of the person concerned must be continuously monitored.

For special situations, security forces are equipped with a so-called *tourniquet* (kit). It contains first aid material (such as easy-to-apply pressure bandages to stop bleeding). The use of such material must be adequately trained (advanced first aid training). The aim is to acquire automatisms that allow the correct application of measures without loss of time.

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807 Employers may have standard procedures in place to test the ability to act. These may include, for example, a driving test, a shooting test and a fictional scenario.

808 Williams, Training the RoE for the Counterinsurgency Fight, p. 45; Martins, RoE for Land Forces, p. 7.

The importance of adequate training of the security forces has already been emphasised by the *Grand Chamber* in the judgment *McCann and others v. The United Kingdom*. It is quite correct in pointing out that the close connection between the correct use of force and training.

> The «[…] national law must strictly control and limit the circumstances in which a person may be deprived of his life by agents of the State. The State must also give appropriate training, instructions and briefing to its soldiers and other agents who may use force and exercise strict control over any operations which may involve the use of lethal force.»[809]

In its judgment *Nachova v. Bulgaria*, the *Grand Chamber* emphasised the importance of training the security forces for the proportionate use of firearms.

> «In particular, 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.»[810]

Neither in the judgment *McCann v. The United Kingdom* nor in *Nachova v. Bulgaria*, the training of the security forces was the reason for the violation of Art. 2 ECHR – even if in the second judgment, the *Grand Chamber* refers to the «grossly excessive force»[811]. The ECtHR is more explicit in the judgment *Kavaklıoğlu and others v. Turkey*; it points out that Turkey could not deduce that the soldiers (conscripts) deployed in a prison riot had been sufficiently trained for such operations. However, even this did not constitute a violation of Art. 2 ECHR (but the planning and execution of the operation did).

> Both gendarmes (professionals) and conscripts were engaged in the suppression of the prison riot. Eight prisoners died; 65 prisoners and one conscript were injured[812].

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809 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 151.

810 *Nachova v. Bulgaria* (GC), 43577/98 (2005), § 97; also *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 250 and *Kavaklıoğlu and others v. Turkey*, 15397/02 (2016), § 163.

811 *Nachova v. Bulgaria* (GC), 43577/98 (2005), § 109.

812 *Kavaklıoğlu and others v. Turkey*, 15397/02 (2016), §§ 3 and 7 ff.

> «[... The] gendarmerie officers and junior officers, as well as the police auxiliary teams which participated in the operation had been professionally prepared for coping with this type of incident, if only as regards operational tactics and the use of arms; on the other hand [...], it cannot be quite so affirmative in connection with the conscripts – a total of some 250 young people on compulsory military service [...]. Since the case file does not refer to the training provided for such conscripts [...], the Court has no basis for considering that they were fit to participate in such an operation, on the understanding that the afternoon of training in body search procedures [...] which they had supposedly followed is immaterial in this regard.»[813]

> «The gendarmes' reaction to the attack against junior officer M.E. [...] would suggest that in fact they were quite simply not prepared to pursue such a non-lethal strategy or to wait for it to show results.»[814]

> «The [...] State's responsibility may also be engaged where its agents fail to take all feasible precautions in the choice of means and methods of an operation such as that conducted in the present case against an opposing group with a view to avoiding and, in any event, minimising, loss of life, whether incidental or not»[815].

In the judgment *Abdullah Yaşa and others v. Turkey*, the ECtHR made it clear that insufficient training in itself can constitute a violation of Convention guarantees for the protection of the physical integrity of persons. In our opinion, the considerations of the Court made in the interpretation of Art. 3 ECHR also apply to the guarantee of the right to life.

> Eleven protesters were killed during a demonstration. Two of them, *T. Atakkaya* and *M. Mızrak*, were killed by tear-gas grenades[816] (*see* no. IV.3.3.3.e). «[...] Turkish law lacked any specific provisions on the use of tear-gas grenades during

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813 *Kavaklıoğlu and others v. Turkey,* 15397/02 (2016), § 190.

814 *Kavaklıoğlu and others v. Turkey,* 15397/02 (2016), § 200.

815 *Kavaklıoğlu and others v. Turkey,* 15397/02 (2016), § 211.

816 *Abdullah Yaşa and others v. Turkey,* 44827/08 (2013), § 6.

> demonstrations, and did not lay down instructions for their utilisation. Given that during the events [...] two persons were killed by tear-gas grenades and that the applicant was injured on the same occasion, it may be deduced that the police officers were able to act very independently and take ill-considered initiatives, which would probably not have been the case if they had been given appropriate training and instructions. [... Such] a situation is incompatible with the level of protection of the physical integrity of individuals [...]. [... It] has clearly not been established that the use of force [...] was an appropriate response to the situation, [...] or was proportionate to the aim pursued, namely to disperse a non-peaceful gathering. In fact, the severity of the injuries noted to the applicant's head could not have been commensurate with the strict use by the police officers of the force necessitated by his behaviour [...]. There has accordingly been a violation of Article 3 of the Convention.»[817]

In the judgment *Frick v. Switzerland*, the ECtHR explicitly pointed out that the Convention States have not only organisational obligations but also an obligation to provide training.

> «La Cour [...] rappelle le principe selon lequel il appartient aux États contractants d'organiser leurs services et de former leurs agents de manière à leur permettre de répondre aux exigences de la Convention [...]. [... Ce] qui est valable dans ces domaines-là l'est d'autant plus concernant un droit aussi fondamental que le droit à la vie au sens de l'article 2 de la Convention, pour lequel il convient de faire preuve d'un degré de diligence et de prudence particulièrement élevé.»[818]

In our opinion, the concept of training in the context of the use of force should be understood in a broad way. In addition to the basic training of their security forces, the Convention States are also obliged to provide them with adequate further education and training[819].

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817 *Abdullah Yaşa and others v. Turkey,* 44827/08 (2013), §§ 49 ff.

818 *Frick v. Switzerland,* 23405/16 (2020), § 97.

819 From a practical perspective Williams, Training the RoE for the Counterinsurgency Fight, pp. 47 f.

4.3. SPECIFIC PREPAREDNESS AND USE OF POTENTIALLY LETHAL FORCE

Police education and training of security forces must include preparation of standard procedures and standard tactics for normal day-to-day situations as well as for special situations. Since not every operation with its specific requirements can be anticipated, basic training is necessary for this purpose.

4.3.1. Preparation for specific and exceptional situations

Also for special situations, training should relate to the entire operations or interventions (*cf.* the *UN Basic Principles,* §§ 18-20). Poor or limited training can lead to misconduct at all stages with potentially serious consequences.

> The *Grand Chamber* has stressed in *Giuliani and Gaggio v. Italy*, «[...] that all the personnel either belonged to specialised units or had received ad hoc training in maintaining order during mass gatherings. [...] In view of the very large numbers of officers deployed on the ground, they could not all be required to have lengthy experience and/or to have been trained over several months or years. To hold otherwise would be to impose a disproportionate and unrealistic obligation on the State.»[820]

However, it cannot be required that each law enforcement official receives a specific training for each particular situation[821]. In practice, this would hardly be feasible and, in our opinion, would impose a disproportionate burden on the states.

In the planning and concrete preparation of operations, it must be taken into account that persons with special training also take on the corresponding tasks or at least have a leading and instructing function. This can guarantee a certain level of expertise and control and reduce possible misconduct.

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820 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 255.

821 This also depends on the extent of the event.

The simultaneous mention of the organisational obligation and the duty to train in the judgment *Frick v. Switzerland*[822] (*see* no. IV.4.2) underlines – whether consciously or not – the two relevant levels: the organisational duty is related to an abstract level and has a certain complexity in its implementation; the training duty requires individual skills of members of security forces. The interaction of the two levels ensures adequate action in police operations.

In our opinion, this also implies an obligation to train and review the *leadership* over security forces. Only providing structures – for example for special situations – is not sufficient. More complex procedures must also be trained, namely the command and coordination of operations in special situations.

4.3.2. Training on special intervention resources

For the use of force, the intervention forces must have a good level of training and being familiar with the handling of the respective resources or means of intervention. Ultimately, it is about acquiring automatisms.

The term automatism is to be understood in a broad sense. In addition to manipulations of weapons and equipment (drills), automatism also includes familiarity with the relevant (legal) bases of operation within the framework of proportionate action[823].

In addition to a legal regulation (*see* no. IV.1.4.2), a specific instruction as well as an effective and regular training is required. In this way, emergency forces can and must be prepared for the use of force and, in particular, of firearms[824].

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822 *Frick v. Switzerland,* 23405/16 (2020), § 97: «La Cour […] rappelle le principe selon lequel il appartient aux États contractants d'organiser leurs services et de former leurs agents de manière à leur permettre de répondre aux exigences de la Convention […]. Selon la Cour, ce qui est valable dans ces domaines-là l'est d'autant plus concernant un droit aussi fondamental que le droit à la vie au sens de l'article 2 de la Convention, pour lequel il convient de faire preuve d'un degré de diligence et de prudence particulièrement élevé.»

823 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, §§ 18-20.

824 Gerards, Right to Life, in: van Dijk/van Hoof/van Rijn/Zwaak (Eds.), Theory and Practice, pp. 367 f.

4.3.3. Training of specialists

In the judgment *McCann and others v. The United Kingdom*, the *Grand Chamber* emphasises that in the given circumstances the involvement of a specially trained unit complied with the state's duties.

> «The [...] SAS is a special unit which has received specialist training in combating terrorism. It was only natural, therefore, that in light of the advance warning that the authorities received of an impending terrorist attack they would resort to the skill and experience of the SAS in order to deal with the threat in the safest and most informed manner possible.»[825]

Such specialised personnel must also be properly instructed and led. The SAS is trained and established as an *anti-terrorist unit*. Their special capabilities, for example for hostage rescue operations, for storming objects or for arresting persons within the framework of coordinated actions must be properly managed within the framework of mission command (*Auftragstaktik*).

> «However, the failure to make provision for a margin of error must also be considered in combination with the training of the soldiers to continue shooting once they opened fire until the suspect was dead. As noted by the Coroner in his summing-up to the jury at the inquest, all four soldiers shot to kill the suspects [...]. Soldier E testified that it had been discussed with the soldiers that there was an increased chance that they would have to shoot to kill since there would be less time where there was a ‹button› device [...]. Against this background, the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill.
>
> Although detailed investigation at the inquest into the training received by the soldiers was prevented by the public interest certificates which had been issued [...], it is not clear whether they had been trained or instructed to assess

825 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 183.

> whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest.
>
> Their reflex action In this vital respect lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to their attention and which emphasised the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement [...].
>
> This failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation.»[826]

In our opinion, the same applies to individual specialists. These include snipers in particular. Their training and special skills must be taken into account within the framework of command and control.

> In particular, they must not be given *general orders* to shoot. When properly deployed, snipers are either camouflaged or protected by cover. Moreover, they operate from a certain distance. This means that their own risk is lower than, for example, that of police grenadiers storming objects and thus must place themselves directly in danger zones. In addition, they usually have more time to open fire. According to the usual operational doctrine, snipers operate in binomial mode. They can presumably often assess special situations better than other forces.

4.4. TRAINING FOR DEPLOYMENT

Training and continuing education constitutes more than just the foundation for operations and missions of the security forces: individual members of the security forces as well as entire entities are conditioned. Any training without taking into account the legal basis is senseless, if not dangerous. Constant refreshing and improvement of skills

826 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), §§ 211 f.

(theory, operational doctrine and practice) is needed; otherwise the performance of the forces will decline or skills will get lost.

For security forces who are authorised to exercise coercive measures and to use force respectively, the basic training is only a necessary fundament to achieve their operational capability. What is not constantly refreshed and further improved is forgotten or no longer mastered. Maintaining operational fitness requires reinforcing steps at all levels. This also includes the exchange of experiences within the respective organisations and beyond. However, a high level of training and organisation has its price: training programmes, instruction personnel and an appropriate infrastructure must be available – and sufficient time must be invested in training and further education as well as in maintaining the level of training.

5. CONCLUSION: SIGNIFICANT SHIFT OF STATE OBLIGATIONS TO THE PRELIMINARY STAGES OF OPERATIONS

The obligations of the Convention States arising from the right to life already materialise in the *preliminary stages* of the exercise of coercive means. Ultimately, the three obligations from Art. 2 ECHR are concretised both individually and interdependently specifically in the *preventive* and *pre-operational domains*.

> In the judgment *Finogenov and others v. Russia*, the ECtHR is still hesitant in its legal assessment of duties in the pre-operational area. The Court does comment on the planning of the rescue and evacuation operation but only seems to conclude that the right to life has been violated when the rescue operation is assessed as a whole.
>
> A little later, in the judgment *Tagayeva and others v. Russia*, the Court argues more decisively by recognising the right to life in the case of terrorist threats (and existing state duty to protect) as already violated in the deficient pre-operational fulfilment of tasks. The state does not have a duty to succeed – but it does have a duty to adequately avert danger.

The ECtHR cannot examine the violation of fundamental rights or the adequacy of particular state measures in advance. However, the requirements developed in the

context of individual cases in assessments *ex ante* can sometimes only be fulfilled through *forward-looking* legislation, planning and execution of measures or operations. Negligence leads to latent potential violations of the Convention – in the case of materialisation in specific situations, there may no longer be any possibility of adequately protecting life as a legal asset.

The international standards and recommendations provide basic guidance on the content of police law norms in the domestic legal framework. The ECtHR tends to refer to the *U.N. Basic Principles* as a benchmark for the implementation of substantive rules in the Convention States (*see* no. III.5). Ultimately, it is a matter of providing the necessary legal basis for averting real and immediate risk. These legal bases must be capable of regulating even the most serious encroachments on fundamental rights in conformity with the Convention or else serve as a clear barrier to the actions of the security forces. In the concrete case of application, both from the perspective of the authorities and from a fundamental rights perspective, it is about the use of coercive means to avert dangers (policing). Although anti-terrorist operations are at the highest end of the escalation spectrum, they cannot (and should not) be based on a "special police law" (on the right to life in a state of emergency, *see* no. III.3.4.3).

With the required legal and administrative framework, the ECtHR relies on a pair of terms that cover a broad regulatory range. In our opinion, the *administrative framework* includes the internal coordinating and controlling instruments with regard to state or authority action (up to and including actual state management activity) – it can, for its part, be based on special legal foundations. A state must be able to identify and assess specific threats and risks. Based on this, it can direct its measures towards specific goals. A *methodical risk analysis* is virtually the state counterpart to the terrorist target evaluation. Preventive state measures are virtually the counterpart of terrorist attack preparations. This all serves to recognise activities of opposite sides and optimally to prevent them at an early stage, or at least to create favourable conditions for success in specific operations.

The assessment of the situation influences the *deployment of police resources*. The availability of resources (or accessibility to them) is an essential factor for success in countering terrorism. Police resources must be deployed in a focused and proportionate

manner according to the risk analysis, which in turn requires forward planning and agile behaviour by the authorities.

In addition, there are high demands on the dissemination and level-appropriate inclusion of the situational picture as well as the coordination of state behaviour. The ECtHR judges with a certain *organisational blindness*: how the Convention States fulfil their obligations is left to themselves. The creation of favourable conditions for the implementation of anti-terrorist operations is elementary for their success. This usually requires a combination of different state authorities and instruments. In particular, the Convention States must take into account the preliminary effect of the duty to investigate. In addition to a robust *organisation* of the authorities involved, this also includes the *training* of human resources at all levels, starting at the tactical level for individual members of the security forces, through the operational level for leading missions, to the strategic level for managing crises.

The quality of the conduct of an anti-terrorist operation stands and falls with the dutiful performance of the obligations preceding it. If necessary, a Convention State must be able to use its entire repertoire of means legally permissible in a manner appropriate to the stage and situation in order to avoid human casualties. For further measures (such as surveillance), the established fundamental rights standards and limits apply. The price of freedom lies in the restriction of state action.

> *«It is often tempting to believe that adherence to law ties democracies' hands and forces them into a position of weakness. There may be some cases of extreme threat in which this might occur, but in the threat range democracies face, terrorism alone is unlikely to produce sufficient justification for stepping outside the bounds of the law.»*
>
> Grant Wardlaw
> (The Democratic Framework)

V. OPERATIONAL DUTIES

Do «*what's right, legally and morally*»

Col Danny McKnight
(Streets of Mogadishu)

1. USE OF FORCE: PARTICULARITIES IN ANTI-TERRORIST OPERATIONS

Any use of force by state actors must be proportionate. But the the meaning of proportionality may vary according to the constitutional laws of the single Convention states[827]. The same follows imperatively from the absolute necessity for the use of potentially lethal means of coercion required by Art. 2 para. 2 ECHR. Respecting the principle of proportionality applies to general policing as well as to *operations* by security forces.

1.1. POLICE OPERATIONS

A police operation does not usually take place spontaneously. It is based (at least in principle) on planning and it is pursuing a concrete (operational) goal. In very simplified terms, a police operation differs from purely tactical behaviour in its extent and increased complexity.

1.1.1. Terminological approach

Doctrine and concepts of police forces are often oriented towards tactical operations. In planning and conducting operations, special attention is paid to extended organisational requirements (also through the creation of task forces and special command and staff organisations[828]).

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827 Be it from constitutional guarantees or general principles such as that of proportionality.

828 As to Germany, Austria and Switzerland, *c.f.* Zeitner, Einsatzlehre, pp. 39 ff.; Dudek, Besondere Aufbauorganisation, part 1, pp. 17 f. (in particular), FIP, Anhang II (p. 75 – implicit) and FIP Stabtsabeit, § 2 (with a focus on the distinction between the basic structure and operational structure of police staffs from § 2.2).

Military doctrine makes more precise delimitations.

> The NATO Glossary of Terms and Definitions (AAP-6) contains a well-established and arguably common distinction between tactical, operational and strategic level.
>
> – *Tactical level: The level at which activities, battles and engagements are planned and executed to accomplish military objectives assigned to tactical formations and units.*
>
> – *Operation: A sequence of coordinated actions with a defined purpose.»*
>
> – *Military Strategy: That component of strategy, presenting the manner in which military power should be developed and applied to achieve objectives.*[829]

In the following, operations are meant to be coordinated acting by the security forces with a specific goal in the above sense.

> An anti-terrorist operation may have as its objective the prevention of attacks and the arrest of potential perpetrators (*e.g., McCann and others v. The United Kingdom*), a hostage rescue (*e.g., Finogenov and others v. Russia* and *Tagayeva v. Russia*) or the capture of the perpetrators in that very moment (*e.g., Kelly and others v. The United Kingdom*).

1.1.2. Need for coordination

For the fulfilment of police duties in special situations, there are usually specific operational doctrines and particular structures are set up for the coordination of the operational forces (under recourse to existing structures or by creation of ad hoc command and staff structures)[830]. Such forms of organisation, which are usually limited in time, come into play when a situation can no longer be managed with the existing resources

[829] Probably not entirely without any reason, the NATO glossary does not define *strategy* in general terms (it would be an exceedingly difficult undertaking).

[830] In Germany and Austria, for example, a distinction is made between a general organisational structure (*Allgemeine Aufbauorganisation*, AAO) and a special organisational structure (*Besondere Aufbauorganisation*, BAO) for the coordination of the emergency forces. BAO are intended to be used in cases of increased complexity in which the performance of an AAO reaches its limits (increased demand for forces, extended duration of deployment, need for uniform com-

and usual procedures: for example, in the case of long-lasting operations, when there is an increased need for emergency forces or when there is a need for unified command and control[831].

> A special organisational structure makes it possible, for example, to better integrate the knowledge of the local area or the special expertise of members of the security forces, to divide an operational area into (spatial or object-related) sectors and thus ensure better command and coordination and to establish an "internal" command staff or to clarify authority to issue directives.

With regard to the responsibilities of the agencies involved, it seems appropriate to distinguish between preventive and repressive tasks. Depending on the structure of a state and its legal framework, the various actors such as the police or intelligence agencies at different levels, but also the criminal prosecution authorities, have different means at their disposal to collect information.

> For example, intelligence services as well as authorities responsible for criminal prosecutions of state security crimes often lack sufficient legal foundations and even more so the resources to carry out anti-terrorist operations (although this can vary from state to state). Conversely, these authorities usually have specific possibilities for information gathering and intelligence analysis as well as for international cooperation in the preventive field – in other words, means and possibilities that are typically not granted to the regular police authorities to the same extent[832].

> The need to distinguish and to clarify responsibilities does not mean that public authorities should not cooperate with each other. For the very early detection of a threat and, if necessary, the initiation of subsequent steps, the means

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mand, especially in the case of different responsibilities); *cf.* Zeitner, Einsatzlehre, pp. 40 ff. in connection with pp. 116 ff. and Dudek, Die Besondere Aufbauorganisation, part 1, pp. 17 ff.

831 In Germany, the BAO institute was initialised, among other things, because of the Gladbeck hostage crisis (1988). In Switzerland, the Swiss Police Institute (SPI) has drawn up aids for such situations. In addition, there are a few cantonal command and operation manuals/guidelines.

832 For example, in addition to accessing specific national resources, such institutions also give the opportunity to obtain relevant information from international level.

and possibilities of the authorities responsible for prevention can be decisive (*see* no. IV.3.2). Therefore, they can and should participate in operations in an appropriate and permissible form.

The execution of operations (*i.e.,* the actual intervention) is mainly entrusted to police forces and, if necessary, military units as well as rescue forces. On the one hand, these authorities have the human and material resources, but on the other hand they also have the necessary experience for unpredictable situations. They are trained and skilled to deal with such events and have the ability to fulfil their tasks under great stress. In addition, the various agencies, especially the police and rescue services, often work together on a day-to-day basis; this facilitates coordination in special situations.

Task forces and special command and staff organisations (*e.g.,* for a rampage or a hostage situation) are generally characterised by flexibility. They can build on predefined organisational structure consisting of representatives of the different authorities which aims at gathering, coordinating and concentrating the incoming information and using the output as a basis for appropriate intervention. However, depending on the size of the operational area and the forces involved, long communication channels or excessive complexity of a command organisation can have a negative impact on the fulfilment of the mission.

For specific police actions, basic concepts for command and control of the forces are necessary, which must be known to all agencies involved. In addition, joint training and practical exercises are needed to test and implement concepts, as well as to create mutual trust and thus favourable conditions for operations.

Finally, every intervention is an individual case with its own particularities. There will always be a lack of time and an initial chaotic phase is often inevitable. On the basis of existing main concepts, the challenges can be better taken into account and the sources for errors can be minimised. The art of leadership is to establish automatisms but to avoid schematism.

1.1.3. The level of an operation

The ECtHR distinguishes between police operations and general police activity (policing). In our opinion, the distinguishing elements are the coordination and, in most

cases, the planning element in *operations* – while everyday policing is characterised by an open order and spontaneity in the fulfilment of the order. For the latter, the focus is on tactical aspects and individually correct behaviour. This does not mean, however, that individual actions do not have to be taken in an overall context.

The ECtHR stressed this in the judgment *Haász and Szabó v. Hungary*. After a police patrol was activated, a misunderstanding resulted in a shoot on a car[833].

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 [...]. Thus, the Court's assessment of whether the use of potentially lethal force was ‹absolutely necessary› [...] cannot be limited to the situation at the moment when the actual discharge of a firearm by a State agent occurred. It must also take into account the circumstances leading up to the event which caused an immediate risk to life. This will enable an assessment of whether the operational decisions taken by those involved, and the conduct of the operation as a whole, demonstrate that appropriate care was taken to ensure that any risk to an individual's life was minimised to the greatest extent possible and that State agents were not negligent in their choice of action.»[834]

«The [...] police intervention in this case was not a pre-planned operation, but a reaction to a situation prompted by the police officer's and the volunteer law-enforcer's choosing to follow up an event which had come to their attention. Nonetheless, it cannot be held that officer K. was called upon to respond to any unexpected circumstances in the heat of the moment, since the entire incident took place largely as a result of the officer's own conduct. In [...] circumstances where the need to resort to potentially lethal force occurs as a consequence of a series of decisions and measures taken by a police officer, those decisions will engage the State's responsibility to the same extent as the planning and control of police operations.»[835]

833 *Haász and Szabó v. Hungary*, 11327/14 and 11613/14 (2016), §§ 11 ff.

834 *Haász and Szabó v. Hungary*, 11327/14 and 11613/14 (2016), § 56.

835 *Haász and Szabó v. Hungary*, 11327/14 and 11613/14 (2016), § 57.

> «The [...] identity of the owner of the Fiat Punto was communicated to officer K. by the duty officer of [... the] Police Department. [... A] crucial element in the assessment of decisions to be taken, for the purposes of an operation in the field of law enforcement, must be the analysis of all the available information about the surrounding circumstances, including the danger – if any – posed by the persons concerned [...]. However, it does not appear that, when approaching the applicants and blocking the way of their car, officer K. or Mr S. paid any heed to the fact that neither of the persons in the car was wanted by the police, posed any known danger otherwise, or had any reason whatsoever to expect any police action against them.»[836]

In our opinion, the threshold to an operation is not yet crossed when police officers on the ground are or get in contact with other or superior authorities (such as an operations centre) in a concrete case[837]. In this respect, the cautiously formulated judgment *Haász and Szabó v. Hungary* must not be misinterpreted. Regarding the absolute necessity according to Art. 2 para. 2 ECHR, however, it is also necessary to consider the further circumstances of firing shots.

1.2. ADEQUATE PROTECTION OF THE HIGHEST LEGAL ASSETS

1.2.1. Threat as a benchmark

The measures to avert a threat are assessed both in terms of the *legal asset(s)* at risk and the *likelihood of damage* to this legal asset(s) (*see* no. III.2.2.5).

> In anti-terrorist operations, the legal asset to be protected is first and foremost the lives of people (specifically potential victims). Life as a legal asset is easy

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836 *Haász and Szabó v. Hungary*, 11327/14 and 11613/14 (2016), § 62.

837 In contrast, other deployments of security forces can easily be characterised as operations. *Cf. McCann and others v. The United Kingdom* (GC), 18984/91 (1995); *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016); *Finogenov and others v. Russia*, 18299/03 (2011); *Tagayeva and others v. Russia,* 26562/07 (2017); *Isayeva v. Russia*, 57950/00 (2005); *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011); *Andronicou and Constantinou v. Cyprus*, 86/1996/705/897 (1997); *Bubbins v. The United Kingdom,* 50196/99 (2005); *Abdullah Yaşa and others v. Turkey,* 44827/08 (2013); *Kelly and others v. The United Kingdom*, 30054/96 (2001).

to identify in the case of an immediate threat. The reference to the right to life is more difficult when measures are taken generally to protect internal security or national interests. Recourse to a use of force may also be permissible for this purpose – but the absolute necessity to use potentially lethal means will usually be lacking. Rather, surveillance measures and instruments of law enforcement are in the spotlight there.

If the barrier from mere risk to (sufficiently probable) danger is exceeded, the proportionality of a use of force is measured both on the legal asset itself and on the degree of its endangerment.

The assessment of a terrorist threat is based on a situational picture or a situation assessment (*see* no. IV.2). In our opinion, a threat is severe if the use of heavy violence is latently to be expected. This can be concluded from attacks that have already taken place (*e.g.,* the Baader-Meinhof gang, known as the first generation of the Red Army Faction), from the fact that the potential perpetrators are armed (*e.g.,* the terrorist cell in Molenbeek, Belgium, which was equipped with heavy weapons and explosives) or from the general willingness of dangerous persons to use violence (*e.g.,* potential suicide bombers like Anis Amri).

In the case of anti-terrorist operations, special circumstances must be taken into account, both in terms of the factual and legal situation. If the special situation is known (*see* no. IV.2.3 and IV.3.2) and the security forces act in *honest belief* (*see* no. V.4.2), the potential endangerment of third parties forms the central criterion for their action – and under certain circumstances leads to dilemmas: the negative obligation that state security forces must refrain from unlawful, unnecessary and disproportionate force must always be observed[838]. This also applies to the use of potentially lethal or life-threatening means of intervention. For state actors, the use of (lethal) means simultaneously reflects a conflict between positive and negative obligations.

The «[…] use of lethal force by State security forces may be justified in certain circumstances. However, any use of force must be no more than ‹absolutely

[838] *Cf.* Reid, Practitioner's Guide, 85-003.

necessary›, that is to say it must be strictly proportionate in the circumstances. In view of the fundamental nature of the right to life, the circumstances in which deprivation of life may be justified must be strictly construed».[839]

1.2.2. Ex ante-assessment

Concrete threats to life as a legal asset are assessed *ex ante*[840]. Therefore, objective or objectifiable criteria apply (*see* no. V.4.2).

Planning and decisions by state security forces must be based on the information that was available at the time the decision was made. The objective *ex ante*-view enables an adequate consideration of the specific situation underlying an event. Whether an (incomplete) situational picture gives rise to a need to obtain further information depends on a concrete threat and the time circumstances.

Retrospectively, additional and better information is usually available. An *ex-post* assessment may prove that a situational picture was erroneous and decisions and measures based on it may subsequently prove to be inadequate. This is in the light of both the prohibition of excessive measures (a threat subsequently proves to be less serious than originally assumed – so that coercive means would not have been necessary or would not have been necessary to the same extent) and the prohibition of insufficient measures (a threat proves to be more serious).

1.2.3. Overlapping of state duties

The fundamental rights obligations of states in anti-terrorist operations may vary and overlap. In the case of a use of force, a balancing of the positive and negative obligations may be necessary (*see* no. V.4.6).

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839 *Leonidis v. Greece*, 43326/05 (2009), § 54.

840 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 212; *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 269 (assessment of the need for an investigation); *Andronicou and Constantinou v. Cyprus*, 86/1996/705/897 (1997), § 192 (hostage rescue operation).
For *targeted killings*, an ex-post assessment is sometimes required in addition to a strict legal proof; *cf.* MacDonald, Lawful Use of Targeted Killing, p. 138.
Critical of the application of the *ex ante*-principle in armed conflicts Gillard, Protection of civilians in the conduct of hostilities, p. 168 (speculative assessment).

> In extreme cases, the use of military means may become necessary. The doctrine of the Royal Army on *land operations* basically describes the challenge of the Convention States to adequately deploy resources under the term *counter-terrorism* as well: «Counter-terrorism describes all preventive, defensive and offensive measures taken to reduce the vulnerability of forces, individuals and property against terrorist threats and/or acts, to respond to terrorist acts. Counter-terrorism operations may be conducted against state-sponsored, internal or transnational, autonomous armed groups who are not easily identified, and who may not fall under the categories of combatants defined in international law. Measures taken include those activities justified for the defence of individuals as well as containment measures implemented by military forces or civilian organisations. The latter are primarily conducted by police and special forces supported by conventional land forces. Land forces have a greater contribution to creating and maintaining effective protective measures to reduce the probability and impact of terrorist attacks against infrastructure or people.»[841]

Ultimately, at all levels, it is about the delicate undertaking of doing "what's right, legally and morally"[842]. Defensive action and aggression, however, can be close to each other: whoever fights back becomes the aggressor[843]. What sounds placative is, in view of the duty to investigate that then comes into effect, quite appropriate.

> Moreover, schematism can aggravate possible dilemmas. For example, the use of special means does not necessarily presuppose the prevention of a greater threat (greater potential for damage). Rather, special means can contribute to more precise action in special situations and open up additional margins for the security forces or increase existing margins. It is crucial that there are *rules of*

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841 U.K./MOD, Land Operations, Army Doctrine Publication AC 71940 (2017), § 8C-13.

842 Corresponds to the *integrity* according to the seven values of the U.S. Amry "L-D-R-S-H-I-P" (Loyalty, Duty, Respect, Selfless Service, Honor, Integrity, Personal Courage), according to McKnight, Streets of Mogadishu, p. 10.

843 Laqueur, Terrorismus, p. 397.

engagement for these special means that meet the legal standards of absolute proportionality[844]. This includes pro-actively preventing possible excesses[845].

1.3. PRINCIPLE OF DISTINGUISHING ACCORDING TO IHRL

The "war" against terrorism may tempt states to classify perpetrators not as criminals but as combatants. This would remove restrictions on national legal systems and make terrorist actors subject to International Humanitarian Law (IHL; on the meaning, *see* no. III.4).

1.3.1. Legal forms of armed conflicts

Depending on the type of armed conflict, different elements of IHL are relevant (in particular the *Geneva Conventions* and their *Protocols*). A distinction must be drawn between *international armed conflict* and *non-international armed conflict*[846]. In the case of the latter, a further distinction does depend on the intensity (*low-intensity conflict* and *high-intensity conflict*).

In *non-international armed conflicts* there is a complex coexistence of the relevant norms of international law with those of International Human Rights Law (IHRL). The LOAC does not establish *leges speciales*, but complementary rules (*e.g.,* for combatant status). As a rule, there are high hurdles for the existence of an armed non-international conflict[847]. Possible "hybrid" forms of conflict will not be discussed in detail here.

In all types of armed conflicts covered, essential human rights guarantees remain intact[848]. No form of conflict that is legal under international law can completely displace human rights.

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844 *Cf.* – *mutatis mutandis* – on the case of the interdiction of the use of an AC-130 ("gunship") in support of the arrest operation of the suspected war criminal General Mohamed Farrah Hassan Aidid in Mogadishu McKnight, Streets of Mogadishu, pp. 84 f. and 168 f.; also Reilly, RoE in Special Operations, pp. 182 ff.

845 In international humanitarian law (specifically LOAC) this is recognised today.

846 *Cf.* Art. 3 Geneva Convention I; *see also* Zwanenburg, Peace Operations, pp. 156 ff.

847 For example, anti-piracy operations were also not included under the concept of defence; *cf.* Sax, Soldaten gegen Piraten, p. 387 (where the author refers to the *destructive force* of a pirate attack, which is not equivalent to a military attack).

848 Lubell/Prud'homme, Impact of human rights law, pp. 108 and 115 ff.

In the judgment *Al-Skeini and others v. The United Kingdom*, for example, the *Grand Chamber* affirmed in principle a duty to investigate under Art. 2 ECHR even in the case of events of war (and even on the territory of a non-Convention State). Specifically, the conduct of British troops after the invasion of Iraq in the spring of 2003 was to be assessed[849]. Similarly, in the judgment in *Isayeva v. Russia*, the ECtHR affirmed the duty to investigate during the armed uprising in Chechnya[850].

It is probably no coincidence that, according to the current state of jurisprudence, the duty to investigate arising from Art. 2 ECHR forms the connecting link for the validity of Convention guarantees in armed conflicts. This obligation can hardly be relativised (*see* no. V.4.7).

1.3.2. Protection of civilians

The IHL protects the civilian population in particular: civilians may not be attacked or killed as a matter of principle[851]. In addition, they enjoy further protection entitlements. Conversely, civilians are not allowed to take part in armed conflicts. If they do so nevertheless, they can be legally prosecuted (*see* no. III.4.2). This must be taken into account within the consideration of use of force[852].

Protocol I (CP I) calls for precautionary measures[853] in the event of military attacks and the avoidance of collateral damage to civilians[854]. To this end, in Art. 57 lays down precise rules aimed at controlling operational and tactical behaviour:

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849 *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), §§ 161 ff. in connection with 34 ff.

850 *Isayeva v. Russia*, 57950/00 (2005), § 180.

851 MacDonald, Lawful Use of Targeted Killing, p. 130; Bosch, IHL Notion of Direct Participation in Hostilities, pp. 999 f. and 1038 f.; Nolte, Principle of Proportionality, p. 251; Belz, War on International Terror, p. 100; Gardam, Non-combatant immunity, pp. 356 ff.

852 In recent times, the opinion has prevailed – with good reason – that (the scope of) IHL should be interpreted rather broadly; *cf.* Zwanenburg, Peace Operations, pp. 157 ff. and 163 ff.

853 Hampson, Article 2 during armed conflict, p. 196.

854 Lesh, Conduct of hostilities, pp. 113 ff.

Article 57 Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of inter-

national law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

1.3.3. Combatants

In *international armed conflicts*, the principle of distinction demands a legal separation of combatants from non-combatants (basically: civilians)[855].

Combatant status conveys treatment according to the specific principles and rules of IHL: *lawful combatants*[856] are allowed to take part in conflicts within its limits without having to take personal responsibility for it (*combatant immunity*)[857]. Conversely, they may be fought according to the principles of lawful warfare and attacked and killed at any time (*see also* Art. 48 Protocol I)[858]. In addition, combatants enjoy a certain protected status *hors de combat*, especially in case of injury or capture[859].

Art. 43 and 44 of Protocol I set out the essential framework for determining combatant status:

Article 43 Armed Forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall

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855 Crawford, Combatants, p. 123; MacDonald, Lawful Use of Targeted Killing, p. 130; ICRC, Interpretative Guidance (direct participation), p. 36 (non-international armed conflict).

856 Jensen, Direct Participation in Hostilities, p. 88.

857 *See also* Crawford, Combatants, pp. 131 f. (non international armed conflict); Jensen, Direct Participation in Hostilities, p. 88; Blank/Guiora, Teaching old Dogs New Tricks, pp. 62 ff.

858 Blank/Guiora, Teaching old Dogs New Tricks, p. 54.

859 In particular for *wounded and sick* members of armed forces according to Geneva Convention I, *wounded, sick and shipwrecked* members of armed forces at sea according to Geneva Convention II, *prisoners of war* according to Geneva Convention I, Geneva Convention III and Art. 44 Protocol I.

be subject to an internal disciplinary system which, ‹inter alia›, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Article 44 Combatants and prisoners of war

(…)

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

(…).

According to the *Geneva Conventions* in *international armed conflicts*, various types of participation in the conflict can lead to the status of a combatant. In addition to mem-

bers of regular state armed forces (Art. 43 Protocol I), partisans or resistance fighters are also considered combatants[860]. The characteristics[861] are ultimately based on *Hague Convention IV*, which (in accordance with the subject matter of the regulation) refers to armed units[862].

> Annex, Art. 1
>
> *The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:*
>
> *1. To be commanded by a person responsible for his subordinates;*
>
> *2. To have a fixed distinctive emblem recognizable at a distance;*
>
> *3. To carry arms openly; and*
>
> *4. To conduct their operations in accordance with the laws and customs of war.*
>
> *In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination «army».*

Individual terrorists or terrorist groups often do not meet the requirements established for *international armed conflicts*. By directing their violent actions primarily against the civilian population – even if they claim political goals for doing so – they fail to comply with the laws and customs of warfare.

1.3.4. Direct participation in hostilities

In armed conflicts, (protected) civilians may not take part in hostilities[863]. If they do, they lose the protection of not being attacked (for *armed international conflicts, see* Art. 51 para. 3 CC I; for *armed non-international conflicts, see* Art. 13 para. 3 CC II)[864].

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860 *See also* Kleffner, Organised Armed Groups, pp. 50 ff.

861 *See also* Crawford, Combatants, pp. 127 f. or Crane/Reisner, Jousting at Windmills, p. 74.

862 Individual misconduct by members does not deprive an entire unit of combatant status.

863 Lesh, Direct participation in hostilities, p. 181; Jensen, Direct Participation in Hostilities, p. 91.

864 Gillard, Protection of civilians in the conduct of hostilities, p. 159; Nolte, Principle of Proportionality, p. 251; Schmitt, Deconstructing Direct Participation in Hostilities, p. 698.

However, they do not gain combatant status (and thus no corresponding privileges)[865]; they are *unlawful combatants*[866].

> Under certain circumstances, the participation of civilians in armed conflicts is "considered a serious violation of the IHL prohibition against perfidy"[867]. It is currently disputed whether there is a category of unlawful combatants in the IHL for armed international conflicts[868]. This term is not explicitly used in the basic provisions of the IHL. Moreover, under the Geneva Conventions and Protocol I, in the case of armed international conflicts, only spies and mercenaries are denied combatant status from the outset (Art. 46 and 47 Protocol I)[869].

Unlawful combatants can be militarily attacked as lawful targets[870] *for such time as they take a direct part in hostilities* (Protocol II Art. 13 [para. 3] / Protocol I Art. 51 [para. 3]). What is controversial is both what is to be understood by direct participation and what significance may be attributed to the temporal component[871].

> Often, "specific hostile acts which amount to direct participation in hostilities"[872] are required – respectively must show a certain *threshold of harm*

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865 Lesh, Direct participation in hostilities, pp. 181 f.; Crawford, Combatants, pp. 132 f. On the significance under customary international law, *cf.* Bosch, IHL Notion of Direct Participation in Hostilities, pp. 1001 ff.

866 Blank/Guiora, Teaching old Dogs New Tricks, pp. 64 f.

867 Bosch, IHL Notion of Direct Participation in Hostilities, p. 1039.

868 *See also* Crawford, Combatants, pp. 133 ff.; Dörmann, Legal situation of "unlawful/unprivileged combatants", pp. 48 ff.; Belz, War on International Terror, p. 118; Jensen, Direct Participation in Hostilities, pp. 103 f.

869 Crawford, Combatants, p. 132.

870 Schmitt, Notion of Direct Participation in Hostilities, p. 13 (specifically and intestinally targeted); Jensen, Direct Participation in Hostilities, p. 101.

871 Schmitt, Notion of Direct Participation in Hostilities, pp. 13, 25 ff. (direct participation) and 34 ff. (temporal aspects); *see also* Schmitt, Deconstructing Direct Participation in Hostilities, pp. 705 ff. and Lesh, Conduct of hostilities, pp. 115 ff.

872 Bosch, IHL Notion of Direct Participation in Hostilities, pp. 1007 ff.

as well as a belligerent nexus[873]. The harmful conduct must also take place directly[874].

1.3.5. Significance

In military operations during armed conflicts, the status of non-uniformed individuals may have to be decided within a very short period of time[875]. If a person's combatant status is in doubt, he or she is considered a civilian (for *international armed conflicts, see* Protocol I Art. 50 [para. 1 sentence 3])[876]. If civilians are no legitimate targets for attacks and if the acceptance of collateral damage among civilians is also not permitted under IHL, this restricts the permissibility of military operations accordingly[877].

In our opinion, these are not questions of proportionality (according to LOAC: *Proportionality*), but rather the application of the requirement of distinction (according to LOAC: *Distinction*).

Particularly in the case of modern forms of international terrorism, the rules of IHL ultimately lead to increased protection (of the lives) of those actors who themselves do not abide by the law[878].

In order to combat terrorist activities, considerations have been made in Israel and the U.S.A. to legally solve the problem of *unlawful combatants*[879]. This is basically about finding a justification for being allowed to directly attack terrorists (or dangerous persons) at any time.

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873 *Cf.* Lesh, Direct participation in hostilities, pp. 182 ff.

874 On the problem of *acutal harm*, *cf.* Jensen, Direct Participation in Hostilities, p. 102 (according to which neither a bomb maker nor a recruiter is covered) or Lesh, Direct participation in hostilities, pp. 187 f.

875 Crane/Reisner, Jousting Windmills, pp. 71 f.

876 Hampson, Article 2 during armed conflict, p. 196; Blank/Guiora, Teaching old Dogs New Tricks, p. 63; Crane/Reisner, Jousting at Windmills, p. 74.

877 Blank/Guiora, Teaching old Dogs New Tricks, pp. 66 f.

878 Jensen, Direct Participation in Hostilities, p. 85.

879 *See also* Crane/Reisner, Jousting at Windmills, pp. 75 ff.

Terrorists are not entitled to combatant status in the result[880]. Depending on the nature of a conflict and their concrete behaviour, they can at best be temporarily assigned to the (disputed) category of *unlawful combatants*[881].

Measures against terrorism as such and against terrorist-motivated actors are to be considered according to the respective national law and, for the Convention States, additionally according to the standards of the ECHR. In our opinion, the rules of the IHL can be used analogously as the outermost legal barriers or as aids to interpretation.

2. CONTROL AND ORGANISATION

Since the ECtHR in its assessments focuses on operations as a whole, it logically also examines their control and organisation. However, a closer distinction between control and organisation of an operation does not seem to make sense.

> «The question arises, however, whether the anti-terrorist operation as a whole was controlled and organised in a manner which respected the requirements of Article 2 [...] and whether the information and instructions given to the soldiers which, in effect, rendered inevitable the use of lethal force, took adequately into consideration the right to life of the three suspects»[882].

Rather, a distinction must be drawn between prior planning and subsequent execution (the former being dealt with in the pre-operational obligations; *see* no. IV.3) – even though the two can be closely related, and the ECtHR sometimes examines planning and control jointly.

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880 MacDonald, Lawful Use of Targeted Killing, pp. 131 f. or – even more generally – ICRC, Interpretative Guidance (direct participation), p. 24: "organized armed violence failing to qualify as an international or non-international armed conflict remains an issue of law enforcement, whether the perpetrators are viewed as rioters, terrorists, pirates, gangsters, hostage-takers or other organized criminals."

881 Quite similarly, U.K./MOD, Manual of the law of armed conflict (JSP 383), § 1.33.4: "The internal use of force against criminal and terrorist activity is not regulated by the law of armed conflict unless the activity is of such a nature as to amount to armed conflict. However, human rights law would apply" (with reference to Art. 1 para. 2 Protocol II).

882 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 201.

2.1. GENERAL REQUIREMENTS ON THE SURVEILLANCE

The ECtHR's jurisprudence on the conduct of police operations remains rather general. The reason for this lies in the open-minded purpose of examining operations as a whole (which are in turn to be distinguished from single tactical measures).

> «According to its case-law, the Court must examine the planning and control of a policing operation resulting in the death of one or more individuals in order to assess whether, in the particular circumstances of the case, the authorities took appropriate care to ensure that any risk to life was minimised and were not negligent in their choice of action.»[883]

The Court has addressed the control of police operations not only in anti-terrorist operations[884] but also in the context of other activities[885].

It sometimes explicitly refrains from specifically examining the control of operations[886] because a violation of Art. 2 ECHR has already been established on other grounds[887]. It seems more significant that «guidelines on the planning and control of police operations» exist at all in national legal bases[888].

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883 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 249; quite similarly, in *Andronicou and Constantinou v. Cyprus,* 86/1996/705/897 (1997), § 181; in the same sense *Nachova and others v. Bulgaria* (GC), 43577/98 and 43579/98 (2005), § 103 and *Tagayeva and others v. Russia,* 26562/07 (2017), § 562.

884 *Tagayeva and others v. Russia,* 26562/07 (2017), §§ 562 ff.

885 *Makaratzis v. Greece* (GC), 50385/99 (2004), § 62; *Nachova and others v. Bulgaria* (GC), 43577/98 and 43579/98 (2005), §§ 103 ff.; *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), §§ 244 ff.; *Andronicou and Constantinou v. Cyprus,* 86/1996/705/897 (1997), § 181 (rescue operation); *Ergi v. Turkey, 66/1997/850/1057* (1998), §§ 79 ff.; *Bubbins v. The United Kingdom,* 50196/99 (2005), §§ 138 ff.; *Akkum and others v. Turkey, 21894/93* (2005), § 246; *Leonidis v. Greece, 43326/05* (2009), §§ 61 f.

886 *Akkum and others v. Turkey, 21894/93* (2005), § 246 and in the verdict, § 4.

887 *Akkum and others v. Turkey, 21894/93* (2005), § 243.

888 *Makaratzis v. Greece* (GC), 50385/99 (2004), § 62.

> «[…] policing operations must be sufficiently regulated by national law, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force.»[889]

The Court correctly separates operations that are planned or plannable from spontaneous events; it takes into account the degree of control exercised by the state security forces in a given situation.

> «[…] The degree of scrutiny depends on the extent to which the authorities were in control of the situation and other relevant constraints inherent in the operative decision-making in this difficult and sensitive sphere […].»[890]

> In Finogenov and others v. Russia, the ECtHR gave the authorities some margin: «It should be noted that the authorities were not in control of the situation inside the building. In such a situation the Court accepts that difficult and agonising decisions had to be made by the domestic authorities. It is prepared to grant them a margin of appreciation, at least in so far as the military and technical aspects of the situation are concerned, even if now, with hindsight, some of the decisions taken by the authorities may appear open to doubt.»[891]

In planned operations or insofar as the state security forces exercise actual control (ergo enjoy freedom of manoeuvre), stricter requirements for organisation and leadership may come into play (*see* no. IV.3) than in the case of spontaneous events[892].

> «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

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889 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 249.

890 *Tagayeva and others v. Russia,* 26562/07 (2017), § 563; quite similarly, in *Finogenov and others v. Russia*, 18299/03 (2011), § 214.

891 *Finogenov and others v. Russia*, 18299/03 (2011), § 213.

892 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 245: «The obligation in question must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, 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».

have particular regard to the context in which the incident occurred as well as to the way in which the situation developed [...]»[893].

«The [...] operation in question was a spontaneous chase decided on the spot by the two police officers and it was mounted with the aim of carrying out an identity check on the applicant's son and his friends.»[894]

2.2. COMMAND STRUCTURE AND RESPONSIBILITY

A police operation (in the proper sense) requires a command structure or at least a chain of command[895]. In more complex operations, command and control is a particular challenge.

For example, the military *"Operation Banner"* in Northern Ireland – which had lasted 38 years – was criticised for lacking an "overall campaign authority", for a "decision-making process" that was partly chaotic and for "intelligence agencies [that] were working to different agendas"[896].

A basis of confidence must be created and experienced within a command structure. Without the confidence of the agencies potentially involved, the effective conduct of operations is practically impossible. Clarifying responsibilities in advance is a key factor in creating a basis of confidence.

2.2.1. The aim of police command and control

A command structure of police forces does not necessarily require the existence of a strictly hierarchical, uniform level of command (in the sense of a staff with comprehensive jurisdiction and overriding rights to issue directives). With different authorities involved, this would usually not be legally possible and would not make practical sense.

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893 *Leonidis v. Greece, 43326/05* (2009), § 61; *Andronicou and Constantinou v. Cyprus,* 86/1996/705/897 (1997), § 182.

894 *Leonidis v. Greece, 43326/05* (2009), § 62.

895 *Bubbins v. The United Kingdom*, 50196/99 (2005), § 148 (chain of command); Roche, Operationalising the ECHR, p. 63.

896 Edwards, Northern Ireland Troubles, pp. 82 f., pointing out that better solutions in support of operations by the army would not have been easy to find.

The decisive factor is that coordination and cooperation can take place between the agencies involved[897]. In special situations, a special command and operational structure is created which is designed precisely for this purpose. The advantage of such a structure (as opposed to a fixed hierarchy) is that each authority involved can act within the framework of its legal basis.

2.2.2. Overall responsibility

In the case of large-scale police operations (at least *anti-terror operations*[898]), it may be indicated to determine an overall responsibility specifically. The ECtHR attaches different weight to the fact that overall responsibility cannot always be clearly assigned.

a. Command, control and law enforcement

The case of *McCann and others v. The United Kingdom* was a joint operation between police, military and intelligence agencies. The *Police Commissioner* had requested the assistance of the (specially trained and equipped) SAS. The SAS in turn was supported by police forces. The release of the SAS' access to the three terrorists was reserved for the Commissioner[899]. The Commissioner had handed over part of the control of the operation to the SAS by a (written) order[900]. The *Grand Chamber* did not address the overall responsibility in the operation in the context of a possible violation of Art. 2 ECHR (but dealt with the factual events and planning assumptions[901]): «It suffices to note in this respect that the rules of engagement issued to the soldiers and the police in the present case provide a series of rules governing the use of force which carefully reflect the national standard as well as the substance of the Convention standard.»[902]

In our opinion, this leaves room for interpretation regarding the involvement of additional authorities. It can be deduced that additional forces can be involved if the

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897 FOREST Counterterrorism, p. 22 (focusing on *law enforcement agencies*).

898 *Tagayeva and others v. Russia,* 26562/07 (2017), § 595.

899 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), §§ 15 f. and 32.

900 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), §§ 54 and 65.

901 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), §§ 202 ff.

902 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 156.

corresponding legal basis (laws, ordinances, regulations) or rules of engagement are in place, which on the one hand allow the use of these special personnel (in particular with regard to coercive measures –including the permissible use of resources) and on the other hand regulate the question of responsibility.

b. Legal assessment

In the case of *Tagayeva and others v. Russia*, a command staff was not established until approximately 30 hours after the hostage-taking[903]. Moreover, it seems that a command structure was not really apparent[904]. What is not unusual in a chaotic phase in the beginning of a crisis later led to various elementary errors in coordination and decision-making[905].

> «Under the relevant national law, the OH [operative headquarters] was responsible for the anti-terrorist operation in Beslan. The extraordinary scope of the crisis and the multitude of factors which had to be taken into account and demanded a constant and centralised response make it impossible to evaluate the planning and control aspect of the operation without focusing on the work of the OH, the body tasked with those responsibilities. [... The] Court identifies the following important issues under this heading: the composition, functioning and accountability of the OH and the distribution of lines of responsibility and communication within the OH and with the outside agencies, such as the rescue, fire and medical services. [... The] absence of a single coordinating structure tasked with centralised handling of the threat, planning, allocating resources and securing feedback with the field teams, contributed to the failure to take reasonable steps that could have averted or minimised the risk before it materialised [...]. This lack of coordination was repeated during later stages of the authorities' response.»[906]

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903 *Tagayeva and others v. Russia,* 26562/07 (2017), § 566.

904 *Tagayeva and others v. Russia,* 26562/07 (2017), § 567: «But even once this new structure had been set up on 2 September, its configuration was not respected. In fact, it seems impossible to determine its composition with certitude, since various sources indicated different people.»

905 *Tagayeva and others v. Russia,* 26562/07 (2017), § 569.

906 *Tagayeva and others v. Russia,* 26562/07 (2017), §§ 564 f.

For anti-terrorist operations, command and control requirements as well as, under certain circumstances, the need for special coordination and the assignment of overall responsibility arise from obligations under fundamental law.

> «In a situation which involves a real and immediate risk to life and demands the planning of a police and rescue operation, one of the primary tasks of the competent authorities should be to set up a clear distribution of lines of responsibility and communication within the OH and with the agencies involved, including the military and security, rescue, fire and medical services. This body should be responsible for collecting and distributing information, choosing negotiation strategies and partners and working out the possible outcomes, including the possibility of a storming and its consequences. It is therefore striking to see that the majority of the members of the body tasked precisely with those questions were effectively excluded from any discussions or decision-making processes. The absence of any records, however concise, of the OH meetings and decisions adopted, highlight the appearance of a void of formal responsibility for the planning and control of the operation, as the situation developed. The subsequent domestic proceedings were unable to fill in this void, and it is still unclear when and how the most important decisions had been taken and communicated with the principal partners, and who had taken them.»[907]

A special organisational structure in special (extraordinary) situations permits adequately countering recognised threats. The obligations under fundamental law are condensed into a *cura in organisando* (organisational responsibility) that goes hand in hand with the responsibilities of the state in that concrete situation.

c. Binding on the legal bases

The designation of an overall command and control structure or the actual overall command of police operations is bound to the legal bases (and cannot be detached from them). The regulation of police operations is one of the pre-operational obligations

[907] *Tagayeva and others v. Russia,* 26562/07 (2017), § 570.

of the Convention States – whereby the ECtHR allows margins for situation-specific solutions in acute crisis situations (*see* no. IV.1.4.3).

> «[… 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› […]. 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.»[908]

It is important to bear in mind that police operations must primarily be reliable on the legal basis of the authority or agency that has overall command. The relationship of the legal bases relevant for operational command to those relevant for special authorities or agencies as well as to those relevant for the use of force can pose a particular challenge, both legally and practically.

In principle, each state agency is bound by its specific legal bases. Police forces are bound by police laws, rescue forces by their legal bases and military forces by the law on military operations.

> For example, in *Giuliani and Gaggio v. Italy* the Criminal Code and police legislation served as the primary legal bases for the legal examination[909]. The ECtHR concludes that these legal bases meet the requirements for the use of force[910].
>
> In *Isayeva v. Russia,* the ECtHR concerns a military operation. According to the expert report, the operation was based on military legal bases such as the *Army Field Manual* and the *Internal Troops Field Manual*[911]. The Court criticises the insufficient national legal basis: «The […] Government's failure to invoke the provisions of any domestic legislation governing the use of force by the army

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908 *Tagayeva and others v. Russia,* 26562/07 (2017), § 595.

909 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), §§ 142 ff.

910 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 218.

911 *Isayeva v. Russia*, 57950/00 (2005), § 97.

> or security forces in situations such as the present one, whilst not in itself sufficient to decide on a violation of the State's positive obligation to protect the right to life, is, in the circumstances of the present case, also directly relevant to the Court's considerations with regard to the proportionality of the response to the attack.»[912]

The deployment of security forces in joint operations can lead to mixed legal situations (and "legal muddles"). If the relevant legal bases provide additional forces to support the regular authorities, for example, the corresponding regulations for regular authorities apply. In addition, well-designed rules of engagement (*see* no. V.3) can avoid misunderstandings or overreactions.

> The cases of *Tagayeva and others v. Russia* and *Finogenov and others v. Russia* were operations involving both police and military forces as well as rescue services. In those cases, the anti-terrorist operations were based on the national legal basis of the *Suppression of Terrorism Act*. The problem for the ECtHR is that this legal base was not sufficiently definite. This ultimately led to the analogous application of military rules of engagement. In the given situations, these were neither compatible with the state's duty to protect nor with the principle of proportionality[913].

Depending on the circumstances, situational legal bases might exist. They can be linked to the degree of escalation of a particular situation. The broadest case would be the state of emergency. However, states can also provide for other types of law during extraordinary situations (*see* no. V.3.4.1.b).

2.3. SPECIAL REQUIREMENTS

Under the obligations of Art. 2 ECHR, the ECtHR examines the adequate alignment of operations. Particularly in cases where a standard behaviour is applied, it is important to act appropriately with regard to the concrete situation or a concrete threat. Force is not to be used schematically, not irrespective of the circumstances of an individual case.

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912 *Isayeva v. Russia*, 57950/00 (2005), § 199.

913 *Tagayeva and others v. Russia,* 26562/07 (2017), § 598.

> «As to the context, the authorities clearly understood that they were dealing with a young couple and not with hardened criminals or terrorists. The [...] authorities never lost sight of the fact that the incident had its origins in a ‹lovers' quarrel› and that this factor had to be taken into account if, in the final analysis, it transpired that force had to be used to free Elsie Constantinou. It was not unreasonable in view of the context for the authorities to enlist the help of the family and friends of Lefteris Andronicou in order to bring the situation to an end»[914].

Conversely, there may also be requirements which must be complied with under all circumstances, *i.e.,* even if their importance is not obvious from the outset (*e.g.,* the documentation of assignments).

2.3.1. Situation assessment

It is part of the command and control of an operation to explore its own options on the basis of an assessment of the particular situation (*see* no. IV.2.3). To this end, the nature of a threat must first be addressed (actors, intentions, capabilities, means). The concrete potential for damage must be assessed, among other things, on the basis of the type of threat, the effectiveness of the means of the opposing party and possible further consequences. This becomes the starting point for an evaluation of the possible means, taking into account proportionality[915]. The likelihood of harm to third parties (who are not perpetrators or interferers) and other environmental factors must also be taken into account[916].

> For example, if a large firepower is applied in an inhabited area, there is a significant likelihood that bystanders will be harmed[917]. It is of little help (and does not relieve a Convention State of its responsibility) to order "bystanders" to leave this area in advance – it is characteristic of hostage situations or the

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914 *Andronicou and Constantinou v. Cyprus,* 86/1996/705/897 (1997), § 183.

915 FIP, § 6.5.5 f.

916 FIP, § 6.5.4 and 6.5.6.

917 *Isayeva v. Russia*, 57950/00 (2005), § 191; *Tagayeva and others v. Russia,* 26562/07 (2017), § 603.

perfidious use of human shields that the persons to be protected are no longer free to seek protection on their own.

Even before a use of force, the necessary rescue measures must be assessed and planned. Depending on the type of means used, different procedures and resources are required for the medical and psychological care of the victims (*see* no. V.5.1.3).

2.3.2. Temporal aspects and contingency planning

Besides the availability of resources, temporal factors have to be taken into account in larger operations. Depending on the initial situation and the urgency, certain resources may not be available or may only be available to a limited extent.

For example, the Czech Republic has the "*Útvar rychlého nasazení Policie ČR*", a special anti-terror unit[918]. The rapid response unit has a strength of 60 people. In order for such a unit to be deployed, it must be able to be moved to the theatre of operations in a time-appropriate (means: quickly) manner. Depending on the place of deployment, the displacement time of the special unit must be taken into account in the command and organisation of an operation.

If necessary resources are not available immediately or only too late, contingency planning must be carried out in addition to an assessment of the situation and intervention[919].

The factor of time also plays a decisive role at the tactical level. In the military field, systems are being considered under the title *Future Soldier*, which in particular allow for stronger networking, shorter decision-making paths and, in the meantime, also the substitution of human decisions by artificial intelligence[920]. In our opinion, the use of such systems will require even more

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[918] https://www.policie.cz/clanek/Police-of-the-Czech-Republic.aspx (last visited on 4 June 2022).

[919] In addition to the prioritisation of tasks, the availability of resources and the capabilities of the opposing side, the presumed duration of the operation also matters. Especially with regard to the operational capability of the actors involved (nutrition, mental and physical strain, concentration, etc.); FIP, § 6.5.3.

[920] Curtis, Planning for the Next Generation of Soldier Modernisation, § 3.1 (Table 4); Weisswange, Der ditigale Soldat, p. 53.

than before that the particular situation is known sufficiently and assessed correctly. The demands on the planning and preparation of an operation may increase.

2.3.3. Compliance with the relevant legal framework

The legal framework applicable to the individual state agencies determines in particular the tasks and responsibilities as well as any permissible means of intervention.

The relevant state agencies (or actors) whose different tasks and skills are to be bundled or coordinated must be represented in the operational command and staff organisations (*see* no. V.1.1.2)[921]. The legal bases, duties and responsibilities, but also the actual skills and available resources of the respective agencies, form important operational elements. Individual skills and experience can also be important.

Even if they are integrated into a task force structure or a larger command staff, state agencies remain bound by the legal basis applicable to them. They must be authorised to act and have the necessary capabilities to do so. This is particularly relevant for the correct use of potentially lethal means of coercion and for the proportionality of state action.

Based on their duties and responsibilities, the actors involved can be charged with tasks in special situations. With the optimal integration of the resources required in a specific case and at the same time legal clarity and responsibility for their use, the state's duty to protect can be fulfilled in the best possible way.

2.3.4. Internal communication and transfer of information

Adequate communication between different government agencies is relevant regardless of subordination and concrete missions. Communication as a permanent process enables a constant flow of information and, last but not least, ensures that the situational picture can be updated.

In *Tagayeva and others v. Russia*, communication was deficient. For example, the fire brigade and the authorities in charge of the evacuation were

[921] FIP, § 2.2.2.

> not informed about the number of hostages. Further, they had not received instructions on how to increase their operational preparedness, even though there was an obvious risk of explosions and fire in School No. 1. The authorities for public health had not been kept informed about the number of possible victims. The actual number was three times higher than originally communicated[922]. Insufficient communication contributed to a delay in the rescue operation.

During operations, a consolidated situational picture must be transmitted at different levels in varying depths and degrees. Without an updated situational picture and without sharing the possible (assumable) evolution or development of the situation, the actions of the agencies involved can no longer be directed towards the aimed objective. Involved agencies then act improperly or too tardy due to a lack of better knowledge. This does not minimise risks but increases them – and may even create additional dangers (also for the security forces involved).

> In *Finogenov and others v. Russia*, the evacuation of the hostages did not begin until 80 minutes after the (dangerous and in effect lethal) gas had been introduced. The rescue operation had been delayed due to a lack of information and awareness on the part of the rescue forces. The victims were exposed to the gas for a considerable period of time without medical assistance and thus at a higher risk of mortality[923].

Finally, ensuring adequate communication at the technical, procedural and actual levels is part of both the pre-operational[924] and command and control duties of major police operations.

> *Technically*, it must be achieved that all involved agencies are provided with those communication channels that allow an exchange: whether by radio, by conference calls or by a situation network system. Redundancy is to be strived for.

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922 *Tagayeva and others v. Russia,* 26562/07 (2017), § 569.

923 *Finogenov and others v. Russia*, 18299/03 (2011), §§ 257 f.

924 *Cf.* Bolz, Intelligence Requirements in Hostage Situations, p. 62.

Procedurally, this means designing the processing and transfer of information independently of individuals or conceivable frictions[925]. In particular, communication must be included in the management processes.

Factually, information must be flowing. This is achieved in particular through rhythms of briefings and debriefings, situation and status reports.

2.3.5. Stability and clarity

Particularly in larger (and long-term) operations, a certain stability in command and control and clarity of orders are among the factors for success.

Changes in command are in principle to be avoided during the execution of tactical actions. Exceptions may be appropriate if a change at the command level expands the options for action (for example, by opening up greater scope for action, integrating additional material or personnel resources or enabling the use of other tactics).

When there are (personnel) changes in command, however, there is a risk of carrying out operations differently from what had been planned or of making changes that surprise the bodies that have been involved for a longer period of time or in which they are not sufficiently involved.

The intention formulated by the operation command must always be clear to every authority involved. However, the intention must also be regularly checked for its accuracy (and permissibility). The same applies to orders addressed to subordinates. If acting security forces do not know the intention of the command or if their orders are unclear, the success of an operation can be threatened. Failures in command can indirectly lead to a violation of the duties to protect, which determine the finality of an operation.

2.3.6. Documentation

National legal provisions sometimes explicitly stipulate the documentation of police operations.

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[925] Anyone who has served on a military staff will be familiar with the situation where information no longer circulates because the group command is in a meeting (report).

Beyond the duty to keep a journal, the security forces of the Convention States are obliged to sufficiently document their operations at all stages. Such an obligation does not arise directly from Art. 2 ECHR – but it follows indirectly from the duty to investigate. In our opinion, any duty to investigate that may arise at a later stage must be taken into account from the beginning of an anti-terrorist operation.

> «[... The] Court has been hampered by the absence of any contemporary documents recording the planning of the operations and the briefings given to the officers involved. Such material might have thrown light on a number of questions posed by the applicants, notably the reasons why, if the intention had been to arrest the suspects, the operations were not planned to be carried out in simultaneous raids. Nevertheless, on the material available to it, the Court does not find it sufficiently established that within the İstanbul police there had been a conspiracy to execute the suspects or that the police officers entering the apartments had been instructed by the superior officers to kill the suspects irrespective of the existence of any justification for the use of lethal force»[926].

In addition, sufficient documentation supports the implementation of an operation.

> For example, it may be relevant for the operation that all involved units have common and up-to-date command and control documents. This includes logbooks as well as organisational charts and the visualisation of responsibilities, accountabilities and contact details.
>
> National legal provisions sometimes require the written commissioning of specific state agencies. This serves not only clarity and traceability but also the perpetuation and later review of mandates.

2.4. POLITICAL INFLUENCE ON OPERATIONS?

Inappropriate or unnecessary political directives can jeopardise the success of operations.

> An example is Operation "*Gothic Serpent*" in Somalia in 1993. The aim of the military operation was to arrest the suspected war criminal Mohamed Farrah

[926] *Erdoğan and others v. Turkey*, 19807/92 (2006), § 75.

> Aidid and representatives of his inner circle of leaders[927]. For political reasons[928], the strength of the task force deployed had been limited to exactly 450 people. Therefore, their number had to be reduced by 46 personnel immediately before the mission. As a result, the reserve that would have been urgently needed during the operation was missing. In addition – also for political reasons – the planned heavy means for precise reactions were missing[929].

As far as the protection of life as a legal asset is concerned – be it of hostages or other victims, be it of security forces or be it of perpetrators – political influence is, in our opinion, to be measured against the possible (additional) endangerment of human life.

The legal requirements applicable to anti-terrorist operations – including the law at all levels and the relevant case law – take precedence over political influence. This means, for example, that the forces may neither be denied nor improperly granted resources on the basis of purely political considerations.

> After a 32-hour siege of the flat of the Islamist serial killer *Mohammed Merah*, there was a five-minute firefight between him and the special forces of the French police. After unsuccessful negotiations, Merah was finally neutralised with a shot to the head. Merah had previously killed four people outside a Jewish school as well as three soldiers and was considered very dangerous[930]. The operation had been led on the spot by Interior Minister *Guéant*[931]. Soon there was criticism as to why it had not been possible to render the lone perpetrator harmless in another way (after such a long time)[932].

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927 United Nations, Security Council, Resolution 837 (1993), adopted by the Security Council at its 3229th meeting, on 6 June 1993, § 5.

928 McKnight, Streets of Mogadishu, p. 85: "The explanation we were given was that the decision-makers (…) did not want this to look like a build-up similar to Vietnam (…)".

929 McKnight, Streets of Mogadishu, pp. 84 f. and 168 f.; Reilly, RoE in Special Operations, p. 185 (with the example of the AC-130; *see* footnote 844).

930 NZZ of 21 March 2012, p. 1 "Terroristenjagd endet in Toulouse tödlich".

931 NZZ of 22 March 2012, p. 3 "Jihad eines Einzelgängers".

932 NZZ of 23 March 2012, p. 3 "Terror überschattet Frankreichs Wahlkampf".

Political influence must be documented in any case and taken into account both in the follow-up (*see* no. VI.3) and in any duty to investigate (*see* no. VI.4).

Political influence can be exerted through the formulation of *rules of engagement* within the existing legal framework[933]. It then can contribute to make a (required) action proportionate (*see* no. V.3.1)[934].

> Conversely, political interference can lead to reduced effectiveness of operations[935] – for reasons of public perception, for example. What may be a political success may be a failure from the point of view of the security forces – and vice versa[936].
>
> The obligations arising from the right to life cannot be restricted or abrogated for political reasons. This applies also to the right to life of members of state security forces. In our opinion, for example, the use of mild but intrinsically unsuitable means may not be ordered out of political opportunism (*see* no. V.5.1.5)

3. RULES OF ENGAGEMENT AND MEANS OF ENGAGEMENT

The use of means of intervention is governed by the respective legal requirements and limits (*see* no. IV.3.3.3). The normative provisions do not include tactical or operational requirements for the use of certain means of coercion.

Rules of engagement (RoE) as command and control instruments create a link between the legal provisions and the use of coercive means in concrete operations. Due to the increasing complexity of police operations, they are indispensable, especially in anti-terrorist operations.

From the more recent case law on Art. 2 ECHR it can be deduced that there is a duty to design operational means of control and command in police operations.

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933 *Cf.* Reilly, RoE in Special Operations, pp. 27 ff. (from a military perspective).

934 *Cf., e.g.,* U.K./MoD, Joint Doctrine Publication 0-01, p. 49.

935 Guldahl Cooper, RoE Demystified, pp. 190 ff.

936 The scheme is excellent in Reilly, RoE in Special Operations, p. 34 (Figure 2).

3.1. RULES OF ENGAGEMENT

3.1.1. Concept and function

RoE have gained their importance mainly in the context of military operations[937]. Although there is widespread consensus on their function, a general definition of the term is still lacking[938].

> The relevant (classified) NATO regulations[939] define ROE in general terms as "directives to military forces (including individuals) that define the circumstances, conditions, degree, and manner in which force, or actions which might be construed as provocative, may be applied."[940]

As instruments for steering the use of means of coercion in operations[941], RoE are of great practical importance as a guideline[942]. In terms of content, they aim to achieve convergence between what is legally required, what may be politically prescribed and military imperatives[943]. Within this threefold interface, various functional types of RoE are conceivable[944]. In addition to possible standard RoE, specific RoE for certain operations become particularly important[945].

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937 On the historical background of military RoE, *cf., e.g.,* Martins, RoE for Land Forces, pp. 33 ff.

938 Guldahl Cooper, RoE Demystified, pp. 190 ff.

939 NATO ROE Manual MC 362-1 (restricted).

940 NATO ROE Manual MC 362-1 (restricted).

941 Martins, RoE for Land Forces, p. 55; Guldahl Cooper, RoE Demystified, pp. 193 and 236 ff.

942 Williams, Training the RoE for the Counterinsurgency Fight, p. 42; Martins, RoE for Land Forces, p. 6; Seifert, Rewriting the RoE, p. 845.

943 *Cf.* Roach, RoE, pp. 47 ff. and Martins, RoE for Land Forces, p. 26; in depth on the relationship of the synonymous elements to each other Guldahl Cooper, RoE Demystified, pp. 216 ff. *Cf., e.g.,* U.K./MoD, Joint Doctrine Publication 0-01, p. 49. On the connection between strategy and RoE using the example of the U.S. mission in Afghanistan, *cf.* Williams, Training the RoE for the Counterinsurgency Fight, pp. 44 f.

944 Martins, RoE for Land Forces, pp. 30 ff. (with the example of military RoE) and 110 ff. *Cf.* Sanremo Handbook on RoE, pp. 12 ff. (Appendix 2 to Annex A)

945 Seifert, Rewriting the RoE, pp. 847 ff. and 866 ff. on the problem of *uniform RoE* in police operations using the example of the insurgency in Iraq.

> Particularly in operations in the field homeland security, the creation of RoE enables coordination and the smooth steering of discretion either by threat, by areas or in terms of time.

RoE as command and control tools[946] can be used to link elements of situation assessment, planning and operations as well as to establish links between operational and tactical levels. Ultimately, RoE also define the way for dealing with specific challenges in a concrete way. Accordingly, they must be adequately communicated to the security forces participating in an operation and verified in their application.

> The different appearance of (elements of) RoE – sometimes in the form of a (simplified) pocket card for individual forces – can lead to confusion. At the tactical level, it is sometimes (wrongly) assumed that the contents of a pocket card are the same as the RoE.

The creation of RoE in the field of tension between law, politics and operational requirements is always a balancing act[947]. Also, not every tactical behaviour can be controlled by RoE[948]. Especially self-defence situations remain reserved (*see* no. V.5.2).

3.1.2. Legal relevance

RoE can be issued in different shapes and forms[949]. In principle, they do *not* constitute legal norms[950] and are not usable to extend existing legal norms or legal powers[951].

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946 Guldahl Cooper, NATO ROE, pp. 79 ff.

947 Reilly, RoE in Special Operations, pp. 32 ff.

948 Guldahl Cooper, RoE Demystified, p. 240.

949 Sanremo Handbook on RoE, p. 1; Guldahl Cooper, RoE Demystified, pp. 195 ff.; Guldahl Cooper, NATO ROE, pp. 32 ff.

950 Their legal character also depends indirectly on how national legal systems classify *orders* (for example military deployment orders); *cf.* Guldahl Cooper, RoE Demystified, pp. 207 f. (with further references on national realities that are not always free of contradictions) and Guldahl Cooper, NATO ROE, pp. 51 ff.

951 Seifert, Rewriting the RoE, p. 845; U.K./MoD, Joint Doctrine Publication 3-46 (JDP 3-46), Legal Support to Joint Operations p. 26; differenzierend Guldahl Cooper, RoE Demystified, pp. 201 ff. (and finally also rejecting, p. 208). On the – probably fundamental – conflict between the application of RoE on the one hand and the setting and application of standards on the other hand, *cf.*, *e.g.,* Martins, RoE for Land Forces, pp. 55 ff.

Rather, RoE must be able to rely on the relevant legal foundations[952]. But the RoE (reversely) contribute to the implementation of the principle of proportionality[953] in military or police operations. In this respect, they can *restrict* an existing legal scope in the circumstances of the individual case or situation[954].

Through the design of the RoE in anti-terrorist operations, the operational command controls the use of coercive means and of tactics[955]. In this context, the legal criterion of necessity must be particularly taken into account. This already results from the national legal regimes: either it is justified for police action from a fundamental rights perspective or on the basis of the general principle of proportionality. In the case of the use of potentially lethal means of coercion, Art. 2 ECHR establishes absolute necessity as the standard. However, the legal rules for the most severe means of coercion, the use of firearms, are kept general (*see* no. IV.3.3.3). In this respect as well, RoE have a regulatory function.

> In the United Kingdom, the rise of terrorist suicide bombers (since the London attacks of 7 July 2005) has led to a shoot to kill policy[956]. It can be assumed that this policy is modelled and controlled in the RoE of the security forces. But the anchoring of a corresponding policy appears to be delicate. In the context of RoE, the need for a detailed specific situational picture must be pointed out[957]. RoE must not be allowed to gain independence.

RoE can concretise the existing legal framework (in a broad sense[958]) in specific situations or at specific times, in specific areas or in the case of specific threats. In addition

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952 NATO legal Deskbook, pp. 254 ff.; Guldahl Cooper, NATO ROE, p. 25.

953 Sanremo Handbook on RoE, p. 1; Seifert, Rewriting the RoE, p. 842.

954 Seifert, Rewriting the RoE, p. 845.

955 Quite similarly, Guldahl Cooper, RoE Demystified, p. 194.

956 Wilkinson, Changing threat, p. 25 (stating that the first application resulted in an unlawful killing).

957 Wilkinson, Changing threat, p. 25: "imperative to have really precise intelligence before taking this kind of extreme measure".

958 From a practical point of view, it does not matter whether RoE are based on positive law or on case law.

to the control function, they can also have a coordination and clarification role. In this respect, RoE also complement deployment orders.

> The distinction between RoE and specific (tactical) orders is not always easy. The example of the Battle of *Bunker Hill* on 17 June 1775 in the American Independence War is used in the literature as a historical RoE[959]. During the siege of Boston by the British, the defending Colonel Prescott is credited with ordering *"don't one of you fire until you see the whites of their eyes"*[960]. However, this arrangement can just as well (and probably much more likely) be qualified as a specific order[961], which could have been done out of any motive, be it the saving of ammunition, be it tactical considerations[962]. However, the distinction seems to be practically insignificant. Whether an order is issued as a RoE or as a deployment order (or tactical order) does not directly make any changes on the tactical level (but it could be much more relevant for the attribution of command responsibility).

If RoE are violating legal norms, the rules on unlawful orders do apply analogously. Conversely, a violation of RoE may be the first indication that an act is unlawful.

> For example, the doctrine of the United Kingdom Armed Forces provides for a police investigation not only in the case of indications of breaches of the law but also in the case of a "significant breach of rules of engagement"[963].

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959 Martins, RoE for Land Forces, p. 34: "That order, because it specified the circumstances under which friendly forces could initiate combat with other forces, would qualify today as a rule of engagement."; *cf.* Reilly, RoE in Special Operations, pp. 14 f.

960 Martins, RoE for Land Forces, p. 34; Guldahl Cooper, RoE Demystified, p. 197.

961 Guldahl Cooper, RoE Demystified, p. 197: "(…) a specific tactical order, or even a weapon handling instruction, to be executed at that time by the troops present".

962 Reloading the then common front loaders – such as the *flintlock* or the *brown bess* – required quite a long time. However, the loading of the rifles could partly be halved by being less precise.

963 U.K./MoD, Joint Doctrine Publication 3-46 (JDP 3-46), Legal Support to Joint Operations p. 32.

3.2. CIVILIAN AND MILITARY (TASK) FORCES

In anti-terrorist operations, selecting the adequate means of deployment can be challenging[964]. In the following, for the sake of simplicity, task forces and special forces are also considered as operational resources.

3.2.1. Regular police forces

Combating terrorist activities with repressive means, including the possible recourse to a use of force, is a police task. It is therefore primarily the responsibility of the authorities responsible for general police tasks[965]. The importance of regular, locally responsible security forces must not be underestimated.

> «(T)errorism (and the criminal activities that support it) are best dealt with by local law enforcement who – through informal channels of intelligence gathering within a community – are best positioned to investigate and apprehend the leaders and operatives of these networks.»[966]

Regular police forces bear the basic burden of combating (also) terrorist threats. If they are not sufficiently funded or adequately equipped for this within the context of their normal policing activities, this would have to be compensated for at least temporarily in the case of concrete indications of terrorist threats.

> The group of experts cited by the ECtHR in the judgment *Tagayeva and others v. Russia* in its assessment of the terrorist situation in Beslan is probably to be understood in this sense as well: «The experts started by reiterating that the presence of only one unarmed police officer at the school at the time of the hostage-taking had delayed the response to the attack and permitted the terrorists to capture a large number of children and adults at the ceremony, as well as secure the building and deploy the IEDs [improvised explosive devices] with very little resistance. Without predicting the exact results of a heavier

964 *Cf.* Hughes, Military's Role, pp. 37 ff. (examples).

965 Martin, Essentials of terrorism, p. 226.

966 Forest Counterterrorism, p. 21.

> security presence at the ceremony, the experts argued for the possibility that ‹an adequately-assured police response would have repelled the terrorists for long enough to allow significant number› of potential hostages to escape.»[967]

In operations to counter terrorist threats, the normal repertoire of police means of coercion must be used. This includes both non-lethal[968] and lethal means of coercion. In addition, the involvement of specially trained persons may be necessary, *e.g.,* negotiators in hostage-taking situations[969], psychologists or weapons specialists to assess potential threats.

3.2.2. Special operations forces

Since the 1960s, states have tended to form special operations forces (SOF) to combat serious violence (*see* no. IV.3.3.2[970]). Specific anti-terror units require a corresponding *commitment*[971]: without the necessary preparation in training, adequate equipment, the creation of viable legal bases or the clarification of responsibilities, the added value of special units remains low.

In most cases, small but very well-trained SOF with people of high integrity[972] are sufficient to avert particular hazards or to resolve situations[973].

> «Certainly, conventional military units (infantry, armor, etc.) are often ill-suited to the task. As a result, nations throughout the world have developed special

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967 *Tagayeva and others v. Russia,* 26562/07 (2017), § 442.

968 *Şimşek and others v. Turkey,* 35072/97 and 37194/97 (2005), § 91 (with reference to the *UN Basic Principles*); Roche, Operationalising the ECHR, p. 64.

969 *Andronicou and Constantinou v. Cyprus*, 86/1996/705/897 (1997), § 183; Roche, Operationalising the ECHR, p. 63.

970 *Cf.* Hughes, Military's Role, pp. 37 ff.

971 Combs, Terrorism in the Twenty-First Century, p. 298.

972 Urban, Big Boys' Rules, pp. 246 f. (underlining the strict selection of the at the end around 20 members of the *Ulster contingent* of the SAS).

973 For example, the SAS are now divided into three regiments, of which only *22 Special Air Service Regiment* is active. Due to the very strict selection criteria, the regiment has difficulties recruiting qualified new recruits or retaining active members (who can earn much more in a short time in the conflict hotspots of this world).

> military units to fight terrorism, such as the Israeli Sarayat Matkal, British SAS, German GSG9, and U.S. Delta Force. Members of these special units develop an array of unique skills that make them more effective in tracking down and apprehending or eliminating terrorists. They learn foreign languages, cultural awareness, and an ability to adapt on their own (or in small teams) when faced with dynamic and often dangerous situations. In essence, the most effective kinds of military-related deterrents in counterterrorism are often invisible, rather than the more traditional military weapons of tanks, mortars, missiles, and so forth.»[974]

The use of SOF (civilian or military) can lead to a dilemma regarding the application of the principle of proportionality.

> «Successful special operations represent somewhat of a paradox: SOF are usually selected as a minimal force [...] solution at the political and [...] strategic level. However, at the tactical level, SOF must have latitude to apply maximum force in order to succeed.»[975]

Therefore, in our opinion, specific RoE – or even specific legal bases – are necessary for SOF.

3.2.3. Regular military units

Regular *military units* usually operate according to military doctrine. Mission command (*Auftragstaktik*) in military forces is usually focused on using *maximum force* in terms of space and time to achieve a result, *i.e.,* to force success. This may also be necessary – to a limited extent – in anti-terrorist operations. In this case, too, the Convention guarantees must be complied with.

As far as the deployment of autonomously acting military units is concerned, the situation in which they are engaged, the assumptions and assessments on which their own actions are founded and the further principles according to which they are to act are decisive.

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974 Forest Counterterrorism, p. 11.

975 Reilly, RoE in Special Operations, p. 181.

> For military forces, in major operations (such as *McCann and others v. The United Kingdom*), it makes a difference whether they tactically act according to *counterinsurgency* or according to *land operations guidelines*[976].

New forms of conflict lead to a hybridisation of military and police forces[977]. Qualitative needs may lie behind the involvement of military forces if police resources are no longer sufficient to counter a particular threat (for example, because combatants are acting on the opposite side; see no. V.1.3.3 and, *e.g.,* the *Little Green Men* on the Crimea). In the case of widespread threats or threats that persist over a longer period of time, quantitative needs can also be decisive (because the police forces are insufficient in terms of numbers).

The use of military means requires careful consideration of the wider circumstances of an anti-terrorist operation. Military elements usually have the greatest striking power in the fight against terrorism[978] – however, a *balanced* set of instruments to counter such a threat is usually required. Regular military forces are poorly suited for assisting the police and even for peacekeeping[979]. Support for civilian police forces can often be better achieved with the selective deployment of special military units.

3.2.4. Requirement with regard to fundamental rights

It is *prima vista* irrelevant which units or forces are deployed by a Convention State for anti-terrorist operations. Nevertheless, the fundamental rights requirements do manifest themselves indirectly since the available means of deployment are differently suited for different missions.

In practice, anti-terrorist operations are usually not conducted in pure, but in mixed forms. Accordingly, the pre-operational (*see* no. IV) and the fundamental rights requirements for the conduct of an operation (*see* no. V.2) are dominant.

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976 *See also* Urban, Big Boys' Rules, p. 162.

977 Van Creveld, Transformation of War, p. 207 (regular forces degenerate into police forces).

978 Forest Counterterrorism, p. 10 (brute force).

979 Quite similarly, Wilkinson, Terrorism versus Democracy, pp. 102 f.

The deployment of military units always leads to questions about (sufficient) civilian control, accountability and the effectiveness of a subsequent effective investigation.

3.3. RELEASE OF COERCIVE MEANS

The release of means of coercion concerns practical questions of the application of law and the establishment of accountability. It applies, for example, to special firearms or other instruments for the use of force that exceed the usual means available to the security forces for their ordinary policing.

The release of a (specific) means of coercion always represents a stage of escalation: additional – usually heavier (higher firepower or penetrating power as well as greater operational distances) – means are made available. The release is not in every case equivalent to ordering the use of the specific means. Rather, it serves a general, but under certain circumstances also individual, control of the actions or operations and influences the tactical behaviour of the security forces.

3.3.1. General or individual release

With a *general release*, the corresponding means of coercion are in principle[980] made available to all security forces involved in the operation.

An *individual release* refers to the use of a specific means of coercion by a specific person or group of persons. It usually stands in the context of the ordering of a certain measure (in this respect it is individual-concrete).

> An example is the order of a "*rescue shot*". Its execution is usually only entrusted to specifically trained and equipped specialists, such as well-trained snipers of an SOF, who report directly to the operational command.

3.3.2. Proportionality

The release of coercive means is carried out in accordance with the principle of proportionality. The use of the means of coercion subject to a release is not necessary or

[980] In particular, the individual level of education of a person may be reserved.

not reasonable in normal situations (prohibition of disproportionate measures). In a specific situation, the release does not exempt from a proportionality test.

Even a general release does not, in our opinion, discharge the forces on the spot from the examination, in particular, of the reasonableness of use of means of coercion in a specific situation. In the case of an individual clearance and simultaneous order of deployment, however, it is the responsibility of the ordering authorities to first carry out a complete proportionality test. This may require a comprehensive analysis of the environment, which the actually acting person is usually not able to carry out him/herself or not in time.

As a general principle, the release of coercive means is likely to be inadmissible if third parties are also endangered as a result. The use of the corresponding means would then not meet the standard of *absolute necessity* in the concrete situation[981].

> For example, the order to neutralise a hostage-taker with (specific) firearms must be preceded by a concrete assessment of the situation. If it is to be assumed that a projectile (even if it hits the target) would also endanger third parties, the release is inadmissible.

3.3.3. Release of lethal means of coercion

For the selective use of lethal means of coercion, the release by a responsible person is generally required in some Convention States[982]. That responsibility is based on the capacities of this person: in principle, he or she must be able to weigh different options against each other within the scope of a proportionality test. In our opinion, the *potential damage* of the means of coercion to be released is decisive. As a rule, the release will have to be carried out by a head of operations on site or by an overall head of operations.

> The means used may also lead to a prolonged state responsibility. In the case of *Albekov and others v. Russia*, several people died in a minefield near a vil-

[981] On the means of coercion that are not absolutely necessary (and therefore impermissible) in a specific situation, *cf. Güleç v. Turkey*, 54/1997/838/1044 (1998), §§ 71 ff.; *cf.* Hampson, Article 2 during armed conflict, p. 193.

[982] Self-defence and assistance in self-defence may be exempted; but in this case, the principle of proportionality must be respected, too.

lage[983]. «Therefore, having regard to the State's failure to endeavour to locate and deactivate the mines, to mark and seal off the mined area so as to prevent anybody from freely entering it, and to provide the villagers with comprehensive warnings concerning the mines laid in the vicinity of their village, the [...] State has failed to comply with its positive obligation under Article 2 of the Convention to protect the lives of Mr Vakhazhi Albekov, Mr Khasayn Minkailov and Mr Nokha Uspanov.»[984]

3.3.4. Release of non-lethal means of coercion

No strict cascade is necessary for the release of non-lethal means of coercion. When they are applied correctly, life as a legal asset is usually not directly endangered. Conversely, the principle of proportionality opens up scope for the application of non-lethal means of coercion: from the perspective of necessity, they are less severe means than lethal means of coercion. In our opinion, it should remain up to the responsible persons on the spot to decide on the appropriate use of means on the basis of a specific situation.

If the use of lethal means of coercion is permissible, recourse to non-lethal means complies with the principle of proportionality (necessity) if their use also leads to success (adequacy). In this respect, the use of non-lethal means is also possible if lethal means of coercion have been released.

3.3.5. Delegation

The responsibility of the security forces during operations must be reconstructible (*see* no. V.2.2). A delegation of the release of coercive means is imaginable if the corresponding prerequisites exist. The delegation should optimally be in line with the rules

983 *Albekov and others v. Russia*, 68216/01 (2009), §§ 7 ff.

984 *Albekov and others v. Russia*, 68216/01 (2009), § 90. Quite similarly, in *Oruk v. Turkey*, 33647/04 (2014), where the authorities had failed to cordon off a military firing range: La Cour «considère que des panneaux d'avertissement et autres dispositifs susceptibles de signaler la dangerosité de la zone du fait de la présence de munitions non explosées auraient dû être mis en place afin que le périmètre du terrain à risque fût clairement délimité. En l'absence de tels dispositifs, il appartenait à l'Etat d'assurer la dépollution de la zone de tir afin d'éliminer toutes les munitions non explosées qui se seraient trouvées sur le terrain à l'issue des exercices et de garantir que cette zone et ses environs fussent exempts de tout danger pour les populations civiles» (§ 62). On both cases, *see also* Sicilianos, Positive obligations, pp. 36 f.

of engagement. For this purpose, delegations must be planned and reflected in terms of location, time or subject matter.

> For example, mission-related areas can be defined for which the operational command, under certain conditions, hands over the decision on the release of coercive measures to a lower command level for a certain period of time. This is due to the awareness that the overall operational command is often too far away from the incident and thus cannot assess individual situations adequately and in a timely manner. In contrast, local heads of (parts of) operations are more likely to have the (better) leeway to decide directly on the necessity of deploying resources[985], for instance if there is a selective escalation in a particular situation.

In our opinion, it is crucial to maintain overall responsibility and control over the operation even within a specific situation. The chain of command must be fully maintained also in the case of delegation.

> In the judgment of *McCann and others v. The United Kingdom*, the *Grand Chamber* places the responsibility for the lethal use of means not on the soldiers following orders, but on the commanders – who were responsible for misinformation and the resulting lethal outcome of the operation[986].
>
> In contrast, the ECtHR does not consider it necessary in its judgment *Tagayeva v. Russia* to elaborate on the responsibility of certain releases of means of restraint. This was against the legal background that there was already a clear violation of Art. 2 ECHR and that the national legal bases were insufficient[987].

In the case of a delegation, the duty to investigate according to Art. 2 ECHR is always in play (*see* no. VI.4): If an investigation of responsibility (and sanctioning of those

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985 In our opinion, however, a further delegation of the release of means is not justifiable. This does not apply to self-defence and self-defence assistance, as in such situations there is no time to expect a release.

986 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 200.

987 *Tagayeva and others v. Russia*, 26562/07 (2017), § 611.

responsible) is not possible in the case of a questionable use of means, a Convention State bears responsibility for the latter (and violates the convention guarantee)[988].

3.4. ABSTRACT LIMITATIONS ON THE USE OF COERCIVE MEANS

The use of coercive means is determined by the respective legal bases of the Convention States (*see* no. IV.3.3). Under certain circumstances, there are complementary abstract barriers to the use of coercive means, whether because of a means of coercion itself or because of its potential effect. In addition to national regulations, general principles of law and international law barriers may apply as well.

3.4.1. Legal foundations in the Convention States

a. Principle

The principle of legality also requires a (sufficient) legal foundation for anti-terrorist operations (*see* nos. IV.1.3 and IV.1.4.3). The ECtHR expects that there are national legal foundations that protect human rights but also provide the authorities with a regulatory framework for their operations.

> In the judgment *McCann and others v. The United Kingdom*, the *Grand Chamber* held that there may well be differences between the national regulations and the Convention standard to a certain extent: «[...] While the Convention standard appears on its face to be stricter than the relevant national standard [...], there is no significant difference in substance between the two concepts. [... Whatever] the validity of this submission, the difference between the two standards is not sufficiently great that a violation of Article 2 para. 1 [...] could be found on this ground alone.»[989]

The Court stresses that security forces must not be left in a legal vacuum when using coercive means (*see* nos. III.2.5.1 and IV.1.4.2). Regulations can only be instituted within

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988 Harris/O'Boyle/Warbrick, European Convention (3th ed.), p. 223.

989 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), §§ 154 f.

predefined legal boundaries. In our opinion, a need for regulation requires the setting of legal limits.

> For example, a ban on rubber bullets was discussed in the Swiss cantons. In our opinion, a ban would prohibit not only the use of rubber bullets but also the procurement and possession of such launchers and ammunition by security forces. However, a cantonal ban would not apply to federal security forces.

Furthermore, national legislators might provide for technical restrictions or certain types of use of coercive means that are permissible as such.

> For example, in some Convention States the use of water cannons is permitted, but the addition of chemical substances to the water used in deployment is prohibited. This reduces the effect of this means of coercion to a kinetic effect (which of course does not exclude any further effects).

The criteria for the use of certain means of coercion may vary depending on the situation[990].

b. Exception regarding the existence of a duty to protect under Art. 2 ECHR

The ECtHR is apparently willing to be somewhat more generous, at least in exceptional situations. A lenient interpretation of the principle of legality can open up margins for the authorities to find ad hoc solutions to avert danger (*see* no. IV.1.4.2)[991].

> In the judgment *Finogenov and others v. Russia*, the ECtHR found that a clear legal foundation did not exist for the use of a narcotic gas. The Court did not conclude *per se* that the lack of regulation regarding the use of the potentially lethal means of coercion was a direct violation of the Convention[992]: «[…] Even

990 Jacobs/White/Ovey, European Convention, p. 154.

991 *Finogenov and others v. Russia*, 18299/03 (2011), § 229 (with reference to the *UN Basic Principles*).

992 *Finogenov and others v. Russia*, 18299/03 (2011), §§ 229 f.: Although «the law, in principle, allows the use of weapons and special-purpose hardware and means against terrorists […], it does not indicate what type of weapons or tools can be used and in what circumstances».

> if necessary regulations did exist, they probably would be of limited use in the situation at hand, which was totally unpredictable, exceptional and required a tailor-made response. The unique character and the scale of the Moscow hostage crisis allows the Court to distinguish the present case from other cases where it examined more or less routine police operations and where the laxity of a regulatory framework for the use of lethal weapons was found to violate, as such, the State's positive obligations under Article 2 of the Convention.»[993]

Thus, in an extraordinary situation, a regulatory gap does not prevent the use of special means of coercion[994]. It seems decisive that, at the same time, the duty to protect (against third parties), arising from Art. 2 ECHR, is pertinent. The duty to protect life as a legal asset then overrides the prohibition of the use of potentially lethal means of coercion.

> The Court confirmed this in the judgment *Tagayeva and others v. Russia* (albeit in the assessment of absolute necessity): «[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. 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.»[995]

The exception must not be interpreted extensively. According to the ECtHR's case law, it only applies to anti-terrorist operations – that means not to normal policing or other types of emergency response.

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993 *Finogenov and others v. Russia*, 18299/03 (2011), § 230; also in *Tagayeva and others v. Russia*, 26562/07 (2017), § 594.

994 In Switzerland, the *"police general clause"* is legally recognised. This legal institution allows the state authorities to act in extraordinary situations in deviation from the principle of legality. The ECtHR accepts this at least if the *general clause* itself is anchored abstractly on the constitutional level; *see Schneiter v. Switzerland* (AD), 63062/00 (2005), pp. 11 ff. and *Gsell v. Switzerland*, 12675/05 (2009), §§ 51 ff.

995 *Tagayeva and others v. Russia*, 26562/07 (2017), § 595.

3.4.2. Principle of distinction

In our opinion, an absolute barrier to the use of potentially lethal means of coercion follows from the requirement of distinction[996]. For the use of potentially lethal means of coercion, that principle is derived from Art. 2 para. 2 ECHR: The justifications for exceptions to the prohibition of killing are subject to absolute necessity – this excludes the use of such means of coercion against third parties from the very beginning; the state may even have a specific duty to protect all "non-disruptors" (*see* nos. III.2.2.5 and V.4, and there especially 4.5 and 4.6).

> The ECtHR does not require any irrefutable proof that third parties may be affected by the use of potentially lethal means of coercion. According to the judgment *Tagayeva and others v. Russia*, it is sufficient that third parties are affected according to the circumstances: The Court was «unwilling to speculate about the individual deaths and injuries sustained. Despite this lack of individual certainty, the [...] known elements of the case allow it to conclude that the use of lethal force by the State agents contributed, to some extent, to the casualties among the hostages.»[997] In our opinion, this conclusion is coherent, since even an excessive threat to life can lead to a violation of Art. 2 ECHR.

Insofar as anti-terrorist operations are allowed to take place according to the rules of international humanitarian law, a strict distinction must be made between combatants and civilians (regarding the status as a combatant, *see* no. V.1.3.3 and regarding the protection of civilians III.4.2).

> In our opinion, the obligation to protect civilians corresponds to more than just an imperative for armed conflicts. It is a universal principle which – *mutatis mutandis* – also forms a general guideline for state action.

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996 In police law, measures to avert danger are basically directed just against perpetrators.

997 *Tagayeva and others v. Russia*, 26562/07 (2017), § 590.

3.4.3. Chemical agents in particular

The use of lethal gases (*e.g.,* sarin or VX), toxic chemicals from industrial use (*e.g.,* chlorine) or toxins (*e.g.,* ricin) is outlawed worldwide by the Chemical Weapons Convention (CWC)[998].

a. Ban on chemical weapons

According to the general obligations of the CWC, the use of chemical weapons is prohibited (Art. I para. 1 letter b CWC). The CWC prohibitions are to be understood comprehensively; in specific, the Convention does not recognise any grounds for justification (such as self-defence)[999].

The term *chemical weapon* under the CWC refers to the use of toxic chemicals and their precursors (Art. II para. 1 letter a)[1000]. *Toxic* is considered to be «(a)ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere» (Art. II para. 2). A precursor product is considered to be «(a)ny chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system» (Art. II para. 3).

Depending on their effect, chemical weapons can be divided into the four categories of *blister*, *blood*, *nerve* and *harassing agents*[1001].

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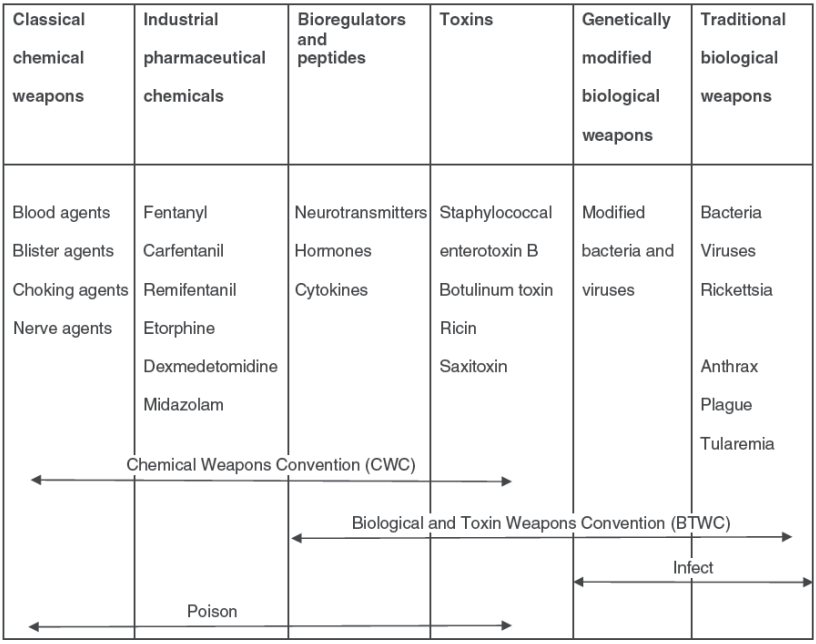
998 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993.

999 Boothby, Weapons and LOAC, p. 117.

1000 The background to this is the fact emphasised by Krutzsch/Trapp, Definitions, p. 76 that under "the CWC, each of the components of a chemical weapons system by itself already has to be regarded as the probibited weapon."

1001 Giovanello, RCA and Chemical Weapons Control, pp. 2 f.

With the broad definition of chemical weapon, chemical substances with a *dual-use* character in particular are also to be covered by the CWC[1002].



Graphic: «Biochemical threat spectrum» according to Crowley, Chemical Control, p. 10.

The concept of the CWC has as a consequence that "the ultimate criterion for defining a toxic chemical as a weapon (is) its intended purpose. (...) Under this concept, *all* toxic or precursor chemicals are regarded as chemical weapons *unless* they have been developed, produced, stockpiled, or used for purposes *not* prohibited"[1003].

[1002] Krutzsch/Trapp, Definitions, p. 77 (with regard to the negotiations) and Crowley, Weaponization of Toxic Chemicals, pp. 148 f. (to the even wider definition range in itself); *see also* WHO, Public health response to biological and chemical weapons, pp. 27 ff. (with reference to the according schedules).

[1003] Krutzsch/Trapp, Definitions, p. 77 (highlighted in the original).

If the prohibition of chemical weapons depends largely on the use intended, it ultimately also depends on the given quantities of chemical substances[1004].

b. Permissibility of riot control agents

The CWC states in an exception clause that the use of chemical substances for "law enforcement including domestic riot control purposes" is not covered by the general prohibition (on chemical weapons; Art. II para. 9 letter d CWC)[1005].

These exceptions include, for example, tear gas (CS) as a coercive agent and similar irritants (riot control agents, RCA)[1006]. According to their effect, RCA comprise "harassing agents" or "non-lethal chemical weapons designed to incapacitate victims temporarily rather than causing long-term injuries or death from exposure"[1007].

This does not exempt toxic substances *per se* from the ban, but only their use in riots – other utilisations remain prohibited[1008].

Under Art. III para. 1 letter e CWC, RCA are subject to a declaration requirement with respect to the chemical name, structural formula and – if classified – registration number of each chemical held by a state for the purposes of riot control. Party states must "(s)pecify the chemical name, structural formula and Chemical Abstracts Service (CAS) registry number (...)".[1009]

[1004] Boothby, Weapons and LOAC, p. 118.

[1005] *See also* Krutzsch/Trapp, Definitions, pp. 94 ff.; Giovanello, RCA and Chemical Weapons Control, pp. 10 f. (with reference to the nevertheless existing ban on RCA during wartime) and Boothby, Weapons and LOAC, p. 118.

[1006] To the list of permitted substances, *see* WHO, Public health response to biological and chemical weapons, p. 34.

[1007] Giovanello, RCA and Chemical Weapons Control, p. 3.

[1008] Krutzsch/Trapp, Definitions, p. 82 (with reference to the possible use of RCA in armed conflicts).

[1009] *Cf.* Trapp, Declarations, 113 f.

Recourse to RCA is thus possible in principle. The permissibility of the use of certain non-lethal or less-lethal toxic chemicals by state security forces can, however, be controversial[1010].

The use of RCA beyond law enforcement remains prohibited[1011]. The use of a chemical substance listed in one of the schedules of the CWC as an RCA is also prohibited[1012].

> «Regarding military applications, defence authorities used to differentiate three classes of disabling chemical. *Class A*: agents that cause temporary physical incapacitation such as sleep, temporary paralysis, weakness, temporary blindness or serious respiratory disturbance and give no danger of death or permanent incapacitation. *Class B*: agents that in small doses cause temporary physical incapacitation, but that in large doses may cause death or permanent effects. *Class C*: agents that cause mental incapacitation. (…)
>
> Since that time several new disabling chemicals have emerged. Among these are chemicals that cause physical incapacitation by psychotropic action, meaning that the distinction between Class A and Class C has faded. Examples include orivals, fentanyls and other opioids. The distinction between Class A and Class B was always less sharp than military authorities appeared to believe, for even an agent such as CS can cause serious damage to those who are exposed to abnormally high dosages or who are abnormally susceptible. That there is no such thing as a non-lethal or otherwise harmless disabling chemical has now become generally recognized.
>
> The key distinction is now seen to lie in the duration of disablement.»[1013]

The ECtHR has addressed the meaning of the CWC and the use of RCA as well as pepper spray. The Court assumes that these (normally) non-lethal means of coercion are permissible in principle.

[1010] Crowley, Weaponization of Toxic Chemicals, pp. 162 ff.

[1011] Boothby, Weapons and LOAC, p. 123 mentions as a consequence that RCA may be used in prisoner-of-war camps – but not as a method for carrying out armed conflicts.

[1012] Krutzsch/Trapp, Definitions, p. 88; Trapp, Declarations, p. 113.

[1013] WHO, Public health response to biological and chemical weapons, pp. 181 f.

> «[... Tear] gas and ‹pepper spray› are not considered to be chemical weapons. It is, however, well-known that the use of this product can cause temporary discomfort, with, for instance, breathing difficulties, nausea, vomiting, irritation of the respiratory tract, irritation of the tear ducts and eyes, spasms, chest pains, dermatitis and allergies. In high doses it can cause necrosis of the tissue in the respiratory tract and the digestive system, pulmonary oedema and internal bleeding (haemorrhaging of the suprarenal glands). Under the CWC, use of such resources is authorised for the purposes of law enforcement, including domestic riot control»[1014].

Nevertheless, the use of RCA that are permissible in principle may be disproportionate depending on the specific nature of the use[1015]. This is another reason why, in our opinion, the use of chemical substances must be regulated in principle in the relevant national legal foundations. In addition to the requirement of a sufficient (formal) legal basis, there is also the need to establish basic rules of their application.

c. Narcotic gases as a means of restraint

In the hostage rescue operation underlying *Finogenov and others v. Russia*, the security forces refrained from using firearms. Instead, they used a potentially (and as a result actually) lethal[1016] anaesthetic gas to storm the Moscow theatre. The gas caused acute respiratory insufficiency among the people in the building and subsequently deaths among both Chechen terrorists and hostages (*see* no. II.2.2).

> The ECtHR stated that the gas was not harmless «because ‹harmless› means that it does not have important adverse effects»[1017]. The substance, the exact composition of which is not known, is a «member of the phentanyl class of synthetic opioids. Several of these are in medical use as analgesics for severe

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[1014] *Abdullah Yaşa and others v. Turkey,* 44827/08 (2013), § 30.

[1015] *See also* Crowley, Weaponization of Toxic Chemicals, pp. 163 f. (with further references).

[1016] *Finogenov and others v. Russia*, 18299/03 (2011), § 170: «The Government's assertion that the gas was not a 'lethal force' is not supported by the materials of the case and contradicted their own submissions» (*e contrario*).

[1017] *Finogenov and others v. Russia*, 18299/03 (2011), § 201.

> chronic pain, and as anaesthetics, and it is known that the margin between the effective dose for unconsciousness and the lethal dose is very small. Death is usually by respiratory depression. Phentanyl is also known as a drug of abuse, and many fatalities have been recorded among recreational users. Since all known phentanyls have similar, and very narrow, safety margins, fatalities from respiratory depression should have been anticipated.»[1018]

Russia invoked its national security interests when it refused to disclose the exact composition of the gas[1019]. The ECtHR therefore did not (and probably could not) investigate whether the gas used fell under the prohibition of the CWC – ratified by Russia without reservation[1020].

> The term *incapacitating chemical agents* is used in different ways, as there is no general definition for it[1021]. The *Royal Society* distinguishes incapacitating chemical agents from RCA as follows: «Incapacitating chemical agents are here defined as substances intended to cause prolonged but transient disability and include centrally acting agents producing loss of consciousness, sedation, hallucination, incoherence, paralysis, disorientation or other such effects (…). Incapacitating chemical agents are distinct from RCAs, which act peripherally on the eyes, mucous membranes and skin to produce local sensory irritant effects that disappear rapidly following termination of exposure to the agent.»[1022]

In our opinion, any use of a narcotic gas by security forces, which apparently consists of a «special mixture based on derivatives of phentanyl» and leads to opiate poisoning[1023], would have to be examined to see whether it falls under the CWC (phentanyl itself is

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1018 *Finogenov and others v. Russia*, 18299/03 (2011), § 103 (with reference to experts).

1019 *Finogenov and others v. Russia*, 18299/03 (2011), § 101.

1020 Critical therefore Casey-Maslen/Connolly, Police Use of Force under International Law, pp. 285 f.

1021 Mogl, Technical Workshop, p. 10.

1022 The Royal Society, Neuroscience, conflict and security, p. 44.

1023 *Finogenov and others v. Russia*, 18299/03 (2011), §§ 22, 55 f., 65 and 101.

covered by the CWC; *see* the graphic above). If no exception in the sense of law enforcement were to apply, its use would be forbidden. Anyway, incapacitating chemical agents are not permitted RCA.

In our opinion, recourse to substances that are prohibited as such is also not permissible in anti-terrorist operations. There is then not only a lack of a legal foundation for use – but there is a regulation (albeit a rather general one) which prohibits the use of such substances[1024].

4. ABSOLUTE NECESSITY TO THE RECOURSE OF LETHAL FORCE

The right to life under Art. 2 ECHR prohibits as a general principle the intentional killing of human beings. Art. 2 para. 2 ECHR additionally describes special circumstances under which the use of potentially lethal use of force is not normatively considered a violation of the fundamental right (*see* no. III.2.1).

> The Commission already stated with regard to the use of force that «[...] the text of Article 2, read as a whole, indicates that paragraph 2 does not primarily define situations where it is permitted intentionally to kill an individual, but defines the situations where it is permissible to ‹use force› which may result, as the *unintended outcome of the use of force*, in the deprivation of life».[1025]

The wording requires an absolute necessity for the use of force. According to the ECtHR's case law, a «stricter and more compelling test of necessity»[1026] therefore applies.

> The Court sometimes uses different formulae for this purpose: The force used must be «strictly proportionate to the achievement of the aims in sub-para-

[1024] *Cf.* Crowley, Chemical Control, pp. 169 ff.

[1025] *Stewart v. The United Kingdom*, 10044/82 (1984), § 15 (highlighted only here).

[1026] *Stewart v. The United Kingdom*, 10044/82 (1984), § 18. *Cf., e.g.,* Reid, Practitioner's Guide, 85-003; Harris/O'Boyle/Warbrick, European Convention (3th ed.), p. 234; Wicks, Right to Life, p. 63.

graphs 2 [...] of article 2»[1027], «to the achievement of the permitted purpose»[1028] or «permitted aims»[1029] to only «strictly proportionate in the circumstances»[1030].

In our opinion, *aims in sub-paragraph 2*, *permitted aims* and *permitted purpose* are to be understood in the same way. The wording *strictly proportionate in the circumstances*, which is probably meant synonymously, however, obscures the fact that other purposes than those positively mentioned in para. 2 are excluded; but the mention of the circumstances better takes into account the necessity of a case-by-case examination.

4.1. THE BENCHMARK FOR THE PROPORTIONALITY TEST

The question of absolute necessity can only be answered for a concrete use of force, even in the case of anti-terrorist operations. Since the use of potentially lethal means of coercion is aimed at averting an imminent danger, a culmination takes place at the level of the legal asset (life). The assessment of a threat is carried out contextually[1031] *ex ante* (*see* no. V.1.2.2); the assessment of the proportionality is ultimately also linked to the assessment of a threat.

The assessment of the use of force according to the criterion of absolute necessity thus leads to a balancing of interests: existing state obligations to act can be opposed by the limitations of the permissibility arising from life as a legal asset on the side of the attackers – but the same legal asset can also be violated on the side of the victims by state omission (or inappropriate action).

[1027] *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 149; *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 176; *Jaloud v. The Netherlands* (GC), 47708/08 (2014), § 199; *Andronicou and Constantinou v. Cyprus*, 86/1996/705/897 (1997), § 171; *Ataykaya v. Turkey*, 50275/08 (2014), § 46; *Tagayeva and others v. Russia*, 26562/07 (2017), § 601.

[1028] *Stewart v. The United Kingdom*, 10044/82 (1984), § 19.

[1029] *İlhan v. Turkey* (GC), 22277/93 (2000), § 74; *McKerr v. The United Kingdom*, 28883/95 (2001), § 110; *Kelly and others v. The United Kingdom*, 30054/96 (2001), § 93; *Bubbins v. The United Kingdom*, 50196/99 (2005), § 135; *Isayeva v. Russia*, 57950/00 (2005), § 173; *Finogenov and others v. Russia*, 18299/03 (2011), § 210.

[1030] *Nachova and others v. Bulgaria* (GC), 43577/98 and 43579/98 (2005), § 94; *Leonidis v. Greece*, 43326/05 (2009), § 54.

[1031] Hampson, Article 2 during armed conflict, p. 193 (background situation).

For the proportionality test in a specific case, both the surrounding circumstances and the means of coercion used, including the thresholds for their use, are relevant.

> «The Court […] may occasionally depart from that rigorous standard of ‹absolute necessity› if its application is simply impossible, especially where certain aspects of the situation lie far beyond the Court's expertise and where the authorities had to act under tremendous time pressure and where their control of the situation was minimal. On the other hand, it has also considered that the more predictable a hazard, the greater the obligation to protect against it […].»[1032]

4.2. RISK ASSESSMENT AND HONEST BELIEF

For the legal assessment of a concrete, potentially lethal use of force, the behaviour of the actors involved is relevant in the overall context. The ECtHR takes into account the assessment of the situation by the acting security forces on the basis of the knowledge available to them (specific situational picture; *see* no. IV.2.3). The Court requires that the security forces act on the basis of their assessment of the situation according to *honest belief*. This opens up the scope for an objectivised assessment of the danger (on individual acts of self-defence in the case of real and imminent risk, *see* no. V.5.2).

4.2.1. Base of trust

In the judgment *McCann and others v. The United Kingdom*, the concrete use of lethal means of coercion was based on an *honest belief* on the part of the security forces. The standard established there has since been applied and confirmed in various other judgments.

The security forces had acted on the basis of the specific situational picture they had been given. They had assumed that the use of lethal means of intervention was absolutely necessary in the encounter with the terrorists[1033]. Although the specific situational

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[1032] *Kavaklıoğlu and others v. Turkey*, 15397/02 (2016), § 176.

[1033] Also the fact that Daniel McCann was said to have killed 26 people may have played a role; *cf.* Andrew, History of MI5, p. 744.

picture turned out to be wrong in retrospect[1034], the ECtHR confirmed the absolute necessity of the use of firearms for the specific situation[1035].

> In concrete terms, the SAS soldiers assumed, based on information from the command and control centre, that the suspected terrorists had small arms and a car bomb at their disposal. According to intelligence information, the terrorists could have detonated the car bomb at any time using a remote control. When there was a contact with two of the three terrorists, and the operation supposedly was uncovered, the soldiers felt compelled to act: «The [...] soldiers honestly believed, in the light of the information that they had been given, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life [...]. The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives. [... 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 [...] where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others. It follows that, having regard to the dilemma confronting the authorities in the circumstances of the case, the actions of the soldiers do not, in themselves, give rise to a violation of this provision [...].»[1036]

[1034] According to Andrew, History of MI5, p. 774, there "was good reason also to believe that the ASU was planning 'a button not a clock job' – a bomb detonated by remote control rather than by timer. It now seems probable that this had been the original intention of the Gibraltar operation and that the decision to use a timing device came as the result of a PIRA change of plan of which the Security Service was unaware. It was not until after the shootings that a Ford Fiesta rented by the ASU was discovered in an underground Marbella car park containing a partly constructed car bomb with 64 kilos of explosive, 200 rounds of Kalashnikov ammunition and a timing mechanism. (...). Had the bomb in the Fiesta exploded during the ceremony, there would have been civilian as well as military deaths. Operation FLAVIUS undoubtedly saved many lives".

[1035] *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 200.

[1036] *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 200.

4.2.2. Actions based on honest belief

For the *Grand Chamber*, the soldiers' actions based on the assessment of the concrete situation did not violate the Convention: they were permitted to trust in the accuracy of the information they had received and the permissibility of the instructions given by their superiors. On this basis of knowledge, they carried out their orders properly and in the firm belief that a serious and immediate threat to themselves and to third parties could be averted with certainty by means of a permissible means of coercion. In doing so, the Court protected the concrete conduct of the security forces (SAS) in the attempted arrest of the terrorists.

If, in the case of a concrete use of potentially lethal means of coercion, *honest belief* is applied in conjunction with a specific *ex ante*-assessment of the situation (*see* no. V.1.2.2), honest mistakes are also covered. An *honest mistake*[1037] regarding the necessity of the use of potentially lethal means of coercion does not lead to a violation of Art. 2 ECHR. But the prior assumptions underlying the mistakes must have been made comprehensible. In our opinion, *honest belief* and *honest mistake* are synonymous from a legal point of view.

The judgment *Andronicou and Constantinou v. Cyprus* dealt with a hostage situation with a death threat. Both the perpetrator and the victim died during the storming of a flat. The ECtHR examined the admissibility of the use of force in the course of the liberation operation and, in particular, the assumptions on which the firing of the shots was based.

> Andronicou held his fiancée in their shared flat for several hours. The fiancée, Ms Constantinou, screamed for help several times and was making it clear that Andronicou was going to kill her. Andronicou repeatedly said that he would kill himself. During the negotiations with the police, witnesses observed that the man was carrying a gun[1038]. In further negotiation talks (including the involvement and support of relatives, acquaintances and medical doctors), Andronicou repeated that the intervention forces could enter the flat at midnight. He wanted to celebrate Christmas with his fiancée and then

[1037] Wicks, Right to Life, p. 63.

[1038] *Andronicou and Constantinou v. Cyprus*, 86/1996/705/897 (1997), § 14.

> judge himself. At the same time, cries could be heard from Ms Constantinou that Andronicou would also kill her[1039]. As neither negotiations nor the use of sedatives had any effect, it was decided to storm the flat shortly before midnight[1040]. During the storming, both persons were fatally hit by shots fired by the intervention forces.
>
> With regard to the planning and execution of the operation, the ECtHR considers the deployment of the special forces to be justified: They had been trained for such events and had received instructions in the specific case that firearms should only be used if the woman's life or their own life was in danger[1041].

In the heat of the moment, the security forces were required to react within seconds[1042]. They were not held accountable for this; however, the Court examined whether there had been a margin for an *honest belief* in the given circumstances (overall situation). The officers had acted on the *serious assumption* that the hostage's life as well as that of the police force was in danger. Therefore, the use of firearms had been appropriate[1043].

> «The [...] Officers [...] honestly believed in the circumstances that it was necessary to kill him in order to save the life of Elsie Constantinou and their own lives and to fire at him repeatedly in order to remove any risk that he might reach for a weapon. [... 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. [...] The officers were entitled to open fire for this purpose and to take all measures which they

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1039 *Andronicou and Constantinou v. Cyprus*, 86/1996/705/897 (1997), §§ 43-51 and 59.

1040 *Andronicou and Constantinou v. Cyprus*, 86/1996/705/897 (1997), §§ 56 and 60-66.

1041 *Andronicou and Constantinou v. Cyprus*, 86/1996/705/897 (1997), § 185.

1042 *Andronicou and Constantinou v. Cyprus*, 86/1996/705/897 (1997), § 192.

1043 *Andronicou and Constantinou v. Cyprus*, 86/1996/705/897 (1997), § 193.

honestly and reasonably believed were necessary to eliminate any risk either to the young woman's life or to their own lives.»[1044]

4.2.3. Accountability in building a base of trust

The protection of an *honest belief* by security forces does not release the state from a broader responsibility both prior to and subsequent to tactical action. The state is liable if official information or assessments were wrong in breach of a duty to act.

In the judgment *Makaratzis v. Greece*, the *Grand Chamber* focuses on the good faith of the police officers in their use of firearms. By including the broader circumstances in terms of reviewing the responsibility for the occurrence of the escalation, the Court puts an examination of the conduct and the operation itself into the spotlight of the legal assessment.

At the time of the events, there were sufficient reasons to assume a concrete threat to the security forces that justified the use of force[1045]. However, the use of firearms had taken place in such a chaotic manner that the clarity of the chain of command was questioned and the correct planning of the entire operation was in doubt[1046].

In *Finogenov and others v. Russia*, the ECtHR confirmed its principles[1047] and explicitly applied the *honest belief* as a benchmark also for the assessment of the conduct of operations.

The decision to storm the Moscow theatre had been taken on the basis of the available information and on the assumption that the use of the narcotic gas was a permissible measure under the given circumstances (because it was a milder means than the use of firearms). Accordingly, the use of the narcotic gas alone (both against terrorists and hostages) did not lead to a violation of the Convention in the ECtHR's view: «[... There] existed a real, serious and immediate risk

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1044 *Andronicou and Constantinou v. Cyprus*, 86/1996/705/897 (1997), § 192.

1045 *Makaratzis v. Greece* (GC), 50385/99 (2004), § 66.

1046 *Makaratzis v. Greece* (GC), 50385/99 (2004), §§ 67 ff. and 70.

1047 *Finogenov and others v. Russia*, 18299/03 (2011), §§ 151 and 219.

> of mass human losses and that the authorities had every reason to believe that a forced intervention was the ‹lesser evil› in the circumstances. Therefore, the authorities' decision to end the negotiations and storm the building did not in the circumstances run counter to Article 2 of the Convention.»[1048]

The judgment in *Armani Da Silva v. The United Kingdom* shows the importance of an active operational command, especially with regard to a correct specific situational picture and thus the prevention of honest mistakes by the tactically acting forces.

> On 7 July 2005, four suicide bombings had occurred in London. On 21 July, another bombing failed. The intelligence services identified the suspect as Hussain Osman[1049]. *Jean Charles de Menezes* lived in the same street as Osman. During a police arrest operation, Mr Menezes was mistaken for Osman by the surveillance team at 9.39 am with «a good possible likeness». Seven minutes later, the wrong identification was corrected to «not identical» – but this information did not reach all the task forces[1050]. Mr Menezes, who was moving very hastily that morning, was pursued by a team of Special Firearms Officers (SFO) to an underground station. He was apprehended in the coach of a subway train: «Mr de Menezes stood up, arms down; he was pushed back onto his seat and pinned down by two police officers; according to one witness his hand may have moved towards the left hand side of his trouser waistband; and two SFOs [...] shot Mr de Menezes several times and killed him»[1051]. The Office of the Commissioner of the Police of the Metropolis was held responsible for the failure. Therefore, there was no violation of Art. 2 ECHR[1052].

4.2.4. Robustness of the ex ante-assessment

There is a close connection between an *honest belief* in the context of a proportionality assessment in anti-terrorist operations and the assessment of a threat *ex ante* in the

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1048 *Finogenov and others v. Russia*, 18299/03 (2011), § 226.

1049 *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), §§ 13 and 16.

1050 *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), §§ 30 and 32.

1051 *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), § 37.

1052 *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), §§ 283 ff.

context of obligations in the pre-operational phase. The objective or objectified assessment *ex ante* builds the base of trust for subsequent action within the framework of operations or in concrete individual cases (tactical actions).

This base of trust must be sufficiently resilient. Accordingly, the criterion of *honest belief* (or honest mistake) is also central with regard to the responsibility and possible sanctioning of the acting persons (*see* no. VI.4.3.5).

4.3. ASSESSING THE EFFECT OF COERCIVE MEANS

The possible effects of coercive means can be technically assessed according to probabilistic or deterministic principles (respectively methods)[1053]. The ECtHR has developed guidelines for this, but the Court does not always apply them consistently.

In the following, the case law is examined analogously to technical safety law using a deterministic and a probabilistic approach.

4.3.1. Deterministic perspective

A deterministic approach can be used to objectify the relationship between cause and effect in the abstract. To put it simply, the question is which effect certain means of coercion can usually cause (as such). But whether they actually do so in a concrete individual case is another question.

> A specific projectile from a *firearm* can penetrate a human head or torso, damaging the brain, heart or other vital organ. This sets a cause of death.
>
> Inhalation of a *gas* leads to a neurological reaction, causing paralysis of lung function. As a result, the oxygen supply to the brain is interrupted. This also sets a cause of death.
>
> An electric shock from a *destabilisation device* with a voltage of 50,000 volts at 160 milliamps leads to tonic muscle contractions. The vital organs are not damaged. The occurrence of death solely due to this cause is excluded for people without specific previous exposure according to objective criteria.

[1053] On the benchmarks of technical safety law, *cf.* Mueller/Zech, Technikrecht, p. 90.

The use of *tear gas* (as RCA) leads to severe irritation of the mucous membranes of the eyes, nose and upper respiratory tract. This is followed by related physical reactions (such as burning eyes, severe nasal flow and coughing), which also make breathing difficult – but does not interrupt it. The occurrence of death solely due to this cause is excluded for adult humans according to objective criteria.

4.3.2. Probabilistic perspective

According to the *probabilistic* method, the likelihood of deaths when using specific means of coercion can be assessed. Different means of coercion can be compared with each other. The decisive criterion for the proportionality of the use of a specific means of restraint is then the degree of probability of the occurrence of a violation of the legal asset (life) – or the degree of exclusion of fatal consequences.

For the use of *firearms*, for example, it is possible to statistically determine how many shots fired with specific weapons and specific ammunition in which situations lead to hits on average and what the effects are (fatal hits or injuries). From this, a statistically graded risk of the use of certain weapons could be calculated or derived.

In contrast, the use of *armour-breaking weapons* on human targets within a certain radius would always be lethal due to the blasting and possibly splinter effect, and inappropriate outside the lethal radius.

In addition, the lethality of principally non-lethal means of coercion might be statistically recorded. This would allow conclusions to be drawn about the appropriateness of their use.

4.3.3. Fundamental rights practice

The *endangerment* of life already leads to a violation of Art. 2 ECHR. Therefore, the use of firearms against people can *per se* be qualified as an interference with life as a legal asset. The legal assessment of the use of firearms (or the preconditions for this) thus follows a *deterministic* approach. Due to the fact that the scope of protection of the fundamental right to life is affected, there is no (or at least only very limited) margin for considerations of probability.

In a criminal case in 1981, the *Swiss Federal Supreme Court* had to judge the shooting at a money-thief. The shooter, claiming self-defence, had prevented the thief from fleeing with a precise shot in the leg. In doing so, he succeeded in saving a large sum of cash. The court verified the shooter's skill in marksmanship by having the scene re-enacted. Since the robbed person would have hit the fleeing perpetrator's legs even if he had repeated the shot, the court concluded that the act of self-defence was appropriate under the circumstances[1054].

In the judgment *Giuliani and Gaggio v. Italy*, the applicants pushed a deterministic argument to the extreme by criticising the fact that the firearm had not been taken from the injured police officer as a preventive measure. The *Grand Chamber* does not see any reasons for such an obligation, especially since the firearm is a personal means of action for the purpose of self-defence: «The weapon was an appropriate means of personal defence with which to counter a possible violent and sudden attack posing an imminent and serious threat to life, and was indeed used for that precise purpose.»[1055]

The national authorities sometimes find it difficult to adequately classify new non-lethal means of intervention in legal terms. They are basically using the stricter method in each case: for *firearms*, the deterministic method, for selected *non-lethal means of coercion*, a more probabilistic method.

In Switzerland, for example, the *taser* is considered a milder means than the use of firearms (which it is from a deterministic point of view) – but the requirements for application are the often same for firearms and destabilisation devices (*i.e.,* they are equal in height). This excludes potential margins for the use of destabilisation devices (prohibition to take inappropriate measures).

In the judgment in *Tzekov v. Bulgaria*, the ECtHR implements a consistently deterministic view of the use of a non-lethal means of coercion. The Court does not consider the use of a plastic bullet to stop a cart to be a life-threatening act as such. The fact that a human being was (unintentionally) hit by a plastic bullet from the police lead

[1054] Judgment of the Swiss Federal Supreme Court, BGE 107 IV 12, *passim*.

[1055] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 260.

to an examination of Art. 2 ECHR. According to the nature and extent of the possible impact of such special ammunition on human bodies, the Court denies that the scope of protection of Art. 2 ECHR is affected.

> Police officers tried to stop *Asenov Tzekov* and his horse-drawn cart. After firing warning shots, they pointed with special ammunition (plastic bullets) at the tyres of the cart. One of several bullets hit Tzekov in the back[1056].
>
> « La [...] force utilisée [...] n'a en définitive pas été mortelle. Si cet élément n'exclut pas en principe un examen des griefs soulevés sous l'angle de l'article 2 [...], la Cour a néanmoins considéré que c'est uniquement dans des circonstances exceptionnelles que des sévices corporels infligés par des agents de l'Etat peuvent s'analyser en une violation de l'article 2 de la Convention lorsqu'il n'y a pas décès de la victime. A cet égard, le degré et le type de la force utilisée, de même que l'intention ou le but sous-jacents à l'usage de la force peuvent, parmi d'autres éléments, être pertinents pour apprécier si dans un cas donné les actes d'agents de l'Etat ayant infligé des blessures n'ayant pas entraîné la mort sont de nature à faire entrer les faits dans le cadre de la garantie offerte par l'article 2 de la Convention, eu égard à l'objet et au but de cette disposition. Dans pratiquement tous les cas, lorsqu'une personne est agressée ou maltraitée par des policiers ou des militaires, ses griefs doivent être examinés plutôt sous l'angle de l'article 3 de la Convention [...].
>
> La Cour doit dès lors déterminer [...] si la force employée contre le requérant était potentiellement meurtrière et quel impact le comportement des agents de l'Etat concernés a eu, non seulement sur l'intégrité physique de l'intéressé, mais aussi sur les intérêts que le droit à la vie est censé protéger [...].
>
> La [...] blessure [...] infligée n'a pas mis ses jours en danger. Concernant la force utilisée, la Cour note qu'une seule balle a touché le requérant et que cinq ou six ont été tirées. Par ailleurs, les munitions utilisées étaient des cartouches spécifiques, visiblement destinées à des opérations de maintien de l'ordre par

[1056] *Tzekov v. Bulgaria,* 45500/99 (2006), §§ 9 ff.

> la police, contenant des balles en plastique et réputées non létales, même si elles pouvaient être potentiellement dangereuses pour la vie à faible distance.
>
> Dès lors, eu égard aux circonstances de l'espèce, la Cour n'est pas persuadée que la force utilisée par les policiers était d'une nature ou d'un degré propre à porter atteinte aux intérêts protégés par l'article 2 de la Convention [...].»[1057]

The ECtHR did not take into consideration whether the scope of protection of Art. 2 ECHR could be opened up by the *purpose* of the also-mentioned use of the means of coercion. It examines that *subjective* component under Art. 3 ECHR and and concludes that there was a violation of the Convention[1058].

Despite its deterministic orientation in principle, the ECtHR leaves a certain margin of interpretation open for exceptional situations, which follows an extended probabilistic approach.

> For example, when in the judgment *Finogenov and others v. Russia* the use of a narcotic gas is not considered inadmissible *per se*, but reference is made to the (failed) rescue measures (*see* nos. V.4.2 and V.4.5.2)[1059].

In our opinion, the consideration of the relevant limits for the use of coercive means (*see* no. V.3.4) as well as the examination of the concrete circumstances remain elementary.

4.4. PROHIBITION OF EXCESS AND MINIMISATION OF RISK

4.4.1. Prohibition of excess in concrete situations

There is no absolute necessity for recourse to lethal means of coercion if no sufficient threat is emanating from an opposing party – *i.e.,* if there is no concrete threat to life as a legal asset (of intervention forces or third parties). The absolute necessity within

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1057 *Tzekov v. Bulgaria,* 45500/99 (2006), §§ 40 ff.

1058 *Tzekov v. Bulgaria,* 45500/99 (2006), §§ 40 (in fine) and 66 : «En conclusion, outre le caractère insuffisant du cadre juridique et administratif pour la protection de l'intégrité physique des personnes, [...] dans le cas de l'espèce les forces de l'ordre ont fait usage d'une force qui n'était pas strictement nécessaire et proportionnée au but légitime de procéder à l'interpellation du requérant, en violation de l'article 3 de la Convention.»

1059 *Finogenov and others v. Russia*, 18299/03 (2011), § 202.

the scope of the exceptional circumstances of Art. 2 para. 2 ECHR is therefore always to be interpreted in the context of the surrounding circumstances.

Thus, the application of potentially lethal use of force is permitted in order to arrest someone lawfully or to prevent someone who has been lawfully deprived of his or her liberty from escaping (Art. 2 para. 2 letter b ECHR; *see* no. III.2.1). However, there is no absolute necessity – and consequently no permissibility of a corresponding means of coercion – if the fleeing person does not pose any threat[1060].

The judgment in *Nachova and others v. Bulgaria* concerned the use of firearms against a fleeing person who was known to be unarmed. The *Grand Chamber* has clarified that the lawfulness of an arrest as such is not sufficient for the use of firearms. Instead, the proportionality must be consistently justified on the basis of the other circumstances.

> «[…The] legitimate aim of effecting a lawful arrest can only justify putting human life at risk in circumstances of absolute necessity. [… In] principle there can be no such necessity where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost […]»[1061]

In its result, the judgment deserves consent. However, the reasoning seems too brief: in our opinion, an assessment of the situation according to objective criteria is the first and most important starting point for evaluating whether the use of potentially lethal means of restraint against people could be permissible. Only when a person must be reasonably assessed as being dangerous, for example because he or she is armed and it is also to be expected that he or she could use the weapon against other people, the justification according to Art. 2 (para. 2 letter b) ECHR can apply. If there is no evidence of a concrete danger, Art. 2 (para. 1) ECHR already prohibits the use of potentially lethal means.

[1060] On the case of violence on the occasion of an arrest, *cf. Nikolova and Velichkova v. Bulgaria*, 7888/03 (2007), § 68.

[1061] *Nachova and others v. Bulgaria* (GC), 43577/98 and 43579/98 (2005), § 95.

A situation can possibly change very quickly. Then, in addition to an adequate assessment of the situation, an immediate adaptation of the operational parameters is necessary. The concrete measures required to do so in practice have to be incorporated into basic safety rules for the use of coercive means and are usually trained as automatisms.

The judgment in *Leonidis v. Greece* on the accidental killing of a suspect during arrest is illustrative: a group of young men were fleeing from a police checkpoint. During the pursuit, one of the men reached into his jacket pocket, which was interpreted by the police officers as a grasp for a weapon. In reaction, a police officer drew his service weapon[1062]. One of the fleeing persons, *Nikolaos Leonidis*, could be stopped. When trying to handcuff him, Leonidis resisted and elbowed the police officer. Due to a reflex action, a shot was fired from the policeman's gun, killing Leonidis at close range[1063]. The «fatal shot was triggered not by any deliberate action on the part of police officer G.A. but by the sudden reaction of the victim. [...] Nikolaos Leonidis's death was not the result of a deliberate action»[1064].

The Court did not take into consideration whether it was necessary to use a firearm in the specific situation. However, the weapon should have been holstered before the handcuffs were put on Leonidis, as there was no immediate threat to the life and limb of the police officers. Instead, the police officer had left his finger on the trigger during the stop[1065].

In our opinion, this behaviour violates minimal safety regulations for the use of firearms. However, the Court does not only look at the officer's misconduct, but also at the overall circumstances: the legal provisions for the use of firearms were outdated and inappropriate at the time of the incident[1066].

1062 *Leonidis v. Greece*, 43326/05 (2009), § 9.

1063 *Leonidis v. Greece*, 43326/05 (2009), § 10.

1064 *Leonidis v. Greece*, 43326/05 (2009), § 59.

1065 *Leonidis v. Greece*, 43326/05 (2009), § 63.

1066 *Leonidis v. Greece*, 43326/05 (2009), § 65 (no clear regulations for the use of firearms in peacetime).

The surrounding circumstances also have a decisive role to play in the balance of power in violent confrontations. Especially in cases of numerical inferiority, the case law of the ECtHR allows the use of at least non-lethal means of coercion.

> In *Stewart v. The United Kingdom* (*see* no. IV.1.4.2.d), a 13-year-old boy participating in a demonstration was hit by a plastic bullet (baton round) fired by the police[1067]. He later died in hospital as a result of his injuries[1068]. The Commission found that the conduct of the soldiers complied with Northern Ireland law[1069]. When examining the absolute necessity of the use of the plastic bullets, it took into account the large outnumbering of the protesters against the security forces (ratio 150 to 8) and the fact that the demonstration was unpeaceful (the soldiers had been attacked with various projectiles)[1070]: «[… Taking] due account of all the surrounding circumstances, […] the death of Brian Stewart resulted from the use of force which was no more than ‹absolutely necessary› ‹in action lawfully taken for the purpose of quelling a riot …› […].»[1071]

4.4.2. Risk minimising in particular

The *UN Basic Principles* recommend rules, «that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm» and «prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk» (§ 11 letters b and c). The ECtHR points out the need to minimise risks in the case of the use of force in general and the use of firearms in particular (with reference to § 2 [*see* no. IV.1.4.2.c] and § 11 of the *UN Basic Principles*).

> «Whenever the lawful use of force and firearms is unavoidable, law-enforcement officials must, in particular, exercise restraint in such use and act in proportion

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1067 To the use of *baton rounds, cf.* Dickson, ECHR and the Conflict in Northern Ireland, pp. 260 ff.

1068 *Stewart v. The United Kingdom*, 10044/82 (1984), p. 163.

1069 *Stewart v. The United Kingdom*, 10044/82 (1984), § 25.

1070 *Stewart v. The United Kingdom*, 10044/82 (1984), §§ 28 f.

1071 *Stewart v. The United Kingdom*, 10044/82 (1984), § 30.

> to the seriousness of the offence and the legitimate objective to be achieved, minimise damage and injury, and respect and preserve human life»[1072].

The ECtHR also includes surrounding circumstances in the planning, control and implementation of operations. In the case of anti-terrorist operations in particular, it is a question of countering risks through further measures.

> «[…In] determining whether the force used was compatible with Article 2 […], the Court must carefully scrutinise […] not only whether the force used […] was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.»[1073]

In the judgment in *Isayeva v. Russia*, the ECtHR found a violation of Art. 2 ECHR based on the overall circumstances.

> There were deficiencies both in informing the population about an imminent evacuation[1074], in the implementation of the operation (disproportionate use of means)[1075], as well as with regard to an investigation (delays[1076], hardly any attempts at explanation as well as lack of identification of further victims or witnesses[1077]).

An anti-terrorist operation is particularly delicate when dealing with suicide bombers – as was the case in *Tagayeva and others v. Russia*. In the case of a terrorist tactic involving the possibility (or intention) of their own death, the perfidious perpetrators are in a particularly "advantageous" position if they cannot be caught in time.

1072 *Tagayeva and others v. Russia*, 26562/07 (2017), § 466.

1073 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 194.

1074 *Isayeva v. Russia*, 57950/00 (2005), § 189.

1075 *Isayeva v. Russia*, 57950/00 (2005), § 191.

1076 *Isayeva v. Russia*, 57950/00 (2005), § 217.

1077 *Isayeva v. Russia*, 57950/00 (2005), §§ 221 f.

> «The [...] group members' intention to die which had been apparent from the beginning, and to cause large-scale loss of life in the event of a storming. In such circumstances, the role of the authorities should be to seek to minimise the loss of life to the greatest extent possible.»[1078]

Although the Court grants the authorities tactical margins of manoeuvre (also in view of existing obligations to act), it requires that their conduct is directed towards risk minimisation even in the case of an offensive approach. This means that the challenges for state security forces are particularly high.

> In the judgment *Tagayeva and others v. Russia*, the ECtHR recognised a violation of the Convention in the failure to minimise the risk in the operation conducted with a massive deployment of forces. «The [...] preparation of responses to unlawful and dangerous acts in highly volatile circumstances, competent law-enforcement services such as the police must be afforded a degree of discretion in taking operational decisions. Such decisions are almost always complicated, and the police, who have access to information and intelligence not available to the general public, will usually be in the best position to make them [...]. This is especially so in respect of counter-terrorist activity, where the authorities often face organised and highly secretive networks, whose members are prepared to inflict maximum damage to civilians, even at the cost of their own lives. In the face of an urgent need to avert serious adverse consequences, whether the authorities choose to use a passive approach of ensuring security of the potential targets or more active intervention to disrupt the menace, is a question of tactical choice. However, such measures should be able, when judged reasonably, to prevent or minimise the known risk.»[1079]

In police operations, risks are inherent. The ECtHR does not require a complete exclusion of any risk – conversely, the taking of a risk must not be "without alternative".

[1078] *Tagayeva and others v. Russia*, 26562/07 (2017), § 411 (with reference to the assessment of an *expert group*).

[1079] *Tagayeva and others v. Russia,* 26562/07 (2017), §§ 492 f.

In the judgment *Andronicou and Constantinou v. Cyprus*, the ECtHR recognised the conformity of the police operation as a whole with the Convention after analysing all the concrete circumstances (duration of the deprivation of liberty, exhaustion of the possibilities of negotiation and contact, threats, arming of the offender, etc.)[1080].

4.4.3. Use of special means

In police operations, the prohibition of excessive force and the requirement to minimise risk gain particular importance in assessing the permissibility of the use *of heavy means*. Conversely, the question arises whether the use of *non-lethal* – in principle milder – *means of coercion* in police operations would always be proportionate (at least in the sense of a legal presumption). However, both questions should not be dealt with separately from the requirements for the legal basis for the use of coercive means.

a. Heavy means of intervention

In a military sense, achieving a clear superiority over the enemy is usually the best way to ensure the success of an operation. Consequently, it is a matter of concentrating the own means in a certain area at a certain time. The focus lies traditionally on the offensive aspect of higher firepower. Defensively, however, it is also imaginable to achieve superiority through greater protection of the own forces. In any case, operational and tactical superiority over the enemy usually expands and improves one's own options.

In anti-terrorist operations, as well, the security forces may have to resort to heavy means. From a police perspective, the use of these means can be defensive, offensive or dissuasive, depending on the specific circumstances.

Armoured vehicles, for example, offer adequate protection against small arms fire. To a certain extent, they also protect against splinters and mines. If such vehicles are additionally equipped with large-calibre weapons, the question arises as to whether their use as a *system* is permissible. In any case, the use of armoured vehicles always has a dissuasive and media effect.

[1080] *Andronicou and Constantinou v. Cyprus,* 86/1996/705/897 (1997), § 194.

In *Tagayeva and others v. Russia*, the security forces used various heavy offensive means (flame and grenade launchers, armoured vehicles, various long-range weapons and hand grenades) to liberate the hostages. The ECtHR did not see any violation of the ECHR in the choice of the broad means as such[1081]. However, the security forces violated the principle of proportionality (in the specification of the prohibition of excessiveness) by the way they used their heavy means and therefore violated Art. 2 ECHR[1082]: They were shooting at School No. 1 while both hostage-takers and hostages were inside.

> «Overall [...] the evidence establishes a prima facie claim that the State agents used indiscriminate weapons upon the building while the terrorists and hostages were intermingled. Accordingly, it seems impossible that it could be ensured that the risk to the hostages could be avoided or at least minimised.»[1083]

The ECtHR criticises in particular the insufficient weighing of interests as well as the lack of management of the operation in terms of minimising the risk to the hostages.

> «The acute danger of the use of indiscriminate weapons in such circumstances should have been apparent to anyone taking such decisions. All relevant factors should have been weighed up and carefully pondered upon in advance, and the use of such weapons, if unavoidable in the circumstances, should have been subject to strict supervision and control at all stages to ensure that the risks to the hostages were minimised.»[1084]

In the judgment in *Isayeva v. Russia*, the ECtHR found no violation of the ECHR in the use of combat aircraft (or aerial bombs) alone – albeit with a big reservation.

1081 *Tagayeva and others v. Russia*, 26562/07 (2017), § 611.

1082 *Tagayeva and others v. Russia*, 26562/07 (2017), § 609: «While errors of judgment or mistaken assessments, unfortunate in retrospect, will not in themselves entail responsibility under Article 2, such use of explosive and indiscriminate weapons, with the attendant risk for human life, cannot be regarded as absolutely necessary in the circumstances».

1083 *Tagayeva and others v. Russia,* 26562/07 (2017), § 589.

1084 *Tagayeva and others v. Russia*, 26562/07 (2017), § 607.

> «Accepting that the use of force may have been justified in the present case, it goes without saying that a balance must be achieved between the aim pursued and the means employed to achieve it.»[1085]

However, the Court did not primarily focus on the weapon's effect *per se* for this type of law enforcement[1086], but on its indiscriminate use (by a lack of distinction with regard to the effect of aerial bombs in the specific case; *see* also no. V.4.5.1).

b. Alternative non-lethal means of intervention

In the judgment *Güleç v. Turkey*, the ECtHR stresses the importance of both passive protection of security forces (through specific means of intervention such as shields) and alternative means of intervention to firearms. Especially in violent riots, chemical substances can be used for this purpose.

> On 4 March 1991 there were spontaneous unauthorised unlawful demonstrations; in the confrontation between demonstrators and gendarmes, the 15-year-old Ahmet Güleç was killed by a bullet on his way home[1087]. The ECtHR considered the use of firearms as justified, but examined the question of alternatives in greater depth. In particular, it pointed to the use – also – of tear gas as a milder means. Specifically, the security forces should have been equipped with alternative means of deployment. «[...] It goes without saying that a balance must be struck between the aim pursued and the means employed to achieve it. The gendarmes used a very powerful weapon because they apparently did not have truncheons, riot shields, water cannon, rubber bullets or tear gas. The lack of such equipment is all the more incomprehensible and unacceptable because the province of Şırnak [...] is in a region in

[1085] *Isayeva v. Russia*, 57950/00 (2005), § 181.

[1086] *Cf.* Corn/Watkin/Williamson, Law in War, p. 220 (high explosive nature of aerial-delivered weapons and their destructive effect).

[1087] *Güleç v. Turkey*, 54/1997/838/1044 (1998), §§ 7, 9 and 63.
According to the «Supreme Administrative Court [...] it was impossible to bring a prosecution against civil servants where the identity of those responsible and their status as civil servants had not been established» (§§ 7 and 70).

> which a state of emergency has been declared, where at the material time disorder could have been expected.»[1088]

The use of tear gas as a non-lethal means of coercion was in question in the judgment *Ataykaya v. Turkey*. At the time of the event, there were no specific regulations on the use of tear gas launchers by the security forces. Referring to the positive obligation under the right to life, the Court held that the authorities had not taken all necessary and expected measures in their legislative and administrative framework to ensure adequate protection of the people.

> The direct firing of tear gas bullets at people led to fatal injuries. The direct firing did not correspond to a correct use of this means of coercion. Its use should have been adequately trained. However, the use of an arch shot would have been appropriate and therefore permissible[1089].

c. Legal bases at national level

Based on the positive obligation arising from the right to life, the Convention States are also required to adequately regulate the use of specific means. However, it can happen that there is *no sufficient* national legal foundation for a specific use of means. The reasons for the absence can be very different and range from the omission of a regulation[1090] to the obsolescence of existing legal bases[1091] to falling short of minimum standards[1092] in terms of content.

In *Tagayeva and others v. Russia*, the ECtHR examined the viability of the national legal framework, with a particular focus on the use of force. It did not set out the main

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[1088] *Güleç v. Turkey*, 54/1997/838/1044 (1998), § 71.

[1089] *Ataykaya v. Turkey*, 50275/08 (2014), §§ 57 ff. (with reference to *Abdullah Yaşa and others v. Turkey*, 44827/08 [2013]).

[1090] *Ataykaya v. Turkey*, 50275/08 (2014), § 57; *Celniku v. Greece*, 21449/04 (2007), § 57; Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 229.

[1091] *Makaratzis v. Greece* (GC), 50385/99 (2004), § 70; *Leonidis v. Greece*, 43326/05 (2009), § 65.

[1092] *Tagayeva and others v. Russia,* 26562/07 (2017), § 599; *Nachova v. Bulgaria* (GC), 43577/98 (2005), §§ 99 ff.

principles and conditions for legitimate anti-terrorist operations, nor did it provide for limits to the arbitrary use of coercive means[1093].

> «The Court notes that the Suppression of Terrorism Act remained silent not only on the types of weapons and ammunition that could be used, but also on the rules and constraints applicable to this choice. It did not incorporate in any clear manner the principles of using force that should be no more than ‹absolutely necessary› such as the obligations to decrease the risk of unnecessary harm and exclude the use of weapons and ammunition that carried unwarranted consequences [...]. At the same time, it provided near blanket immunity to the participants of anti-terrorist operations from responsibility for any harm caused by them to ‹legally protected interests› [...].»[1094]

In the absence of adequate national legal foundations for a "use of force" with special means, the focus is on a case-by-case assessment in order to decide on the permissibility of coercive means on the basis of the concrete circumstances and with specific regard to the principle of proportionality[1095].

> The ECtHR points out the consequences of insufficient regulation: «It is not surprising that in the absence of clear rules on conducting anti-terrorist operations, references were made to the Army Field Manual, which applied to combat situations in armed conflicts and appeared inappropriate for the situation [...].»[1096]

4.5. DISTINCTION

Compliance with the principle of proportionality is essentially linked to the requirement of distinction. Police measures are directed against certain threats and serve to defend against them.

1093 *Tagayeva and others v. Russia,* 26562/07 (2017), § 599.

1094 *Tagayeva and others v. Russia,* 26562/07 (2017), § 598.

1095 *Finogenov and others v. Russia*, 18299/03 (2011), § 216; *Tagayeva and others v. Russia,* 26562/07 (2017), § 563.

1096 *Tagayeva and others v. Russia,* 26562/07 (2017), § 598.

4.5.1. Lethal means of coercion

The use of lethal means of coercion is inadmissible when it interferes with the legal assets of those persons intended to be protected – even if that effect is only reflective (occurs indirectly) – as this would constitute, in our opinion, a violation of the prohibition of intentional killing (Art. 2 para. 1 ECHR). A fortiori, such use of means appears disproportionate (Art. 2 para. 2 ECHR).

In the judgment in *Isayeva v. Russia*, the ECtHR has been correct in its criticism that the bombs dropped were not used with the necessary caution with regard to the lives of the civilian population[1097]. Their use was no more in a reasonable relation to the fulfilment of the purpose and the possible danger to the lives of uninvolved bystanders[1098].

> «[… Using] this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society. […] The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents.»[1099]

4.5.2. "Non-lethal" means of coercion

Questions of proportionality for non-lethal means of coercion arise primarily in their relation to lethal means of coercion. In principle, the use of the first is permissible if the latter would be permissible as well (*see* no. V.4.3.3). However, special consideration must be given to whether the "scope of action" of a non-lethal means of coercion differs from those with a lethal effect. This can be discussed on the basis of *Finogenov and others v. Russia*.

1097 *Isayeva v. Russia*, 57950/00 (2005), § 200.

1098 *Isayeva v. Russia*, 57950/00 (2005), § 173.

1099 *Isayeva v. Russia*, 57950/00 (2005), § 191.

a. Use of narcotic gas: the ECtHR's rationale

The ECtHR has debated the proportionality of the use of a narcotic gas. It pointed out that the gas was harmful (dangerous means), but – in contrast to explosives or air-to-ground missiles – not intrinsically lethal: «the gas used by the Russian security forces, while dangerous, was not supposed to kill»[1100]. Furthermore, the Court referred to the actual observation that apparently not all people in the theatre had lost consciousness due to the injected gas. The ECtHR then returns to the proportionality of the measure as such and the aftercare of the affected individuals[1101]. Under these circumstances, the gas had not been used "indiscriminately"; there would have been a high probability of survival for the hostages (albeit dependent on subsequent rescue efforts)[1102]. On this intellectual basis, the Court draws a comparison – pseudo-probabilistic in our opinion – between the use of narcotic gas and the use of firearms.

> «The Court accepts that the gas was probably not intended to kill the terrorists or hostages. It was therefore closer to ‹non-lethal incapacitating weapons› than to firearms [...].»[1103]

The ECtHR then addresses the question of the dosage of the narcotic gas. The calculation of the dosage had been based on the (expected) reaction of an average person[1104] and caused different effects among people affected[1105]. Under the given circumstances, the ECtHR found the use of the gas to be absolutely necessary, in particular because its purpose was to neutralise the terrorists while minimising the risk to the hostages.

1100 *Finogenov and others v. Russia*, 18299/03 (2011), § 232.

1101 *Finogenov and others v. Russia*, 18299/03 (2011), § 235: «The Court has already established that the gas was dangerous and even potentially lethal. The Government claimed that the gas dosage had been calculated on the basis of an ‹average person's reaction›. The Court notes that even that dose turned out to be insuffi-cient to send everybody to sleep: after it had been dispersed in the auditorium some of the hostages remained conscious and left the building on their own. In any event, the Court is not in a position to evaluate the issue of the dosage of the gas. It will, however, take it into account when assessing other aspects of the case, such as the length of exposure to it and the adequacy of the ensuing medical assistance».

1102 *Finogenov and others v. Russia*, 18299/03 (2011), § 232.

1103 *Finogenov and others v. Russia*, 18299/03 (2011), § 202.

1104 *Finogenov and others v. Russia*, 18299/03 (2011), § 194.

1105 *Finogenov and others v. Russia*, 18299/03 (2011), §§ 235 f.

There would have been no intention to kill (the hostages). Taking into account the further circumstances, the Court concluded that the use of the gas did not constitute a violation of the Convention[1106].

b. Criticism and opposing opinions

The literature is critical of the ECtHR's rationale. With regard to the Court body, it is noted that the judgment was enacted by the First Section, but not by the *Grand Chamber* of the ECtHR. On the one hand, this would reduce the normative significance – on the other hand, it is doubted whether the judgment would have been upheld before the *Grand Chamber*[1107].

Further, it is doubted whether the use of the gas increased the (overall) likelihood of survival of the hostages. This argument is central because the gas had exactly the same effect on both the perpetrators (terrorists) and the victims (hostages). Bernadette Rainey, Elizabeth Wicks and Clare Ovey point out that the rationale of the ECtHR was contradictory: the Court did not (yet) recognise a violation of the Convention in the use of the gas for the purpose of rescuing hostages – but nevertheless concluded a violation of the right to life of the hostages due to a lack of planning and implementation of the subsequent rescue operation[1108].

The ICRC fundamentally doubts the appropriateness of using an anaesthetic gas, which is well known in medicine, as a tactical tool.

> «(In) a tactical situation, when used against a group of people without their consent, it is not possible to provide the safeguards used in highly controlled medical environments. It is not possible to control the 'dose' of the chemical each victim receives, therefore risking overdose. Nor it is possible to make adjustments for wide variations in effects due to differences in age, weight, and health. It is extremely difficult, if not impossible, to provide the neces-

[1106] *Finogenov and others v. Russia*, 18299/03 (2011), § 236.

[1107] Casey-Maslen/Connolly, Police Use of Force under International Law, p. 87.

[1108] Jacobs/White/Ovey, European Convention, pp. 153 ff.

> sary immediate medical care including support for breathing, which is often impaired during anesthesia.
>
> The tactical utility of these toxic chemicals as weapons for law enforcement is also questionable. It is a common misconception that incapacitation can ever be instant. In a tactical situation it will take at least several minutes to cause complete incapacitation in all those targeted and so the use of toxic chemicals cannot immediately prevent aggressors from using force. Countermeasures, such as gas masks or specific antidotes, may also be available to aggressors but not to innocent bystanders.»[1109]

The question of whether the disclosure of the exact composition of the chemical agent used would have allowed for a better treatment of the victims remained controversial[1110]. If a means of coercion is used *ad hoc* (in an exceptional situation) despite the lack of a legal regulation, all conceivably necessary measures must be taken to minimise the resulting harm. This also includes the disclosure of the composition or the exact effect of a chemical agent (or the means of coercion). This is the only way to ensure immediate aftercare for all affected individuals – perpetrators as well as victims – and thus minimise the risk to life as a legal asset[1111]. Otherwise, the violation of the principle of proportionality as well as the state's duties to protect with regard to the hostages (to be rescued) is likely to occur[1112].

c. Statement

In our opinion, the ECtHR's judgment raises questions about the adequacy of the use of a narcotic gas against a (targeted) crowd consisting of both perpetrators (terrorists) and victims (hostages): in particular, the permissibility of using such a gas – the exact

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[1109] ICRC, Toxic Chemicals as Weapons for Law Enforcement, p. 2.

[1110] *Finogenov and others v. Russia*, 18299/03 (2011), §§ 65 and 80.

[1111] In addition, apparently no calculations of the incapacitating concentration (ICt_{50}) or lethal concentration (LCt_{50}) had been made in advance; to ICt and LCt, *cf.* Crowley, Chemical Control, p. 40 and Neill, Riot Control and Incapacitating Chemical Agents under the CWC, p. 12 (with footnote 42).

[1112] Crowley, Chemical Control, p. 40; Neill, Riot Control and Incapacitating Chemical Agents under the CWC, p. 12 (with footnote 42).

composition and dosage of which remains unknown to this day – is not obvious. The fact that some individuals did not lose consciousness does not take away from the potential effect of the narcotic gas even on those people who were supposed to be protected by the security forces' operation. The First Section's hypothesis that the use of the gas did not directly cause the deaths of 125 people[1113] is difficult to comprehend.

From a more dogmatic perspective, it must be remembered that already the endangerment of life can be considered a violation of Art. 2 ECHR – irrespective of the question of whether the means used would be more lenient in comparison to other means. The attempted analogy, according to which the narcotic gas is more comparable to a means of incapacitation than to a firearm, is not convincing against this background. This presumably confuses the (intended or outwardly declared) intention with the effect (that should be assessed deterministically).

> A strong indicator against the proportionality of the use of the narcotic gas (also towards the hostages) in this case may also be the basis of the chemical agent. Phentanyl is covered by the CWC (*see* no. V.3.4.3) – which means that its use in military or police operations for the Convention State Russia is prohibited under international law. In our opinion, a (somehow) prohibited means cannot be a milder means of coercion at the same time[1114].

4.6. COLLISION OF FUNDAMENTAL RIGHTS OBLIGATIONS

In the case of anti-terrorist operations, negative (*see* no. III.2.3) and positive (*see* no. III.2.2) obligations under Art. 2 ECHR may conflict with each other[1115]. In the case of a use of force to protect, obligations with reference to the same legal assets, or about a collision between provisions (or elements) of the same fundamental right, are at stake.

[1113] *Finogenov and others v. Russia*, 18299/03 (2011), § 201: «The official experts in their report concluded that there was no 'direct causal link' between the death of those 125 people and the use of the gas, and that the gas was just one of many factors which led to such a tragic outcome».

[1114] In an interview with the NZZ of 16 April 2019, pp. 14 f., the former President of the ECtHR, Prof. *Luzius Wildhaber*, reports on threats by the Russian ambassador in a specific case and that he had been ordered to instruct other judges how to decide (what he refused to do).

[1115] *Cf.* Martin, Grundrechtskollisionen, p. 279.

The use of coercive means aims to protect the lives of other people or bystanders who are threatened by certain people. If the use of force leads to a (direct or just indirect) threat to the life of the victims, fundamental legal obligations are conflicting with each other.

4.6.1. Particularity of the conflict of fundamental rights aspects according to Article 2 ECHR

The *legal dilemma* is that those elements of the fundamental right to life which are guaranteed "to protect the indispensable conditions of human existence"[1116] (core elements of fundamental rights) are not accessible for consideration of any kind. If a weighing is not possible, each option for taking action would affect the core element of the fundamental right and therefore be inadmissible[1117]. The ECtHR's case law, in contrast, appears to provide a "practical" margin of interpretation. Both the content of the respective obligation (prohibition of interference or duty to protect) and the person of the holder of the fundamental right (endangered person or victim) become of fundamental importance in this respect.

In our opinion, the distinction made by the German legal philosopher Robert Alexy between the conflict of rules and the collision of principles is helpful in this debate[1118]. While a conflict of rules in the absence of collision or exception rules inevitably leads to a violation of the law[1119] (and must therefore be avoided), the collision of principles allows considerations or weightings to be made[1120]. Fundamental rights usually have the character of principles – important and guiding, but always in need of concretisation. They rarely provide concrete rules, as they are usually formulated in the abstract and do not offer a fixed setting, but rather enshrine values or commandments at the constitutional level that are open to interpretation. Of course,

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[1116] Schefer, Kerngehalte, p. 90 (with reference to a targeted killing) and pp. 403 f.

[1117] Schefer, Kerngehalte, pp. 91 and 150.

[1118] Alexy, Theorie der Grundrechte, pp. 71 ff.

[1119] Alexy, Theorie der Grundrechte, pp. 77 f.

[1120] Alexy, Theorie der Grundrechte, pp. 78 f.

this does not deny them their normative character[1121] or their validity or binding character.

The normative wording of the right to life according to Art. 2 (para. 1) ECHR already emphasises the need to implement the positive obligation in the national legal framework(s). The same applies to the justifications for interventions (para. 2). The negative obligation with the prohibition of killing human beings appears to be more "rule-like"; however, the intention behind a conduct is the decisive – and open – criterion there. In our opinion, this means that in the case of a collision of obligations within the fundamental right to life, the different elements are open to a balancing. Thus, insofar as the killing of human beings does not constitute the purpose (the actual primary objective) of a state action – and insofar as the domestic legal framework does not prohibit certain activities in concretisation of the positive obligation – the examination of the absolute necessity of measures can involve a balancing of fundamental rights obligations valid in parallel.

The catalogue of Art. 2 (para. 2) ECHR sets narrow external barriers (and opens the way to "mediatisation by law")[1122]. In anti-terrorist operations, the focus is on the release of people against unlawful violence (letter a).

4.6.2. Absolute limitations

Although already well developed, the case law impregnated principles of Art. 2 ECHR comprise merely a minimum standard. The Convention States can provide for stricter rules in their national legal frameworks[1123].

Thus, with regard to the use of a narcotic gas as a means of coercion, the ECtHR points – *mutatis mutandis* – to the ruling of the German Federal Constitutional Court on the Aviation Security Act. The court ruled in 2006 that shooting down a hijacked aircraft is

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[1121] The same requirements for the principle of certainty cannot be demanded for fundamental rights as for "usual" legal norms (in laws). Fundamental rights are dynamic norms – the ECHR is a *living instrument* for their realisation; *cf., e.g., Tyrer v. The United Kingdom,* 5856/72 (1978), § 31 (on the changing acceptance of corporal punishment).

[1122] *Cf.* Martin, Grundrechtskollisionen, pp. 90 ff., 151 ff. and 280.

[1123] On the role of the legislator, *cf.* Schefer, Kerngehalte, pp. 410 f.

not compliant with the German constitution even if this aircraft is used as a lethal weapon by the hijackers (*e.g.,* in the attacks on New York and Washington on 11 September 2001). In addition to the terrorists, there are realistically always uninvolved persons on board of a hijacked aircraft: minimal aircraft crews, usually also passengers[1124]. Any external use of force against a flying aircraft is inevitably directed against all the people on board.

> There is exactly the same risk of death (in being killed unintentionally) for passengers and crew members as for the hijackers (real and immediate *danger*). In addition, there is a real and immediate *risk* for persons on the ground of being hit by debris and thus being injured or killed.
>
> It is therefore not permissible to authorise the armed forces to shoot down a hijacked aircraft by direct intervention with weaponry, even if an aircraft is to be used as a weapon against the lives of other people. Insofar as people not involved in the crime on board the aircraft are also affected, any physical acts violate the right to life of the passengers. Any weighing of human lives against each other also violates the guarantee of human dignity[1125]. The German legislator would have allowed the status of people as legal subjects to be called into question.
>
> Basically, a governmental shooting down of an aircraft corresponds in every case (at least) to the abstract endangerment (through dangerous activity) of a large number of people. States are therefore required to take all necessary preventive measures to prevent hijackings in advance (on the existing international regulatory framework, *see* no. IV.1.1).

In our opinion, however, absolute limits can only override a fundamental right obligation of the state to act in accordance with Art. 2 ECHR with regard to the protection of

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[1124] *Finogenov and others v. Russia*, 18299/03 (2011), § 231: «The [...] German Constitutional Court [...] found incompatible with the right to life [...] a law authorising the use of force to shoot down a hijacked aircraft believed to be intended for a terrorist attack [...]. It found, *inter alia*, that the use of lethal force against the persons on board who were not participants in the crime would be incompatible with their right to life and human dignity, as provided by the German Basic Law and interpreted in the jurisprudence of the Constitutional Court.»

[1125] Judgment 1 BvR 357/05 of 15 February 2006 (= BVerfGE 115, 118), §§ 118 ff.

other people or bystanders if their right to life is violated by the state operation with almost certainty.

A potentially lethal use of force is generally only absolutely necessary if it is also acceptable. A balancing test is used to determine whether the specific means of coercion used are compatible with the obligations of the Convention States under Art. 2 ECHR (*see* particularly no. IV.3.3.3). The fundamental right to life means that people must not be exposed to excessive endangerment, even if this is directed exclusively against those persons who pose a threat (perpetrators or endangerers). Endangering the lives of bystanders through a use of force is *per se* unreasonable and therefore always impermissible. This applies especially if the state has a duty to protect other people (*see* no. III.2.2.5 and III.2.2.7).

4.6.3. Distinctions

a. Complementarity between the possibility of intervention and the duty to act

If the selective use of potentially lethal means of coercion against perpetrators is permissible and actually possible under the circumstances without endangering the lives of bystanders as legal assets to be protected, there is complementarity of the obligations imposed by the fundamental right: if victims or bystanders are in an immediate situation of danger caused by the perpetrators, the positive obligation arising from the right to life is condensed into an obligation of the state to act. There may be a margin of discretion with regard to the choice of means of coercion. In principle, the mildest means is to be chosen which is sure to succeed, *i.e.,* the immediate and complete elimination of a danger. Such a use of force to protect must primarily be directed at the perpetrator and have the saving of other people as its purpose. An interference with the right to life of bystanders must be fundamentally excluded according to an *ex ante*-assessment.

> An example is the use of coercive means against perpetrators in amok situations. If people are endangered by persons directly exercising violence, the prohibition of excessive force and the prohibition of insufficient force set the guidelines for the police to counter the danger: the chosen means of coercion must allow with a sufficient probability the elimination of the danger posed by

the perpetrator of the rampage. This applies to those means of coercion that cause the perpetrator to immediately become incapable of acting. Therefore, in the case of an immediate threat to third parties, even warning shots before firing on a person would be impermissible (as such), because they can warn the perpetrator and induce him or her to commit the very actions that are to be prevented.

In the situation of the rescue shot, the argumentation may seem quite strange: the use of firearms is potentially lethal from a legal point of view (deterministic benchmark). Therefore the permissibility of a firearm use is to be judged absolutely: either it is permissible or it is not[1126]. If the use of firearms is permissible, it must conversely guarantee the intended success (the rescue of other people). Therefore, the neutralisation (elimination of danger by effecting the immediate incapacity to act) of amok perpetrators is carried out by shooting them in the head with specific (deforming) ammunition[1127].

This does not mean, however, that there is no duty to rescue perpetrators. When a rescue shot is (correctly) executed, rescue measures are only conceivable in the case of mistakes or miracles. However, it must always be planned to rescue the perpetrators after they have been neutralised.

It is sometimes disputed whether direct interventions in the right to life require positive legal regulation[1128]. In our opinion, this could merely be a matter of further concretising the framework of Art. 2 (para. 2) ECHR in national law. The Convention States are entitled to define the conditions for the most severe form of use of force more narrowly than is required by the Convention. However, two particular aspects would have to be considered: a national regulation would also have to take into account possible duties

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[1126] In the judegments *Finogenov and others v. Russia*, 18299/03 (2011) and *Tagayeva and others v. Russia*, 26562/07 (2017), the interference with the right to life of the terrorists is not examined specifically; the focus lies distinctly on the lives of the hostages. The same was already true in *Isayeva v. Russia*, 57950/00 (2005).

[1127] A shot to the extremities of a person would also be an interference with their right to life – but an elimination of the immediate danger posed by the offender would not be guaranteed. Therefore, the factually less severe measure would (according to the first author) be *impermissible*.

[1128] *Cf.* Melzer, Targeted Killing, pp. 19 f. (with reference to the discussion in Switzerland).

to protect (towards other people) – in addition, a regulation can never provide for all eventualities. However, legal regulations can create transparency and legal certainty within the existing margins and considerations.

b. Collision of the possibility of intervention with the duty to protect

When a use of force is associated with the risk of endangering the life of both the perpetrator (dangerous person) and the victim (or other people), the positive obligation (towards victims or other people) and the negative obligation (towards victims or other people – as well as towards the perpetrator) of Art. 2 ECHR may collide.

To the extent that an interference with the fundamental right of the perpetrator appears to be permissible in principle (*cf.* above), strictly speaking it is a matter of a collision of state obligations with regard to the fundamental right to life – only – of the other people. Even then, the purpose of a state action must not be an intentional interference with legal assets of other people: the negative obligation is reinforced by the positive obligation (duty to protect) in the specific situation (real and immediate danger).

> Therefore, it would be impermissible, for example, to shoot at a human shield during a hostage situation in order to neutralise the perpetrator behind it, even if the purpose was to save hostages (other people).

In police operations, the assessment of the permissibility of coercive means takes place as an *ex ante*-assessment (*see* no. V.1.2.2). The use of means of coercion by the state may only take place after a well-founded comparison of the affected state obligations. In concrete terms, it is necessary to balance the positive and negative obligations with a view to concretely assessing options for action (operational variants or selection of coercive means).

> In contrast to the judgment of the German Federal Constitutional Court on the Aviation Security Act (shooting of hijacked aircrafts), we do not believe that in the above-mentioned situation there is a conflict with human dignity and the right to life of other people. The power to act lies with the perpetrator, who acts unlawfully. The only purpose of the state measure to counter danger arising from his conduct is to save the lives of other people (which,

however, must be possible in the first place – unlike in the case of shooting down an aircraft).

Despite the fact that there may be a duty to act, state intervention may be impermissible. Possible effective means of action against the perpetrator may be opposed by collateral effects on the side of the victims.

c. On the "degree of damage to victims" in particular

In *exceptional situations*, the ECtHR seems to include the criterion of risk minimisation in the assessment of the proportionality. As a result, the effects of the state security forces' conduct on potential victims are balanced against the probable effects of the conduct of the perpetrators. Thus, from an *ex ante* point of view, it is possible to assess not only the state's conduct alone, but in *comparison* to the conduct of a perpetrator.

In our opinion, the duty to minimise risk only *exceptionally* allows a decision to be made *within* the scope of a legal asset protected by fundamental rights norms. For example, an interference with the prohibition of torture (Art. 3 ECHR) in order to protect life (Art. 2 ECHR) remains prohibited. There is no margin for balancing.

If a *minimisation* of danger with a simultaneous risk of interference in the right to life of victims is conceivable, the question of the potentially permissible intensity of interference arises. In its case law, the ECtHR admits a margin of interpretation.

In the judgment *Finogenov and others v. Russia*, the ECtHR confirms the use of a potentially lethal nerve agent, unknown in its composition, to be a permissible ad hoc solution in view of the circumstances (*see* no. V.3.4.1.b and V.3.4.3.c)[1129].

The Court acknowledges that it would normally consider, «whether the police operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force and human losses, and whether all feasible precautions in the choice of means and methods of a security operation were taken.»[1130]

[1129] *Finogenov and others v. Russia*, 18299/03 (2011), §§ 235 f.

[1130] *Finogenov and others v. Russia*, 18299/03 (2011), § 208.

> But the «threat posed by the terrorists was real and very serious. The authorities knew that many of the terrorists had earlier participated in armed resistance to the Russian troops in Chechnya; that they were well-trained, well-armed and dedicated to their cause […]; that the explosion of the devices installed in the main auditorium would probably have killed all of the hostages; and that the terrorists were prepared to detonate those devices if their demands were not met.
>
> It is true that the terrorists did not activate the bombs after the gas was dispersed, although some of them remained awake for some time. However, it is mere speculation to allege that they did not execute their threat out of humanitarian considerations; it is possible that they were simply disoriented or had not received clear orders. In any event, the authorities could not know with certainty whether the terrorists would in fact carry out their threats and detonate the bombs. In sum, the authorities could reasonably have concluded from the circumstances that there existed a real and serious risk for the lives of the hostages, and that the use of lethal force was sooner or later unavoidable.»[1131]

In parallel, the Court emphasises the post-operational obligations of the state. This shifts the focus from the absolute necessity of the deployment of potentially lethal "use of force to protect" to the planning and conduct of the rescue operation. The right to life of the hostages had only been violated due to a lack of fulfilment of the state's post-operational obligation, but not already with the decision to storm the building or the use of the gas[1132].

In the judgment *Tagayeva v. Russia*, the ECtHR refers additionally to the International Humanitarian Law[1133]. It raises the question of the possible application of the *CCWC-Protocol III* (on prohibitions or restrictions on the use of incendiary weapons). Some weapons cause excessive injuries or have indiscriminate effects (*see* no. IV.3.3.3).

[1131] *Finogenov and others v. Russia*, 18299/03 (2011), §§ 220 f. The court holds «[…] that there has been no violation of Article 2 of the Convention on account of the decision by the authorities to resolve the hostage crisis by force and to use the gas» (verdict, § 3).

[1132] *Finogenov and others v. Russia*, 18299/03 (2011), §§ 266 (breach of the Convention), 226 (permissibility of the storming) and 236 (circumstances of the storming).

[1133] *Tagayeva and others v. Russia*, 26562/07 (2017), §§ 468 ff.

However, the Court was faced with difficult questions of proof[1134]. Subsequently, it did not address the use of unauthorised means of intervention but reversed the question: «[... The] evidence establishes a prima facie claim that the State agents used indiscriminate weapons upon the building while the terrorists and hostages were intermingled. Accordingly, it seems impossible that it could be ensured that the risk to the hostages could be avoided or at least minimised.»[1135]

In our opinion, the discussion of victim damage only arises in the case of existing state duties to protect. However, if such duties are in place, an endangerment must not result from governmental measures. In the defence against danger, both possible duties to protect and the prohibition of excessive measures must be taken into account[1136]. Although there is never a guarantee of success in police operations, and although the assessment of measures *ex ante* already questions the absoluteness of the protection of the fundamental right to life, there is a limitation. The toleration of harm to victims is in irresolvable contradiction to the aim of their rescue.

According to the ECtHR's case law, it can then be asked whether the use of potentially lethal means against perpetrators *and* victims in exceptional situations can be justifiable on an *ad hoc* basis if the duty of *aftercare* is comprehensively fulfilled. The degree of harm to victims could be minimised accordingly, and the state's duty to protect could at least be met retrospectively, within the context of an operation as a whole.

In our opinion, the *ex ante*-assessment would have to lead with sufficient reasonableness (objectification) to the assumption that the life of the victim as a legal asset can be adequately protected despite the choice of the means of coercion (which is also affecting a victim). This would result in a *de facto obligation to succeed*: if no victim is hurt in the result, the possible temporary endangerment by the state operation is secondary to the existing duty to protect (due to a danger posed by the perpetrators). But if victims are harmed by state action, the duty to justify is reversed against the state (on the burden

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1134 *Tagayeva and others v. Russia*, 26562/07 (2017), §§ 587 f.

1135 *Tagayeva and others v. Russia*, 26562/07 (2017), § 589.

1136 On the controversial significance of the prohibition to take inappropriate measures in the case of existing state duties to protect, *cf.* Martin, Grundrechtskollisionen, pp. 266 ff.

of proof, *see* no. VI.4.2.4– even if the possible consequence then consists merely in a violation of the procedural obligation under Art. 2 ECHR).

> The judgment in *Isayeva v. Russia* concerned an air strike on a town infiltrated by Chechen rebels. The air strike hit both Chechen fighters and civilians without distinction[1137]. The ECtHR argues that there was no early warning of the attack to the population (civilians) and the military roadblocks did not facilitate leaving the site[1138]. With regard to the number of victims, the Court suggests that it was probably significantly higher than that presented in the national investigation[1139]. In our opinion, however, the circumstances in this case (in particular the disproportionate choice of the means of coercion and the insufficient information of the population) do not support a procedure in conformity with the Convention. The ECtHR has recognised a violation of the right to life of civilians (*see* no. V.4.4.2).

The case law on Art. 2 ECHR (*Finogenov and others v. Russia*, *Tagayeva and others v. Russia* and also *Isayeva v. Russia*) suggests that the Court will accept a minimal degree of harm to victims by the security forces (which are therefore required in principle) in extreme cases if duties to protect apply and *ad hoc* acts are in question. However, according to the current state of jurisprudence, no limit for a degree of damage to victims is recognisable. This seems reasonable insofar as this issue must always be assessed on a case-by-case basis, taking into account the overall circumstances. Setting a tolerable *threshold of harm* could lead both to excessive force and to a kind of chilling effect for the forces – *i.e.*, a restriction of the scope of action for operations in the event of serious terrorist attacks.

A residual risk with regard to actual victim damage is unavoidable. Even the benchmark of the *ex ante*-assessment of threats leads to the acceptance of risks. As a general finding – not surprising from a practical point of view – it can be concluded that the better prepared a Convention State is for possible threats, the more it is able to act in a proportionate manner. This is another reason why proportionality issues in the area

[1137] *Isayeva v. Russia*, 57950/00 (2005), § 200.

[1138] *Isayeva v. Russia*, 57950/00 (2005), §§ 187 and 194.

[1139] *Isayeva v. Russia*, 57950/00 (2005), § 197.

of anti-terrorist operations are basically answered by the fulfilment of pre-operational obligations (*see* no. IV).

4.6.4. Link to the duty to investigate

If persons – both perpetrators and possibly also victims – are hurt by police operations, links to the (subsequent) duty to investigate may arise. In the judgment *Tagayeva and others v. Russia*, for example, it could not be clarified beyond reasonable doubt by whose force the numerous civilian victims had died or been hurt (*see* no. II.2.3).

> The terrorists had planted improvised explosive devices (IED) in School No. 1 in Beslan. Explosions occurred during the storming by SOF by heavy means of the army. It remained unclear how the massive explosions were triggered[1140]. The ECtHR goes into great detail on the right to know the causes and the time of death of civilians[1141]. In the context of the conflict at that time, there had been repeated hostage-takings with a large number of fatalities (among hostages)[1142]. Therefore, a large number of victims would have had to be assumed in the event of another attack[1143]. In fact, not enough attention had been paid to the protection of victims by the state authorities especially in the pre-operational sphere (*see* nos. IV.2 and IV.3)[1144]. Based on the forensic examinations and identification procedures, it was not possible to make any clear conclusions as to whether the lethal injuries to the victims had already occurred prior to the official seizure or whether they were caused by the hostage-takers or the intervening SOF.
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> The positive obligation requires state intervention to minimise the degree of harm to victims – in our opinion, this applies regardless of the origin or source of the harm.

[1140] *Tagayeva and others v. Russia,* 26562/07 (2017), §§ 74 ff., 137 ff., 145 ff. and 349.

[1141] *Tagayeva and others v. Russia,* 26562/07 (2017), §§ 266, 494 and 500.

[1142] *Tagayeva and others v. Russia,* 26562/07 (2017), § 485.

[1143] *Tagayeva and others v. Russia,* 26562/07 (2017), § 505.

[1144] *Tagayeva and others v. Russia,* 26562/07 (2017), § 491.

Already in *Finogenov and others v. Russia*, the Court focused on the procedural obligation, *i.e.,* the conduct of an effective investigation[1145]. Art. 2 ECHR had also been violated because of a «failure to conduct an effective investigation into the rescue operation»[1146].

If possible harm to victims by actions of the state security forces is assumed, an obligation to succeed principally arises. When harm to victims actually occurs through such means of coercion, which do not permit any distinction, a violation of the right to life of the victims under Art. 2 ECHR is, in our opinion, unavoidable. But that would finally mean, that the use of the means deployed *ad hoc* was already impermissible.

4.7. SIGNIFICANCE OF THE ABSOLUTE NECESSITY WHEN PROTECTING PERSONS

A use of potentially lethal force to protect persons concerns cases that generally fall under the category of real and immediate risk. If a risk is assessed as an imminent danger to life as a legal asset, the positive obligation from Art. 2 ECHR is aggregated into a concrete duty to protect. In terrorist actions, this duty to protect covers persons at risk: for example, hostages or other potentially lethally threatened people.

A use of force to protect aims to counter a danger – but it remains a use of force: the prohibition of killing according to the negative obligation also applies in principle to attackers or perpetrators. However, the justification grounds of Art. 2 (para. 2) ECHR can be applicable – then an absolute necessity is required for the use of potentially lethal means of coercion according to the text of the norm. In our opinion, the case law criteria on abstract threats (dangerous activities) must be respected when exercising both a use of force and a use of force to protect persons. The positive obligation of Art. 2 (para. 1) ECHR does not imply a prohibition of acts that lead to abstract dangers – what is required is a legal embedding. To this end, the Convention stipulates that the killing of human beings must not be intended. The prohibition of killing does protect third parties absolutely (bystanders or victims).

[1145] *Finogenov and others v. Russia*, 18299/03 (2011), § 232

[1146] *Finogenov and others v. Russia*, 18299/03 (2011), verdict, § 5.

The Convention States have a wide margin of discretion in the necessary legal regulation of the exercise of potentially lethal means of coercion in their legal framework. However, they must comply with the minimum standard of the ECtHR and the general requirements for legislation (in particular the principle of [legal] certainty; *see* no. IV.1.4.2.c). The *UN Basic Principles* represent an international consensus and are supplementary guidelines for national regulations. In the absence of adequate national legislation, the Court uses its criteria developed under case law (*see* no. V.4) to decide whether a use of means was permissible or whether it violates Art. 2 ECHR.

The ECtHR has implicitly developed benchmarks for the assessment of certain means of coercion: for potentially lethal means of coercion, it is following a *deterministic* view. This excludes balancing considerations in principle and severely restricts the use of force in general: with regard to possible aims (*e.g.,* to prevent actions by "perpetrators" or "aggressors"), but also with regard to the use of lethal means of coercion in general. Outside the framework of Art. 2 (para. 2) ECHR, in particular the use of firearms is absolutely impermissible. However, the inclusion of surrounding circumstances can also lead to further restrictions in individual cases.

In exceptional cases, the ECtHR contrasts its deterministic standard of assessment with regard to the use of firearms with the use of alternative means of coercion. If potentially lethal means of coercion are admissible in principle in individual cases, recourse to alternative means of coercion corresponds to the requirement of risk minimisation. This necessarily only succeeds under a *probabilistic* benchmark (for example, in the comparison of firearms with destabilising devices). The operational decisions regarding priorities as well as the means of intervention are interpreted by the ECtHR within the framework of the positive obligation in such a way that they do not form an impassable obstacle for the authorities[1147].

The case law on absolute necessity according to Art. 2 (para. 2) ECHR reflects the possibilities for balancing that are inherent in the Convention guarantee itself. The obligation to protect life concerns a highest-ranking legal asset to which all people are entitled equally. However, if there is a specific duty to protect certain people in certain situations (victims and uninvolved bystanders), a priority is set to actively protect them.

[1147] *Makaratzis v. Greece* (GC), 50385/99 (2004), § 69.

In no other field of application than in the case of a use of force to protect other people does the fundamental right character of the right to life become clearer. In other areas, a balancing is impermissible, as the fundamental right to life has the effect of an absolute limit in its basic function of prohibiting the intentional killing of human beings. But in the case of a collision of obligations unter that same fundamental right, a balancing (within the legal asset of life) is precisely necessary.

When assessing entire *anti-terrorist operations,* the Court is tempted to use a probabilistic benchmark to examine the proportionality of a use of force to (third parties). But what may be permissible and even necessary with regard to a specific attacker ("milder" means), however, overstretches the catalogue of exceptions according to Art. 2 (para. 2) ECHR with regard to the victims to be protected. Minimising the "overall risk" is indeed required at the level of life as a legal asset (insofar as no distinction is made between perpetrator or victim) – but it relativises the permissibility of using coercive means against bystanders. A strict benchmark applies to them, which prohibits the *increase* of risks (or the endangerment of them). In our opinion, this strict benchmark, combined with the duty to protect according to fundamental rights, precludes a "net risk view". A "risk" towards the victims must be able to be excluded *ex ante*.

The arsenal of alternative means of coercion is limited in anti-terrorist operations. If the use of a narcotic gas or the offensive use of heavy means is concerned, we believe that the limits and principles of the IHL must be taken into account. However, the limiting prohibitions of the IHL have not yet found a decisive entry into the EHCR's jurisprudence. As it represents "value judgments" as well, the relevant case law can, in our opinion, at least be used to assess the proportionality of the effect of certain means of coercion (according to the requirement of distinction).

Compliance with the principle of proportionality in any use of force requires – in general – that risks are minimised. However, contrary to what might be expected from the wording of Art. 2 (para. 2) ECHR, absolute necessity does not prove to be the main (direct) limitation for the use of potentially lethal means of coercion according to case law. Especially in the case of a use of force to protect persons, the possibility of balancing clarifies the margins of fundamental rights, which already result from the various obligations under Art. 2 ECHR. The Court is particularly

strict with regard to the duty to investigate – for this element of the right to life, the (relativising) proportionality test does not apply (although the duty to investigate does not contain a duty to succeed and therefore cannot claim absolute validity; *see* no. III.2.4 but also VI.4.3.4).

5. THE RIGHT OF STATE ACTORS TO BE PROTECTED AND SELF-DEFENCE

The fulfilment of police tasks is generally associated with personal risks and sometimes dangers for members of the security forces. Also police operations can directly and indirectly affect the police personnel involved.

> *Direct* effects include physical and psychological stress caused by operations as such, as well as special situations or experiences during operations. *Indirect* effects include, most notably, psychological stress in the aftermath (*cf.* for example, on the indirect losses of the security forces in the Northern Ireland conflict, *see* no. VI.2.3) as well as any investigations.

Art. 2 ECHR protects life as a legal asset. It is undisputed that the obligations arising from it apply in anti-terrorist operations to both victims and perpetrators (and this in principle equally).

> In the judgment *McCann and others v. The United Kingdom*, the *Grand Chamber* examined a violation of the right to life of the three terrorists. The ECtHR's reference to the right to life of the hostages alone, for example in *Tagayeva and others v. Russia* (also for procedural reasons), does not contradict the principle.

The question of the application of the fundamental right to members of the state security forces is more difficult to answer. They act as representatives of the state and are in an internal hierarchical and subordinate relationship to state agencies. State security forces may be obliged to act in certain ways – especially if it is in accordance with the fulfilment of the respective state agency's duties. Depending on the Convention State, state officials are not entitled to certain fundamental rights guarantees, or only to a limited extent (*i.e.,* the right to strike).

In the judgment *Tagayeva and others v. Russia*, the ECtHR did mention the losses among the special operations forces – however, issues surrounding their right to life were not further debated: «[…] ten members of the elite *Vympel* and *Alfa* units, including three group commanders, had lost their lives and about thirty were wounded – the biggest losses ever sustained by the units in a single operation»[1148].

The fundamental right to life is based on human existence (*see* no. III.2). This could lead to the question of whether the state would have to avoid endangering its security forces.

This would severely restrict the state's options for taking action in anti-terrorist operations – and under certain circumstances the state would then be faced with the dilemma of violating its obligations to protect and act under Art. 2 ECHR in any case – just towards different persons. The legal protection of life would then in fact result in a favouring of terrorist activities.

5.1. RIGHT TO LIFE AND PHYSICAL INTEGRITY

5.1.1. Personal scope of Article 2 ECHR

The ECtHR has dealt with the right to life of military personnel in several complaints. If conscripts or persons serving voluntarily with state security forces were excluded from the scope of Art. 2 ECHR, this would have to lead procedurally to the inadmissibility of the corresponding complaints.

In the decision *Álvarez Ramón v. Spain*, the Court indicated in the context of the investigation of the death of a soldier that an effective legal framework must also cover conscripts (*obiter dictum* with reference to the procedural obligation). But the Court did not intervene for factual reasons (and not *ratione personae*): The national authorities had indeed clarified the death of the soldier *Julio López Álvarez*. «[Le] seul fait du constat du décès du fils de la requérante, pendu à la citerne des toilettes de la chambre qu'il occupait à l'infirmerie de la caserne où il faisait son service militaire, ne permet pas, en soi et dans les

[1148] *Tagayeva and others v. Russia,* 26562/07 (2017), § 93.

circonstances particulières de l'affaire, de conclure que l'obligation de protéger la vie, au sens de l'article 2 de la Convention, n'a pas été respectée.»[1149]

In the judgment *Abdullah Yılmaz v. Turkey*, the ECtHR considered a complaint concerning the death of a soldier admissible. The case concerned a fatal conflict respectively the ill-treatment of *Maşallah Yılmaz* in the army (*see* no. IV.4.1). The positive obligation of the Convention States «[qui] vaut sans conteste dans le domaine du service militaire obligatoire […], implique avant tout pour les Etats le devoir primordial de mettre en place un cadre législatif et administratif de prévention efficace.»[1150]

In the judgment *Beker v. Turkey*, the ECtHR also considered the complaint concerning the death of a professional military officer admissible. *Mustafa Beker* was working as an expert corporal (employee of the armed forces) in a special team of the gendarmerie. He had been found shot dead in a military compound. The ECtHR found that the conditions for accepting the complaint (Art. 35 para. 3 ECHR) were fulfilled and – probably with a view to Beker's *special status relationship* to the state[1151] – added that the complaint «is not inadmissible on any other grounds»[1152].

In the judgment *Mustafa Tunç and Fecire Tunç v. Turkey*, the *Grand Chamber* assessed the investigation into the circumstances of the death of Corporal *Cihan Tunç*, who was found fatally shot on a watchtower[1153]. Turkey had argued procedurally that the applicants lacked victim status[1154]. The *Grand Chamber* explicitly rejected this argumentation with regard to the procedural obligation in question because «[…] the circumstances of Cihan Tunç's death were not established from the outset in a sufficiently clear manner. Various explanations were possible, and none of them was manifestly implausible in the initial stag-

1149 *Álvarez Ramón v. Spain* (AD), 51192/99 (2001), p. 7.

1150 *Abdullah Yılmaz v. Turkey*, 21899/02 (2008), § 56.

1151 *Beker v. Turkey*, 27866/03 (2009), §§ 43 ff.

1152 *Beker v. Turkey*, 27866/03 (2009), § 38.

1153 *Mustafa Tunç and Fecire Tunç v. Turkey* (GC), 24014/05 (2015), §§ 12 ff.

1154 *Mustafa Tunç and Fecire Tunç v. Turkey* (GC), 24014/05 (2015), §§ 12 ff.

> es [...]. Thus, the State was under an obligation to conduct an investigation. The mere fact that the authorities made a payment could not exempt them from their procedural obligation.»[1155]

The Court thus recognises in principle the personal scope of application of Art. 2 ECHR also for persons performing compulsory military service or belonging to the security force[1156].

> Compulsory military service enforceable by state coercion is permissible under Art. 4 ECHR[1157]. As a rule, compulsory military service cannot be avoided by legal means – unless a state would provide for alternative service or exemptions from service[1158].

In each Convention State «health and well-being must be adequately secured by medical assistance»[1159]. Another question – which cannot be answered in general terms – is what the concrete consequences of this obligation are.

> The above-mentioned case law suggests that the Convention States have a special responsibility based on Art. 2 ECHR, at least in cases of ill-treatment of members of their security forces as well as in the investigation of their deaths.

5.1.2. Rules for the protection of soldiers' lives (positive obligation)

The recent case law of the ECtHR confirms the obligation of states to create *rules* to protect the lives of soldiers; these apply generally to military activities and operations.

1155 *Mustafa Tunç and Fecire Tunç v. Turkey* (GC), 24014/05 (2015), § 134.

1156 *Cf.* Reid, Practitioner's Guide, 36-006.

1157 *Cf.* Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), pp. 285 f. (military service) and pp. 287 f. (positive obligations under Art. 4 ECHR in general).

1158 Some scholars argue that the scope of protection of Art. 4 ECHR should be limited to compulsory military service; *cf., e.g.,* Zwaak, Prohibition of Slavery and Forced Labour, in: van Dijk/van Hoof/van Rijn/Zwaak (Eds.), Theory and Practice, p. 436.

1159 Reid, Practitioner's Guide, 36-006 (with reference to the case of a physical disciplinary measure which in the specific case violated Art. 3 ECHR).

This means that not only internal rules of conduct or instructions in armies are required, but also rules for all military activities, which serve to protect the soldiers as well.

> The «primary duty of a State is to put in place rules geared to the level of risk to life or limb that may result not only from the nature of military activities and operations, but also from the human element that comes into play when a State decides to call up ordinary citizens to perform military service. Such rules must require the adoption of practical measures aimed at the effective protection of conscripts against the dangers inherent in military life and appropriate procedures for identifying shortcomings and errors liable to be committed in that regard by those in charge at different levels [...].»[1160]

For the ECtHR, it also seems to be of importance whether soldiers have to perform compulsory military service or are professional soldiers. Insofar as individuals are under a certain degree of control of the state or are in a vulnerable position, there is a special state responsibility to protect their lives[1161].

> «In the context of individuals undergoing compulsory military service [...], as with persons in custody, conscripts are within the exclusive control of the authorities of the State, since any events in the army lie wholly, or in large part, within the exclusive knowledge of the authorities, and that the authorities are under a duty to protect them [...].»[1162]

For the existence of a state responsibility towards its own soldiers, the Court focuses on the knowledge (need) to know about possible dangers.

> «A positive obligation will arise, where it has been established that the authorities knew or ought to have known at the time of the existence of a real

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[1160] *Mosendz v. Ukraine*, 52013/08 (2013), § 21 and *Perevedentsevy v. Russia*, 39583/05 (2014), § 91; quite similarly, in *Kılınç and others v. Turkey*, 40145/98 (2005), § 41.

[1161] Gerards, Right to Life, in: van Dijk/van Hoof/van Rijn/Zwaak (Eds.), Theory and Practice, p. 370.

[1162] *Malik Babayev v. Azerbaijan*, 30500/11 (2017), § 66; more restrained *Mosendz v. Ukraine*, 52013/08 (2013), § 92.

> and immediate risk to the life of an identified individual by a third party or himself and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.»[1163]

With regard to the extent of state responsibility, the ECtHR refers also in cases of military conscripts to the fact that this should not impose impossible or disproportionate burdens on the state.

> Thus in the judgment *Malik Babayev v. Azerbaijan* (*see* no. V.5.1.4) on the duty to investigate after the violent death of the soldier *Zakir Babayev*: «[… Such] an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. Accordingly, not every claimed risk to life can entail a Convention requirement for the authorities to take operational measures to prevent that risk from materialising […].»[1164]

The ECtHR thereby uses the – general – formula for dealing with concrete danger prevention (real and immediate risk) including the limits of the positive obligation (*see* nos. III.2.2.5 and III.2.2.7.d). In our opinion, this is not entirely consistent because the state sets essential parameters itself when deploying its security forces.

> In our opinion, it must be taken into account that soldiers do not enter latently risky situations voluntarily and of their own choice. Where and how they are deployed, equipped and, if necessary, protected is decided by state authorities. Therefore, it is also up to them to assess potentially risky deployments and, if necessary, to take further measures. From a fundamental rights perspective, it is irrelevant which state agency – whether the one issuing the order, the one in command or a completely different authority – is responsible for this duty.

[1163] *Malik Babayev v. Azerbaijan*, 30500/11 (2017), §§ 66 f.

[1164] *Malik Babayev v. Azerbaijan*, 30500/11 (2017), § 66.

5.1.3. Special duty to protect life

If a Convention State stipulates general compulsory military service, the question of the fitness of individual conscripts arises. Under certain circumstances, it may be a violation of the right to life to keep a person under the flag who is not (or no longer) fit for service.

> *İbrahim Serkan Gündüz* had to carry out his compulsory military service in a dangerous area. He was treated inhumanely by his superiors and suffered from psychological problems. Whether he had then still been fit for military service at all prior to his suicide was not investigated[1165]. Under these circumstances, the ECtHR recognises the maintenance of the service obligation as a violation of the positive obligation to protect life: «Au vu de l'ensemble de ces éléments, [...] les autorités militaires auraient dû savoir que l'engagement et le maintien d'İbrahim Serkan Gündüz sous les drapeaux comportaient un risque réel pour l'intégrité physique et psychique de celui-ci.»[1166]

The ECtHR also recognises a violation of Art. 2 ECHR in cases of assaults on soldiers within the army as well as in cases of unexplained deaths or suicides of soldiers. In this context, the hierarchical relationships and the resulting duties of superiors also have a special significance with regard to the well-being of the troops – or, more precisely, of individual members of the armed forces.

> In *Mosendz v. Ukraine*, the death of the conscript soldier who was found shot was to be examined. Mosendz' suicide was driven «by his bullying and ill-treatment by his hierarchical military supervisors. [... The] State is therefore to bear responsibility for the death.»[1167]
>
> Similarly, in *Kılınç and others v. Turkey*, where the authorities were aware of the mental health problems of *Mustafa Canan Kılınç*, a military conscript. Thus, they should also have been aware of the suicide risk during his military

[1165] *Gündüz and others v. Turkey*, 4611/05 (2011), §§ 56 ff. and 73.

[1166] *Gündüz and others v. Turkey*, 4611/05 (2011), § 80.

[1167] *Mosendz v. Ukraine*, 52013/08 (2013), § 112.

service[1168]. Since the (military) authorities had not taken any precautionary measures against this, they were considered responsible for his suicide[1169].

In the case of *Perevedentsevy v. Russia*, the recruit *Mikhail Perevedentsev* had been abused and blackmailed. He was later found dead with a sling around his neck. Background of the events was the "*dedovshichina*" (rule of the grandfathers) known in the Russian army[1170]. With reference to national law, the ECtHR stresses the responsibility of a military commander «for all aspects of the life and functioning of the military unit, its subdivisions and each soldier. [... Further] the military commander of the unit was responsible for, among other things, maintaining high standards with regard to morale and the psychological well-being of the personnel under his command; that he was to thoroughly study the personnel under his command by way of personal communication and to be familiar with the personal and psychological features of his subordinates. [... The] domestic authorities have [...] been aware of M.P.'s psychological difficulties, but failed to determine the seriousness of those difficulties which were of a nature and degree capable of putting M.P.'s life at risk, regard being had to the general context of dedovshchina endemic in the Russian army, and to take appropriate measures to prevent that risk from materialising. The Court has no reason to hold otherwise. It finds, therefore, that the State failed to comply with its positive obligation to protect the life of M.P.»[1171]

Further obligations of the Convention States may arise in the care of injured forces (specifically on the duty to provide aftercare, *see* no. VI.2.3). In our opinion, there is no difference between injured civilians and injured security forces. Injured people are to be treated – analogous to international humanitarian law – as persons *hors de combat* – in this respect (*mutatis mutandis*) no special duties can be imposed on them (such as the duty to continue to fulfil the mission despite life-threatening injury).

[1168] *Kılınç and others v. Turkey*, 40145/98 (2005), § 49.

[1169] *Kılınç and others v. Turkey*, 40145/98 (2005), §§ 50 ff. and 58.

[1170] *Perevedentsevy v. Russia*, 39583/05 (2014), §§ 5 ff.

[1171] *Perevedentsevy v. Russia*, 39583/05 (2014), §§ 96 and 100.

5.1.4. Procedural obligation

The procedural obligation under Art. 2 ECHR (*see* in detail nos. III.2.4 and VI.4) also applies to deaths in the ranks of the state security forces. The ECtHR seems to take into account the specific hierarchical relationships and to distinguish whether a death is related to state institutions and their functioning – or may have other causes.

> Thus, in *Mustafa Tunç and Fecire Tunç v. Turkey* (*see* no. V.5.1.1), the *Grand Chamber* recognised that the circumstances of the death on the watchtower, while remaining unclear, had been sufficiently investigated. «While accepting [...] that the entities which played a role in the investigation enjoyed full statutory independence, the Court finds, taking account, on the one hand, of the absence of direct hierarchical, institutional or other ties between those entities and the main potential suspect and, on the other, of the specific conduct of those entities, which does not reflect a lack of independence or impartiality in the handling of the investigation, that the investigation was sufficiently independent within the meaning of Article 2 of the Convention. [...] Cihan Tunç's death did not occur in circumstances which might, a priori, give rise to suspicions against the security forces as an institution, as for instance in the case of deaths arising from clashes involving the use of force in demonstrations, police and military operations or in cases of violent deaths during police custody. Even on the basis of the criminal hypothesis which seems to be favoured by the applicants, suspicions fell on M.S. rather than on the authorities. Yet the fact is that M.S. was a mere conscript, and not a rank-holding army officer. While he was certainly a serviceman, it remains the case that the suspicions against him were not related to his particular status as a gendarme or as a member of the armed forces.»[1172]

The procedural obligation had been violated in the case of an unexplained death of a soldier on guard duty.

> The state authorities did not have to assume that *Zakir Babayev* was in any particular danger to himself or others (*see* no. V.5.1.2)[1173]. However, the nature

[1172] *Mustafa Tunç and Fecire Tunç v. Turkey* (GC), 24014/05 (2015), §§ 254 f.

[1173] *Malik Babayev v. Azerbaijan*, 30500/11 (2017), §§ 69 ff.

of the investigation failed to meet the requirements of effectiveness under the procedural obligation of Art. 2 ECHR in several respects: The «[…] domestic prosecutors and courts overruled the relevant decisions taken by the investigator, citing a failure to carry out a comprehensive criminal investigation. It was repeatedly noted that the investigation had been incomplete and that the decisions to terminate the criminal proceedings had been ill-founded.»[1174] Moreover, the investigating authorities were not independent: The «[…] inspection of the scene of the crime and the collection of the evidence were carried out by the commander of military unit no. 171, Major A.F., in the presence of two attesting witnesses, E.Q. and N.D., who were soldiers in the same military unit. In that connection, the Court notes that such an inspection – carried out by military staff belonging to the military unit in which Z.B. had served – cannot be considered to have been part of an ‹effective investigation› for the purposes of Article 2 of the Convention as it was carried out by persons who could not be considered as independent of anyone likely to be implicated in the events […].»[1175] Additionally, the study proved to be incomplete in terms of content[1176].

In our opinion, there is also a duty to investigate when potentially lethal force is used against security forces. However, special questions may arise in the relationship between the respective Convention State and the affected members of its security forces. They must be taken into account in the effectiveness of an investigation (*see* no. VI.4.2).

5.1.5. Significance and further development

The personal scope of the right to life also extends to members of state security forces. This applies both to the positive obligation and to the duty to investigate in the event of a threat to life[1177]. In our opinion, the development of the ECtHR's subtle-founded

[1174] *Malik Babayev v. Azerbaijan*, 30500/11 (2017), § 83.

[1175] *Malik Babayev v. Azerbaijan*, 30500/11 (2017), § 84.

[1176] *Malik Babayev v. Azerbaijan*, 30500/11 (2017), §§ 85 f.

[1177] Thus, in the event of the death of members of security forces, the Convention State has the duty to investigate the circumstances; *cf.* Reid, Practitioner's Guide, 36-006 (with reference to *Hasan Çalışkan v. Turkey,* 13094/02 [2008]).

jurisprudence is not yet complete. The Court has ruled on questions of *admissibility* in cases of conscripts; in the meantime, it also accepts appeals by professional military personnel. A *compulsory service* excludes the voluntary assumption of special risks for members of the security forces. In our opinion, a compulsorily enforceable duty to serve has no direct connection to the question of a restriction of the personal scope of protection of Art. 2 ECHR – and thus to the possible existence of state duties to protect from the right to life.

Security and rescue forces may be subject to special duties to act (duties to deploy).

> Insofar as a profession has been chosen voluntarily, the risks and duties of action associated with this profession are in principle also assumed (*informed consent*). For example, it is one of the duties of firefighters to put out fires, one of the duties of paramedics to expose themselves to dangers and one of the duties of police officers to intervene in perilous situations to avert danger.

However, members of the security forces have not, as it were, assumed the risk of any psychological harm by taking up their functions or professions (on the limit of consent with regard to the right to life, *see Vilnes and others v. Norway* and nos. III.2.2.3 and III.2.2.7). In our opinion, specifics arise in the intensity of state obligations towards members of the security forces. Professionals deliberately expose themselves to *certain* dangers – but they are also better trained and possibly better equipped to deal with it than other people. In our opinion, states are obliged to take the right to life of security forces *adequately* and as far as possible into account within the context of the fulfilment of their tasks.

> It would be impermissible to expose security forces to a danger or to deny them protective equipment for no good reason. It would also be impermissible to deny them the right to self-defence.

In our opinion, it can be assumed that today all members of state security forces are protected by Art. 2 ECHR. Situations of war are a real exception for members of armed forces (whether serving voluntarily or compulsorily). If they are killed while on duty, the duty to investigate also applies unreservedly to members of security forces. Thus, there is ultimately also a gateway to the substantive obligations of the

right to life of members of state security forces – by investigating the reasons and responsibilities for their fate.

5.2. SELF-DEFENCE

The right to self-defence belongs to the legal and administrative framework of the right to life (Art. 2 para. 1 ECHR). According to its meaning, it is directed at private individuals and allows them to intervene in the legal interests of third parties in order to defend their own (at least equivalent) legal assets against unlawful attacks by these third parties.

The *defence of any person from unlawful violence* is permissible in principle under the Convention (Art. 2 [para. 2, letter a] ECHR). This exception is directed at the Convention States (*i.e.,* not directly at private individuals). If state security forces act in self-defence in concrete situations, a parallelism arises between criminal law and fundamental rights. A unifying element is the absolute necessity of the used means, which is measured by the threatened legal asset (life)[1178]. The exclusion of a right of self-defence for members of state security forces would, in our opinion, conflict with their right to life (*see* no. V.5.1.5).

> The ECtHR dealt with the acts of state security forces in self-defence in particular in the judgments in *McCann and others v. The United Kingdom* (GC), *Giuliani and Gaggio v. Italy* (GC), *Bubbins v. The United Kingdom*, *Ramsahai and others v. The Netherlands* (GC), *Kelly and others v. The United Kingdom* and in the decision *Brady v. The United Kingdom* (AD).

There is some criticism in the literature that the Court does not apply its case law on the extension of state responsibility, established in *McCann and others v. The United Kingdom* (GC), in the same way in every case and does not always assess operations as a whole in the case of police activities[1179].

[1178] In this sense probably *Ernest Bennett v. the United Kingdom* (AD), 5527/08, § 71.

[1179] Dickson, ECHR and the Conflict in Northern Ireland, p. 258.

5.2.1. Invocation of self-defence by state security forces

The *UN Basic Principles* postulate the permissibility for state security forces to use firearms for appropriate self-defence within a narrow framework (§ 9 *e contrario*):

> *Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, (…) and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.*

According to the case law of the ECtHR, members of state security forces also have the right to self-defence. However, they are required to act in *honest belief* and within the limits of proportionality.

> The Court «has never found that a person purporting to act in self-defence honestly believed that the use of force was necessary but proceeded to find a violation of Article 2 on the ground that the belief was not perceived, for good reasons, to be valid at the time. Rather, in cases of alleged self-defence it has only found a violation of Article 2 where it refused to accept that a belief was honest […] or where the degree of force used was wholly disproportionate […].»[1180]

If self-defence (as probably in most cases) considers the use of force, the ECtHR applies its generally strict standard[1181].

a. Acting in honest belief

Security forces can spontaneously get into individual dangerous situations. Human behaviour is sometimes unpredictable, and situations can derail (even unintentionally). For state security forces, specific questions arise in tactical operations with regard to their knowledge or what they need to know about specific threats (for the *honest belief*, *see* no. V.4.2).

[1180] *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), § 247.

[1181] *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 135 «The test of whether the use of force is reasonable, whether in self-defence or to prevent crime or effect an arrest, is a strict one».

If the security forces have a margin of manoeuvre in concrete situations, they must be allowed to make individual assessments based on the situation and to act tactically appropriately – within the limits of what is legally permissible. The assessment of the permissibility of acts of self-defence (as well as of self-defence assistance) consequently also includes an individual-subjective component.

The judgment in *Bubbins v. The United Kingdom* was about *Michael Fitzgerald*, who «was shot dead by an armed police officer at his flat [...], following a siege»[1182]. Fitzgerald was heavily drunk at the time[1183]. The police officer using his firearm had seen a gun pointed at him and assumed that he was in a life-threatening situation. In fact, Fitzgerald had been holding a replica gun. The fatal shot fired at the person believed to be an intruder was therefore justified for the ECtHR.

«Officer B observed through his gun sight that the barrel of the handgun appeared to be pointing directly at him. He was afraid for his own safety and shouted: ‹Armed police. Drop the gun or you will be shot.› The occupant remained in his threatening stance. Officer B then squeezed the trigger of his carbine and fired one shot which hit the occupant in the chest.»[1184]

«[...] Officer B honestly believed that his life was in danger and that it was necessary to open fire on Michael Fitzgerald in order to protect himself and his colleagues. [...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 [...]. [... The] use of lethal force in the circumstances of this case, albeit highly regrettable, was not disproportionate and did not exceed what was absolutely necessary to avert

1182 *Bubbins v. The United Kingdom*, 50196/99 (2005), § 10 (on the facts of the case in detail §§ 10 ff.).

1183 *Bubbins v. The United Kingdom*, 50196/99 (2005), § 69.

1184 *Bubbins v. The United Kingdom*, 50196/99 (2005), §§ 58 f.

what was honestly perceived by Officer B to be a real and immediate risk to his life and the lives of his colleagues.»[1185]

The *honest belief* of security forces is usually connected to further information. For example, general and specific assessments of a situation or other assumptions can encourage the authorities in their acting (for *Armani Da Silva v. The United Kingdom*, *see* no. V.4.2.3).

For the *Grand Chamber*, it is decisive with regard to the (putative) self-defence of the SFO «whether the person had an honest and genuine belief that the use of force was necessary. [...] whether the belief was subjectively reasonable, having full regard to the circumstances that pertained at the relevant time»[1186].

Then, however, there is an anticipatory responsibility of the state agencies with regard to the correctness (or objective resilience) of the specific situational picture (*see* no. V.4.2.4).

b. Proportionality

The assessment of the appropriateness (or proportionality) of the use of coercive means in self-defence situations is a difficult undertaking even from a criminal law perspective, particularly when actions of the authorities are to be assessed. Where spontaneous self-defence situations arise in the context of their ordinary policing, members of the security forces are always allowed to defend themselves within the permissible limits. The permissibility of the use of their means of coercion for this purpose depends largely on the legal asset threatened. If the lives of members of the security forces are directly endangered, they may also defend themselves by using their weapons.

In the judgment *Ramsahai and others v. The Netherlands*, the *Grand Chamber* had to judge such a self-defence situation. *Moravia Ramsahai* was stopped by two police officers after the armed theft of a scooter[1187]. Then the situation escalated very quickly: «Officer Bultstra saw Moravia Ramsahai draw a pistol from his trouser belt. Officer Bultstra then dropped a two-way radio which

[1185] *Bubbins v. The United Kingdom*, 50196/99 (2005), §§ 138 ff.

[1186] *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), § 248.

[1187] *Ramsahai and others v. The Netherlands* (GC), 52391/99 (2007), §§ 14 ff.

> he had been holding in his hand, drew his service pistol and ordered Moravia Ramsahai to drop his weapon. Moravia Ramsahai failed to do so. Officer Brons, the driver of the patrol car, then approached. It was stated afterwards that Moravia Ramsahai raised his pistol and pointed it in the direction of Officer Brons, who also drew his service pistol and fired. Moravia Ramsahai was hit in the neck»[1188]. The *Grand Chamber* relied on the findings of the previous courts judging the case for the pursuit and arrest. The police officers had drawn their weapons solely on the assumption of a serious threat by the opposing person; finally, the fatal firing occurred in self-defence[1189]: «Having […] established the facts, the Chamber was unable to find that Officers Brons and Bultstra ought to have sought further information or called for reinforcement. It went on to hold that the use of lethal force had not exceeded what was ‹absolutely necessary› for the purposes of effecting the arrest of Moravia Ramsahai and protecting the lives of Officers Brons and Bultstra and that, consequently, the shooting of Moravia Ramsahai by Officer Brons did not constitute a violation of Article 2 of the Convention.»[1190]

In our opinion, the instruction and training of security forces are of particular importance in the application of the principle of proportionality (*see* nos. IV.4.2 and IV.4.3.2). In addition to knowledge of the legal situation, they must be able to apply coercive means in a tactically correct manner. This includes in particular the calling of further intervention forces or the immediate taking of protective measures.

Legal assets other than life may not be defended with the use of potentially lethal means of coercion, even in self-defence situations. The question may arise as to whether abstract dangers may be averted by invoking a situation of self-defence or state of emergency; for example, if there is a threat to critical infrastructures and thus to protect public interests or legal assets. In our opinion, the element of an immediate threat for life as a legal asset should be the primary consideration.

1188 *Ramsahai and others v. The Netherlands* (GC), 52391/99 (2007), § 18.

1189 *Ramsahai and others v. The Netherlands* (GC), 52391/99 (2007), §§ 276 ff. and 280 ff.

1190 *Ramsahai and others v. The Netherlands* (GC), 52391/99 (2007), § 282.

5.2.2. Erroneous assessments by the authorities

In operations by security forces, the question arises as to what extent self-defence situations can be foreseen and whether they have to be prevented proactively. In our opinion, the assessment of the situation *ex ante* is crucial[1191]. In certain circumstances, it may be necessary to refrain from police action (*e.g.,* even a seizure) in the case of an obviously increased danger to other persons or the state agents themselves, and to wait instead. For the ECtHR, possible misjudgments do not *per se* lead to a violation of the right to life if things have gone wrong.

In *Brady v. The United Kingdom*, police authorities had received a tip from an informant about an armed burglary. A police operation was set up to apprehend the perpetrators in the act[1192]. While being arrested, *James Brady* was shot by a police officer, who had assumed that Brady was pointing a gun at him[1193].

The applicant submitted «that the whole firearms operation was grossly negligent and incompetently planned. [... No] proper or adequate assessment was given as to the risk to the life of the deceased, even though the police knew about the proposed robbery some 4 days before the incident and could have planned ahead, instead of just 6 hours before the incident. [... Those] planning the operation failed to have regard to the inevitability that lethal force would be used.»[1194]

In its decision, the ECtHR first addressed the concrete circumstances of the self-defence situation: based on the material in the case, it assumes that «Officer A honestly believed that it was necessary to shoot James Brady in order to protect himself. This belief derived from good reasons, perceived at the time to be valid, which were later shown to be mistaken. It is not for the Court with

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1191 *Bubbins v. The United Kingdom*, 50196/99 (2005), § 147: «the Court must be cautious about revisiting the events with the wisdom of hindsight».

1192 *Brady v. The United Kingdom* (AD), 55151/00 (2001), pp. 2 f.

1193 *Brady v. The United Kingdom* (AD), 55151/00 (2001), pp. 2 f.

1194 *Brady v. The United Kingdom* (AD), 55151/00 (2001), p. 6.

> detached reflection to substitute its own opinion of the situation for that of a police officer who was required to react in the heat of the moment»[1195].
>
> He then dealt with the decision on police action: The «decision not to arrest the men until they attempted to enter the premises cannot be regarded as unreasonable in the circumstances. If there had been insufficient evidence of a crime having been committed, there would have been no possibility of bringing criminal charges or a prosecution. Nor is the Court persuaded that the plan in itself rendered the use of lethal force either inevitable or highly probable. […] Operations of this kind inevitably require a certain amount of flexibility of response to evolving circumstances. Errors of judgment or mistaken assessments, unfortunate in retrospect, will not per se entail responsibility under Article 2 of the Convention.»[1196]

In our opinion, it remains unclear why the ECtHR, with this reasoning and after a substantive examination of the concrete circumstances of the case, comes to a decision of admissibility. It might just as well have accepted the complaint and dismissed it on the merits. In doing so, the Court could also have addressed the question of whether there is a disproportionate burden on the state if it is no longer allowed to take the risk of catching the perpetrators in the act (a certain parallel to the ambush operations against terrorists is unmistakable; *see* no. V.5.2.4).

5.2.3. Obligation to exclude self-defence situations?

The question arises as to what precautions the authorities must take, especially in the case of well-directed police action, in order to exclude the use of force in self-defence situations. In respect thereof, the ECtHR is in principle willing to consider the planning and control of police action.

> «In determining whether the force used is compatible with Article 2, it may […] be relevant whether a law enforcement operation has been planned and con-

[1195] *Brady v. The United Kingdom* (AD), 55151/00 (2001), p. 8.

[1196] *Brady v. The United Kingdom* (AD), 55151/00 (2001), p. 9.

trolled so as to minimise to the greatest extent possible recourse to lethal force or incidental loss of life.»[1197]

a. In general

This presumes that the conduct of the security forces can be planned and controlled in the first place.

> «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.»[1198]

When considering the further circumstances of a self-defence act, the ECtHR does not limit itself to a mere search for errors but makes an overall assessment.

> In the case of *Bubbins v. The United Kingdom*, there were indications that the alleged burglar and the flat owner could have been the same person. The police had been alerted by Fitzgerald's neighbour who (consequently) had a suspicion. Through the window, a man with a (supposed) weapon was recognised several times. Although no negotiator had been available, there was an experienced inspector on the spot. Warning calls had been made before the shot was fired[1199]. «Above all, it would appear that the police were at all times unwilling to take precipitate action, but tried to defuse the situation without recourse to lethal force or to tactics which might provoke a violent response from the man inside the flat. It is significant in this connection that Inspector Kelly ordered that night personnel be called out, thus indicating a firm intention to avoid a confrontation and the risk of bloodshed».[1200] The ECtHR did not see any violation of Art. 2 ECHR in the police conduct: «it has not been shown that the operation at issue was not planned and organised in

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[1197] *Bubbins v. The United Kingdom*, 50196/99 (2005), § 136.

[1198] *Bubbins v. The United Kingdom*, 50196/99 (2005), § 141.

[1199] *Bubbins v. The United Kingdom*, 50196/99 (2005), §§ 142 ff.

[1200] *Bubbins v. The United Kingdom*, 50196/99 (2005), § 148.

> a way which minimised to the greatest extent possible any risk to the life of Michael Fitzgerald».[1201]

In the judgment *Giuliani and Gaggio v. Italy*, the *Grand Chamber* had to assess the circumstances of a fatal shooting by the Carabiniere M.P. As the incident had occurred in the context of a major police operation (protection of the G8 summit in Genoa), it assessed the use of weapons from different perspectives: First, the Court asked whether the lethal coercive measure was justified in itself – focusing on the question of self-defence[1202]. Secondly, it examined the legal bases for the use of coercion (*see* no. IV.1.4.2.a) [1203] and, thirdly, the compatibility of the organisation and planning of police operations with the right to life[1204].

The *Grand Chamber* concluded that the reaction of the Carabiniere M.P. to Giuliani's attack with a thrown object (*see* nos. II.2.5 and IV.2.1) was in self-defence and that the use of firearms against the attacker had therefore been justified.

> The officer's use of his weapon had taken place from a vehicle. He was in it together with other Carabinieri who all had been injured priorly. During a clash between demonstrators and security forces, the vehicle could not be withdrawn due to a blocked road. The jeep's location was overrun[1205]. In the specific situation, various factual elements were essential for the *Grand Chamber*:
>
> After the enclosure of the jeep, the freedom for acting was in the hands of the violent demonstrators: «This was quite clearly an unlawful and very violent attack on a vehicle of the law-enforcement agencies which was simply trying to leave the scene and posed no threat to the demonstrators. Whatever may have been the demonstrators' intentions towards the vehicle and/or its occupants,

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[1201] *Bubbins v. The United Kingdom*, 50196/99 (2005), § 151.

[1202] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), §§ 158 ff.

[1203] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), §§ 197 ff.

[1204] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), §§ 219 ff.

[1205] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), §§ 22 and 28.

the fact remains that the possibility of a lynching could not be excluded, as the Genoa District Court also pointed out.»[1206]

The «footage and the photographs in the file show that, as soon as it became hemmed in by the refuse container, the jeep [...] was attacked and at least partially surrounded by the demonstrators, who launched an unrelenting onslaught on the vehicle and its occupants, tilting it sideways and throwing stones and other hard objects. The jeep's rear window was smashed and a fire extinguisher was thrown into the vehicle, which M.P. managed to fend off. The footage and photographs also show one demonstrator thrusting a wooden beam through the side window, causing shoulder injuries to D.R., the other carabiniere who had been taken off duty.»[1207]

The firing police officer was allowed to assume that the attack was ongoing and that he himself was in mortal danger: «In this extremely tense situation Carlo Giuliani decided to pick up a fire extinguisher which was lying on the ground, and raised it to chest height with the apparent intention of throwing it at the occupants of the vehicle. His actions could reasonably be interpreted by M.P. as an indication that, despite the latter's shouted warnings and the fact that he had shown his gun, the attack on the jeep was not about to cease or diminish in intensity. Moreover, the vast majority of the demonstrators appeared to be continuing the assault. M.P.'s honest belief that his life was in danger could only have been strengthened as a result. In the Court's view, this served as justification for recourse to a potentially lethal means of defence such as the firing of shots.»[1208]

b. Legal bases of self-defence in particular

The basis for the exercise of self-defence under national (criminal) law is often open to interpretation. The ECtHR exercises some restraint.

[1206] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 187.

[1207] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 186.

[1208] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 191.

> «The [...] Convention does not oblige Contracting Parties to incorporate its provisions into national law [...]. Furthermore, it is not the role of the Convention institutions to examine in abstracto the compatibility of national legislative or constitutional provisions with the requirements of the Convention [...].»[1209]

The Court's main concern is that the constellations in question are «regulated by domestic law and that a system of adequate and effective safeguards exists to prevent arbitrary use of lethal force»[1210]. In its case law, the ECtHR draws a link from the absolute necessity of the use of potentially lethal means of coercion (Art. 2 [para. 2] ECHR) to the rules of self-defence in criminal law[1211].

> In *Armani Da Silva v. The United Kingdom*, the *Grand Chamber* carries out a differentiated analysis. In its assessment of the national legal bases, it comes to the conclusion that «[...] it cannot be said that the test applied in England and Wales is significantly different from the standard applied by the Court in the McCann and others judgment and in its post-McCann and others case-law [...]. Bearing in mind that the Court has previously declined to find fault with a domestic legal framework purely on account of a difference in wording which can be overcome by the interpretation of the domestic courts [...], it cannot be said that the definition of self-defence in England and Wales falls short of the standard required by Article 2 of the Convention»[1212].

De facto, the investigation of self-defence situations (*i.e.*, the procedural obligation from Art. 2 ECHR in the sense of a duty to investigate, respectively to inquire) is of a crucial importance. In turn, criminal procedural law will often set the broader framework to do so.

[1209] *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 153.

[1210] *Bubbins v. The United Kingdom*, 50196/99 (2005), § 150.

[1211] To self-defence in the Criminal Law Act (Northern Ireland) 1967, *cf. Margaret Caraher v. the United Kingdom* (AD), 24520/94, p. 13 (but not further relevant for the decision, as a comparison was to be assessed) and to the corresponding common-law definition of self-defence, *cf. Ernest Bennett v. the United Kingdom* (AD), 5527/08, § 69.

[1212] *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), § 252.

c. Additional state obligations with respect to a "real and immediate risk"?

At the G8 summit in Genoa there had been prior tensions between demonstrators and the police[1213]. Since the use of firearms – same as for the leading judgment *McCann and others v. The United Kingdom* – did not occur in the context of common policing, but in the context of a (large) police operation, the *Grand Chamber* in the judgment *Giuliani and Gaggio v. Italy* also examined state responsibility in a broader sense. The question was whether the Convention State could have prevented the self-defence situation through (better) *planning and conduct* of the police operation.

The *Grand Chamber* uses the benchmark of *real and immediate risk* as a reference (*see* no. III.2.2.5)[1214]. This benchmark usually refers to a specific responsibility of the state in the context of fulfilling duties in policing. The state may well know or ought to know about a particular danger to individuals (as in the case of the journalist *Kemal Kılıç*) – or that it bears a special responsibility for persons in its custody (as in the case of *Christopher Edwards*). Then the positive obligation requires the Convention State «*in appropriate circumstances* to [...] to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.»[1215]

In the judgment *Giuliani and Gaggio v. Italy*, the *Grand Chamber* affirmed a situation of self-defence already before the detailed examination of the state's further responsibility. In the subsequent extension of the benchmark, there is a similarity to the case of *McCann and others v. The United Kingdom* – but it must be kept in mind that at that time (1995), the benchmark for concrete aversion of danger (real and immediate risk) had not yet been established in the Courts' case law.

> If this more recent benchmark is applied to self-defence situations during operations by security forces, this can lead to a contradiction: It should be the life of the person who uses (or may use) self-defence that actually must be pro-

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[1213] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), §§ 252 f.

[1214] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 244.

[1215] *Kılıç v. Turkey*, 22492/93 (2000), § 62; *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 54; *Kontrová v. Slovakia,* 7510/04 (2007), § 49; *Opuz v. Turkey,* 33401/02 (2009), § 128 (highlithing only here).

tected (according to the requirements of the national legal and administrative framework). It would then have to be examined whether the Convention State bears responsibility for the fact that this person got into a self-defence situation. In the case of *Giuliani and Gaggio v. Italy*, this would be the Carabiniere. If the situation was different, the right to life would require Giuliani to be hindered in order not to get into a situation in which self-defence – against him as the acting person! – becomes permissible. From the perspective of life as a legal asset, however, it does not matter whose life is threatened. From a procedural point of view, however, it would appear somewhat curious if the applicants had to complain of a violation of the right to life of the representative of the state.

d. Limitation of obligations due to an impossible or disproportionate burden?

The benchmark of *real and immediate risk* is linked to the criterion that the positive obligation under Art. 2 ECHR should not impose an *impossible or disproportionate burden* on state authorities[1216].

This additional criterion has a general meaning since it applies to *general policing*[1217] as well as in connection with abstract threats (*dangerous activities*)[1218].

According to the *Grand Chamber* in *Giuliani and Gaggio v. Italy*, the concrete development of a self-defence situation was not foreseeable. In our opinion, this is in contrast to those police operations where a potential self-defence situation could *always* be expected (*e.g.,* the arrest of terrorists or other serious criminals).

«It could not have been predicted that an attack of such violence would take place in that precise location and in those circumstances. Moreover, the reasons which drove the crowd to act as it did can only be speculated upon.»[1219]

[1216] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 245.

[1217] *Branko Tomašic and others v. Croatia*, 46598/06 (2009), § 50.

[1218] *Öneryildiz v. Turkey* (GC), 48939/99 (2004), § 107.

[1219] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 254.

Besides, Italy had used the measures at its disposal – especially with the large contingent of security forces – to do everything necessary to avert dangers (*see* no. IV.4.3.1).

> A «distinction has to be made between cases where the law-enforcement agencies are dealing with a precise and identifiable target [...] and those where the issue is the maintenance of order in the face of possible disturbances spread over an area as wide as an entire city, as in the instant case. Only in the first category of cases can all the officers involved be expected to be highly specialised in dealing with the task assigned to them.»[1220]

> Furthermore, the *Grand Chamber* assessed whether the official conduct «before the attack on the jeep by the demonstrators were in breach of the obligation to protect life [...]. There was nothing [...] to indicate that Carlo Giuliani, more than any other demonstrator or any of the persons present at the scene, was the potential target of a lethal act. Hence, the authorities were not under an obligation to provide him with personal protection, but were simply obliged to refrain from taking action which, in general terms, was liable to clearly endanger the life and physical integrity of any of the persons concerned.»[1221]

> The Court paid particular attention to the question of why the jeep with the injured Carabinieri had remained at the place in question at all: «The [...] law-enforcement agencies might have to use non-armoured logistical support vehicles to transport injured officers. [...], everything seemed to indicate that the jeeps were better protected on Piazza Alimonda, where they were next to a contingent of carabinieri. Furthermore, there is nothing in the file to suggest that the physical condition of the carabinieri in the jeep was so serious that they needed to be taken to hospital straightaway as a matter of urgency; the officers concerned were for the most part suffering from the effects of prolonged exposure to tear gas.»[1222]

[1220] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 255.

[1221] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 257.

[1222] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 258.

> A secondary aspect concerned the means of communication used by the security forces, respectively the command and control capability in the operation: The «fact that the communications system chosen apparently only allowed information to be exchanged between the police and carabinieri control centres, but not direct radio contact between the police officers and carabinieri themselves [...], is not in itself sufficient basis for finding that there was no clear chain of command, a factor which [...] is liable to increase the risk of some police officers shooting erratically [...]. M.P. was subject to the orders and instructions of his superior officers, who were present on the ground.»[1223]

e. Predictability

In the judgment *Bubbins v. The United Kingdom* (*see* above), the ECtHR acknowledged that from the perspective of the firing police officer, there was a concrete danger to his life and that of his colleagues. Taking into account the concrete circumstances, the use of a firearm was not disproportionate and did not contradict the requirement of absolute necessity[1224]. A possible escalation had been foreseen and taken into account when planning the operation. The Court concludes that the police tried everything possible to resolve the situation without using lethal means of coercion[1225].

Taking into account all the circumstances, the *Grand Chamber* concludes in the judgment *Giuliani and Gaggio v. Italy* that there has been no violation of the Convention with regard to the planning and organisation of the operation[1226]. For the Court, the lack of foreseeability of the concrete incident had a central impact. It may have been relevant that the temporary placing of the injured Carabinieri in the jeep certainly corresponded to a protective measure.

> «The immediate cause of these events was the violent and unlawful attack by the demonstrators. It is quite clear that no operational decision previously

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[1223] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 259.

[1224] *Bubbins v. The United Kingdom*, 50196/99 (2005), § 140.

[1225] *Bubbins v. The United Kingdom*, 50196/99 (2005), § 148.

[1226] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 262.

taken by the law-enforcement agencies could have taken account of this unforeseeable element.»[1227]

5.2.4. Importance of the procedural obligation

If potentially lethal means of coercion are used by security forces in self-defence situations, this generally triggers a duty to investigate. The question then arises as to whether an examination of the procedural obligation under Art. 2 ECHR is adequate – or whether it is always necessary to extend the subject of the investigation to the further circumstances after the negative obligation (*i.e.,* to the operation as a whole).

The judgment in *Kelly and others v. The United Kingdom* deals with an ambush by security forces. The ECtHR also examines issues surrounding the conduct of the anti-terrorist operation[1228]. However, for procedural reasons, it refrains from examining the further circumstances and instead deals with the procedural aspects of Art. 2 ECHR in the subsequent considerations[1229]. As a result, it found a violation of the right to life due to failures in respect of failings in the investigative procedures.

The operation was based on information of an attack by the IRA on the Loughgall station of the Royal Ulster Constabulary on 8 May 1987[1230]. After the attackers opened fire on the police station, the hidden security forces fired back. As a result, an escalating firefight developed[1231]. The nine fatalities included two unarmed terrorists and one unarmed civilian not connected to the IRA[1232]. The ECtHR considered «[…] that in the circumstances of this case it would be inappropriate and contrary to its subsidiary role under the Convention to

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1227 *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 259.

1228 *Cf.* Hunter, Targeted Killing, p. 23: "The duty of a state to protect its citizens from this threat is clear and unassailable, and the terrorist's death (assuming for the sake of argument that he could not be captured alive) is a necessary outcome."

1229 *Kelly and others v. The United Kingdom*, 30054/96 (2001), §§ 100 ff.

1230 *Kelly and others v. The United Kingdom*, 30054/96 (2001), § 12. *See also* Urban, Big Boys' Rules, pp. 227 ff.

1231 *Kelly and others v. The United Kingdom*, 30054/96 (2001), §§ 16 ff. To the firefight also, *cf., e.g.,* Urban, Big Boys' Rules, pp. 231 f.

1232 *Kelly and others v. The United Kingdom*, 30054/96 (2001), § 99.

attempt to establish the facts of this case by embarking on a fact finding exercise of its own by summoning witnesses. Such an exercise would duplicate the proceedings before the civil courts which are better placed and equipped as fact finding tribunals.»[1233] Initial political reactions to the SAS ambush from Sinn Féin were reserved[1234]. Nevertheless, it was disputed afterwards whether there was no alternative to waiting until the IRA attacked and then striking back on a massive scale as *clean kills*[1235].

The *Grand Chamber* also imposes the usual requirements for conducting the investigation into the use of lethal means of coercion in clear self-defence situations.

In *Ramsahai and others v. The Netherlands*, elementary principles of investigation had been disregarded. However, the judgment also shows that police forces are basically to be treated as at least potential "perpetrators" after a shooting. Therefore, in our opinion, the immediate behaviour after a gunshot should be defined and practised by the authorities.

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

What is more, Officers Brons and Bultstra were not kept separated after the incident and were not questioned until nearly three days later [...]. Although, [...] there is no evidence that they colluded with each other or with their colleagues on the [...] police force, the mere fact that appropriate steps were not taken to reduce the risk of such collusion amounts to a significant shortcoming in the adequacy of the investigation.»[1236]

[1233] *Kelly and others v. The United Kingdom*, 30054/96 (2001), § 101; *McKerr v. The United Kingdom*, 28883/95 (2001), § 117; *Hugh Jordan v. The United Kingdom*, 24746/94 (2001), § 111 and *Shanaghan v. The United Kingdom*, 37715/97 (2001), § 95.

[1234] Urban, Big Boys' Rules, p. 234 (with a quote from *Gerry Adams*).

[1235] Urban, Big Boys' Rules, pp. 234 ff.

[1236] *Ramsahai and others v. The Netherlands* (GC), 52391/99 (2007), § 356.

«The investigation into the death of Moravia Ramsahai has been shown to have fallen short of the applicable standards, in that it was flawed to the extent of impairing its adequacy [...] and in that part of it was left to the police force to which Officers Brons and Bultstra belonged [...]. To that extent there has been a failure to comply with the procedural obligation imposed by Article 2 of the Convention.»[1237]

5.2.5. Assessment of the individual right of self-defence for state action

Members of state security forces can invoke an individual right of self-defence in concrete situations based on their own assessment of a danger. The obligations imposed on the Convention States in this regard relate to

- the design of the legal and administrative framework in the sense that there is a *sufficiently clear foundation* for the use of coercive means in general as well as for the use of firearms in particular (also in self-defence situations)[1238];
- the *instruction and training* of security forces in the use of firearms and other (lethal) means of deployment[1239], so that they can use their means of self-defence in a specific and proportionate manner;
- the restriction of the right of self-defence to situations of *absolute necessity*[1240] – which may also require an adequate information of the security forces *ex ante* and, above all, the factual analysis and legal assessment of self-defence cases *ex post*.

In obvious cases of self-defence, the ECtHR has so far not examined the deployment of security forces any further. However, the duty to investigate may oblige states to

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[1237] *Ramsahai and others v. The Netherlands* (GC), 52391/99 (2007), § 329 f.

[1238] Gerards, Right to Life, in: van Dijk/van Hoof/van Rijn/Zwaak (Eds.), Theory and Practice, p. 365.

[1239] Gerards, Right to Life, in: van Dijk/van Hoof/van Rijn/Zwaak (Eds.), Theory and Practice, p. 365.

[1240] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 176 (which «indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is ‹necessary in a democratic society› under paragraphs 2 of Articles 8 to 11 of the Convention»).

include the broader framework for acts of self-defence as well (*Ramsahai and others v. The Netherlands* [GC]).

Human behaviour is to a certain (sometimes even to a large) degree unpredictable. In reasonably (according to an honest belief) not foreseeable self-defence situations, an extension of the negative obligation would therefore not be convincing.

> It is impossible to foresee every hypothetically conceivable incident or every development of an event and to always take into account or even regulate all eventualities. Under pressure of time and with an incomplete situational picture, it may be necessary to act schematically and prioritise on the basis of the situation assessment. Then it is important to *avoid an "over-complexity"*, which could make it difficult to intervene adequately in the event of an (urgent) need for action. Even in the case of an adequate situation assessment and an optimal planning, there is always a residual risk.

According to the case law of the ECtHR, even the positive obligation does not require Convention States to *actively* prevent any situations of self-defence or assistance in self-defence. However, a duty to protect the lives of all persons involved applies when security forces carry out police operations: the creation of life-threatening situations then directly establishes the responsibility of the acting security forces. In *this* respect, the assessment of the situation and the foreseeability of possible developments must be taken into account.

In our opinion, the foreseeability of the possible use of potentially lethal means of coercion is closely related to the question of control and freedom for acting in certain situations; however, a clear attribution is sometimes tricky.

> In *McCann and others v. The United Kingdom*, the security forces were in control of the situation and acting actively. Therefore, it seems right to hold the Convention State responsible accordingly.
>
> In *Kelly and others v. The United Kingdom*, the security forces could have prevented the attack on the police station, but the attackers were in control of the action. In our opinion, it was foreseeable that the attackers would engage in a firefight with the security forces. However, their plan to attack was obviously

based on taking advantage by surprise. Since the plan had already failed with the first counter-reaction, the IRA terrorists would have had a choice to give up. A Convention State cannot be held responsible for the boldness or recklessness of aggressors.

In *Giuliani and Gaggio v. Italy*, the violent demonstrators had succeeded in temporarily wresting the control over the situation from the security forces. This ought to have been prevented by the state, especially with the very large police contingent.

The individual obligations under Art. 2 ECHR coexist independently of each other. The *procedural obligation* has a different focus than the negative obligation. In the context of a retrospective investigation, a possible "excessive use of force or negligence in the planning or control of the operation"[1241] may be uncovered (*bottom-up approach*). However, the negative obligation within the scope of operations as a whole must be interpreted comprehensively (*top-down approach*). In our opinion, the assessment of a use of firearms from an actual individual point of view should not be made in an isolated manner. After all, it must also be placed in the overall context of a police action or operation (if such do exist). The aim is to identify possible links between organised and individual action – but at the same time to avoid excessive severity. Once a self-defence situation has been resolved, the Convention States are faced by the positive obligation. This means that life-saving measures are to be initiated immediately[1242]. These duties to protect (albeit retrospectively) should, in our opinion, be minimally established in the administrative framework.

6. INFORMATION INTERESTS – AND THEIR LIMITS

Democracy thrives on debate and discussion, especially on politically controversial issues and topics. An essential prerequisite for this is freedom of expression, which is anchored in Art. 10 para. 1 ECHR:

[1241] *Kelly and others v. The United Kingdom*, 30054/96 (2001), § 110.

[1242] *Ramsahai and others v. The Netherlands* (GC), 52391/99 (2007), § 275.

> *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

The broad guarantee includes both freedom of expression in general and freedom of the media in particular, as well as freedom of information. The conveyed freedoms and information claims (in the end those of the public) are not granted as limitless.

6.1. PUBLIC INTEREST IN INFORMATION VERSUS COMPLICITY OF THE MEDIA

Due to legitimate security interests of the state – in particular the protection of secrets – information interests of private individuals and the media as well as the public can be restricted[1243].

> The administrative and legal framework can provide specific criminal offences (*e.g.,* to protect classified information), exempt certain matters from legal remedies (especially *actes de gouvernement*), restrict access rights (*e.g.,* in political negotiations) or balance personal rights against public interests (*e.g.,* in court proceedings).

However, a general restriction of coverage of security-relevant events or processes would be neither permissible nor reasonable (on the relation of terrorism to the public and the media, *see* no. III.1). The prevention of terrorist threats is the state's mandate – but this fight is carried out and won by civil society[1244]. The content-related confrontation with violence on a strategic scale thus takes place in the public sphere as well.

Terrorist campaigns have always included information operations[1245]. Today, this even applies to lone wolves, who use pamphlets (*e.g.,* Breivik in Norway in 2011), videos (*e.g.,*

[1243] On the different interests of terrorists, states and the media, *see*, in general, Combs, Terrorism in the Twenty-First Century, p. 188.

[1244] Quite similarly, Forest, Conterterrorism, pp. 24 ff.; also Jafa, Defeating Terrorism, pp. 161 f.

[1245] On the religious sect of the *Sicarii* in Palestine in the first century a.d. or on the Assassins from the 11th century onwards and the legend of the *Old Man of the Mountain*, *cf.* Laqueur, Terrorism,

Anis Amri in Germany in 2016) and social media (*e.g.*, the perpetrator of the Christchurch attack in New Zealand in 2019) in order to make themselves known in the media. This poses challenges to the state's information policy.

On a tactical level, the question arises how close in spatial and temporal terms journalistic coverage may take place. Thereby, the right to life can conflict with the freedom of the media.

6.1.1. The terrorist's primary target and advantage

A terrorist is a criminal who seeks publicity[1246]. Terrorist groups achieve an instant attention with their attacks: modern media report worldwide, without delay and sometimes unfiltered. A high level of public attention enables the perpetrators to spread fear and intimidation and thus also their "messages" to the public[1247].

> «Who are these people blowing up restaurants, shooting policemen, hijacking planes? Why are they doing it? What are their aims, intentions, philosophies? And what are their demands? The press assumes that the public is clamoring to know the answers to such questions, and seeks to provide them. The terrorists themselves so arrange their affairs as to make life relatively easy for the media. They arrange press conferences, publish ‹communiques› and statements of ultimate aims, and give exclusive interviews.»[1248]

From the 1970s onwards, spectacular attacks and anti-terrorist operations have been reported live in the mass media. In some cases, the coverage has enabled terrorist actors to witness measures taken by the security forces against them[1249]. Such a "close" reporting

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pp. 20 ff.; on propaganda and violence as a means of *anarchistic* struggle in the second half of the 19th century Mueller, Innere Sicherheit Schweiz, pp. 151 ff. (with further references).

[1246] According to the English journalist, commentator and politician John O'Sullivan (Deny Them Publicity, p. 120); *cf.* Combs, Terrorism in the Twenty-First Century, p. 186.

[1247] Combs, Terrorism in the Twenty-First Century, p. 187 (destabilizing the enemy).
Critical to the development Hoffman, Inside Terrorism, p. 194: "Terrorist acts are (…) too easily transformed into major international media events – precisely because they are often staged specifically with this goal in mind."; *cf.* Forest, Counterterrorism, pp. 15 f.

[1248] O'Sullivan, Deny Them Publicity, p. 122.

[1249] *Cf.* O'Sullivan, Deny Them Publicity, p. 125 (with two examples).

not only strengthens the media impact of criminal activities but also indirectly even fulfils the function of an "intelligence service" for the opposite side.

In the media, "actors" have a fundamental advantage over state authorities. They determine the places and times of actions and, at least at the beginning – which is often decisive for the effect – they hold the initiative (freedom for acting). This advantage is reinforced by timely reporting by the "classic" media and the use of social media without any delay[1250]. In contrast, state authorities are always at a disadvantage as they have to *react*; moreover, they are – correctly – bound to the truth[1251]. Even if an updated and correct situational picture (honest belief) is available, both tactical considerations and criminal procedural requirements can hamper active dissemination of information by the authorities.

If "classical" media give terrorist actors and their apologists room – even if this is done from the necessary distance and with a due criticism – they contribute to the formation of a (pseudo) political corona around criminal acts[1252]. The means of *terrorism* fulfils its purpose of getting *attention* only to a small extent through terrorist acts as such (the effect of these only being the secondary target)[1253], but primarily this purpose is achieved through how the act is dealt with in the public domain.

6.1.2. The media's importance

Art. 10 ECHR guarantees the *freedom of expression*. The scope of its protection is broad[1254]. The fundamental rights guarantee also includes the *freedom of the media* and *journalistic freedom*[1255], both necessarily needed in a free and democratic society.

[1250] To examples of information operations and counter information operations in Afghanistan, *cf.* Chang, Social Media and Transparency, pp. 68 ff.

[1251] Chang, Social Media and Transparency, pp. 66 f.

[1252] O'Sullivan, Deny Them Publicity, p. 123: "Talking about the aims and philosophies of terrorists inevitably conveys the impression that they are a species of politician rather than a species of criminal".

[1253] From the perpetrators' perspective, the number of people killed in an attack is not relevant. Also, the fact whether a person who has been the target of an attack actually dies as a result is not important. Ironically, this even coincides with the view of fundamental rights.

[1254] *Cf.* Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), pp. 593 ff.

[1255] *Cf.* Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), pp. 618 ff.

The fundamental rights of *free communication* – which include freedom of association, assembly, art and science – safeguard an elementary need to communicate and interact with other people and a broad range of ideas. This addresses firstly an immediate, personal level. However, free communication also bears a socio-political significance: the unrestricted exchange (or "stream") of information, opinions and interpretations of reality provides impulses for private individuals and state institutions, impulses that protect the community from rigidity and thus enable necessary changes and adjustments in an ever-changing environment[1256].

> An example related to the use of force is the violent death of the Black American *George Floyd* as a result of a police action in Minneapolis (Minnesota) on 25 May 2020. The coverage and subsequent debates and protests are multi-layered. It is not only about issues of racism, but also about the training, command and conduct of police forces[1257].

The work of the media entails, among other things, informing the public about current events and fostering democracy, but also critically questioning and uncovering grievances[1258]. This also applies to the reporting of terrorist attacks, where the focus lies on informing as well as investigating the events.

However, the hunt for the best headlines or the most "clicks" can lead to misinformation, to the violation of the rights of third parties, to (unintentional) propaganda or to the dissemination of "unacceptable" content. Accordingly, the question arises as to the *borderline* between the permissible and the impermissible, or the specific limitations to freedom of the media in relation to terrorist attacks and the fight against them.

[1256] *Cf., e.g.,* Jacobs/White/Ovey, European Convention, pp. 488 f. and *GRA Stiftung gegen Rassismus and Antisemitismus v. Switzerland,* 18597/13 (2018), § 51 and *Handyside v. The United Kingdom* (Court Plenary), 5493/72 (1976), § 49.

[1257] *Cf., e.g.,* the *Tweet* of the (at that time) Gouerneur of New York, Andrew Cuomo (@NYGovCuomo) on 31 May 2020: "Change must come and it starts with standardizing police misconduct policies across America. We need: Independent police misconduct investigations; one universal definition of excessive force; publicly available disciplinary records of officers who are accused of misconduct."

[1258] Jacobs/White/Ovey, European Convention, pp. 488 f.

The ECtHR has dealt with the role of the media under Art. 10 ECHR in particular in the leading cases *Handyside v. The United Kingdom* (Court Plenary) from 1976 and *Stoll v. Switzerland* (GC) from 2007.

The case of *Handyside v. The United Kingdom* concerns a publisher. He had produced a book for schoolchildren with controversial content, including 26 pages on sexual terms and issues[1259]. State authorities punished and sanctioned this as a violation of a law to protect the morals of young people[1260]. A renewed publication took place in an altered form. The applicant claimed that the "partial censorship" constituted an impermissible restriction of the freedom of the media. In its judgment, the Court found that the state had acted in conformity with the Convention[1261].

The case of *Stoll v. Switzerland* concerns a newspaper article on the treatment of dormant assets in Swiss bank accounts after the Second World War. Legal disputes had already been going on for some time between Holocaust survivors and their descendants on the one hand and some Swiss banks concerned on the other. In the mid-1990s, this turned into a political conflict between Switzerland and the U.S.A. At its height, the journalist Martin Stoll published a confidential note from the Swiss ambassador in Washington in a newspaper. His article was about the compensation of Holocaust victims for dormant assets[1262]. The note of the ambassador quoted in the article was partly very clearly worded and partly taken out of context in the newspaper article[1263].

With his article, the journalist had weakened Switzerland's negotiating position *de facto* and violated the publication of official secret negotiations *de jure*. He was sentenced to a fine of CHF 800. The Swiss Federal Supreme Court protected the journalist's conviction for violation of the criminal law provision. In

1259 *Handyside v. The United Kingdom* (Court Plenary), 5493/72 (1976), § 20.

1260 *Handyside v. The United Kingdom* (Court Plenary), 5493/72 (1976), §§ 34 f.

1261 *Handyside v. The United Kingdom* (Court Plenary), 5493/72 (1976), § 59.

1262 *Stoll v. Switzerland* (GC), 69698/01 (2007), § 108.

1263 *Stoll v. Switzerland* (GC), 69698/01 (2007), § 147.

doing so, it also referred to Stoll's unjustified conduct[1264]. The latter appealed to the ECtHR on the grounds that the conviction constituted an inadmissible restriction of freedom of the media (Art. 10 ECHR)[1265]. The ECtHR's section ruled in favour of the journalist Stoll; it underlined that there is a great public interest in the actions of the authorities in delicate situations[1266]. After extensive consideration of the interests and circumstances at hand, the *Grand Chamber* subsequently ruled in favour of Switzerland[1267]. In addition to the interest in protecting secrets, it also took into account the behaviour of the journalist Stoll. His article was biased and sensational – and therefore in the end not deserving protection; the sanction appeared to the *Grand Chamber* to be proportionate[1268].

The two cases not only illustrate how controversial restrictions on freedom of the media can be discussed from a legal perspective – they also show that a legal balancing is sometimes difficult. This is so especially when *public interests* conflict with each other – when, for example, it is a matter of balancing the interests of the state (protection of its interests, security, under certain circumstances even morals, etc.) with a public interest in being informed.

6.2. SCOPE AND LIMITATIONS OF FREEDOM OF THE MEDIA

6.2.1. Guidelines under the Convention

The freedom of the media does not enjoy absolute protection[1269]. The ECHR establishes in Art. 10 (para. 2) the substantive criteria for restrictions on the fundamental right:

[1264] Judgment of the Swiss Federal Supreme Court, BGE 126 IV 236, E. 8 pp. 254 f.

[1265] *Stoll v. Switzerland* (GC), 69698/01 (2007), § 45.

[1266] *Stoll v. Switzerland*, 69698/01 (2006), §§ 46 ff.

[1267] *Stoll v. Switzerland* (GC), 69698/01 (2007), § 162.

[1268] *Stoll v. Switzerland* (GC), 69698/01 (2007), §§ 153 ff.

[1269] *Stoll v. Switzerland* (GC), 69698/01 (2007), § 102: «Paragraph 2 of Article 10 does not, moreover, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern […].»

> *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

The reasons mentioned specifically, however, appear abstract, partly in need of interpretation and partly transformable (*e.g.*, "morals"). In addition, the principle of proportionality must be observed.

By combining the relative openness of the substantive conditions for restrictions of the fundamental right on the one hand with the required formal condition of a legal regulation on the other hand, the provision opens up a certain margin of discretion in implementation for the Convention States.

> Thus, calls for the use of violence or the harassment of certain groups of the population can be penalised by the states[1270]. The same applies to the denial of the Holocaust[1271]. Provisions on the protection of secrets are also permissible in principle[1272].

The Court, however, requires a «sufficient precision» of the legal framework (*see* no. IV.1.4.2), «to enable the citizen to regulate his conduct»[1273].

> She or he «[...] must be able [...] to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those

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[1270] *Cf. Leroy v. France*, 36109/03 (2008), *passim*.

[1271] *Cf. Perinçek v. Switzerland*, 27510/08 (2015), §§ 129 f. and *Garaudy v. France* (AD), 65831/01 (2003), *passim* (inadmissibile).

[1272] *Stoll v. Switzerland* (GC), 69698/01 (2007), § 102 and *Blake v. The United Kingdom* (AD), 68890/01 (2005), §§ 75 ff. and 162 f.

[1273] Fundamentally *Gorzelik and others v. Poland* (GC), 44158/98 (2004), §§ 64 f.; on the requirements for national laws, *cf. Delfi AS v. Estonia* (GC), 64569/09 (2015), §§ 120 ff. and *Karácsony and others v. Hungary* (GC), 42461/13 and 44357/13 (2016), §§ 123 ff.

> consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice [...]»[1274].

However, the interpretation of norms restricting fundamental rights remains dependent on the context. For example, persons exercising a particular profession may be required to «take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail»[1275].

> In the judgment *Karácsony and others v. Hungary*, a complaint was made by opposition parliamentarians. During a debate on the reorganisation of the tobacco market, they displayed a poster with accusations and insults. This was sanctioned with fines[1276]. The *Grand Chamber* first reviewed the precision of the legal basis (amendment to the Parliament Act). The applicants had criticised it for being too vague: «It appears that the applicants took part in the parliamentary examination of the amendment. By reason of their specific status, members of parliament should normally be aware of the disciplinary rules which are aimed at ensuring the orderly functioning of Parliament. Those rules inevitably include an element of vagueness (‹gravely offensive conduct›) and are subject to interpretation in parliamentary practice. [...]. The Court considers that the applicants, on account of their professional status of parliamentarians, must have been able to foresee, to a reasonable degree, the consequences which their conduct could entail, even in the absence of previous application of the impugned provision [...]»[1277].

[1274] *Delfi AS v. Estonia* (GC), 64569/09 (2015), § 121; quite similarly, in *Karácsony and others v. Hungary* (GC), 42461/13 and 44357/13 (2016), § 124 and *Rekvenyi v. Hungary* (GC), 25390/94 (1999), § 34.

[1275] *Lindon, Otchakovsky-Laurens and July v. France* (GC), 21279/02 and 36448/02 (2007), § 41.

[1276] *Karácsony and others v. Hungary* (GC), 42461/13 and 44357/13 (2016), §§ 12 ff.

[1277] *Karácsony and others v. Hungary* (GC), 42461/13 and 44357/13 (2016), § 126.

The need for implementation of the abstract convention-law guidelines in the national legal frameworks and the resulting legislative leeway leads to a wide scope for interpretation, also in the *application* of the fundamental right's guarantee[1278]. Quite rightly, the ECtHR defines its own margin of interpretation rather broadly.

> «[…] The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its ‹necessity›; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.»[1279]

In its judgments, the Court takes into account the further concrete circumstances of cases when considering the justification of interference with the freedom of the media[1280]. This is particularly about public interests.

> Public interests can be opposed to the (personal) rights of private individuals. The *Grand Chamber* dealt with this in the judgment *Von Hannover v. Germany (No. 2)* in a precedent-setting ruling. The Court subsequently stresses whether the exercise of freedom of the media in a specific case is a "contribution to a debate of general public interest"[1281]. With regard to the reporting, the Court distinguishes between *private individuals* and *persons acting in a public context* (political figures or public figures), looks at the *context* of the reporting in this respect and the *previous conduct* of this person[1282]. It also takes into account the content of the report itself, the form of the publication and the possible consequences thereof[1283].

If the interests of the state are at stake – as in the judgment in *Stoll v. Switzerland* – various public interests must be balanced against each other: In specific, the interests of the state in maintaining confidentiality must be balanced against the interests of the

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1278 *Handyside v. The United Kingdom* (Court Plenary), 5493/72 (1976), § 48.

1279 *Handyside v. The United Kingdom* (Court Plenary), 5493/72 (1976), § 49.

1280 *Handyside v. The United Kingdom* (Court Plenary), 5493/72 (1976), § 50.

1281 *Von Hannover v. Germany No. 2* (GC), 40660/08 and 60641/08 (2012), § 109.

1282 *Von Hannover v. Germany No. 2* (GC), 40660/08 and 60641/08 (2012), §§ 110 f.

1283 *Von Hannover v. Germany No. 2* (GC), 40660/08 and 60641/08 (2012), § 112.

public in information and debate. In doing so, the Court follows fundamentally similar criteria as in the case of private interests being affected. Even with state involvement, the Court emphasises the importance of the freedom of the media and its principles[1284].

> In the judgment mentioned, on the one hand, an important political issue was at stake (behind which stood Swiss interests as well as private interests of the banks). On the other hand, there was a great, even international interest in the subject matter dealt with in the report[1285]. «Accordingly, [...] it must be borne in mind that the interests being weighed against each other were both public in nature: the interest of readers in being informed on a topical issue and the interest of the authorities in ensuring a positive and satisfactory outcome to the diplomatic negotiations being conducted.»[1286]

When imposing restrictions, the ECtHR takes into account the distinct role and function of the media. This is manifested above all in questions of proportionality under Art. 10 (para. 2).

> «It (...) is applicable not only to ‹information› or ‹ideas› that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‹democratic society›.»[1287]

In its case law, the Court seeks to strike an appropriate balance between the exercise of the freedom of the media and the permissible limitations of the fundamental right[1288]. Overall, restrictions on freedom of expression are to be interpreted narrowly[1289].

1284 *Stoll v. Switzerland* (GC), 69698/01 (2007), §§ 101 ff.

1285 *Stoll v. Switzerland* (GC), 69698/01 (2007), § 115.

1286 *Stoll v. Switzerland* (GC), 69698/01 (2007), § 116.

1287 *Handyside v. The United Kingdom* (Court Plenary), 5493/72 (1976), § 49; quite similarly, in *Arslan v. Turkey* (GC), 23462/94 (1999), § 44.

1288 *Cf.* Jacobs/White/Ovey, European Convention, pp. 491 ff.

1289 Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 592 (with further references).

6.2.2. Exceptions to the scope of protection

Art. 10 ECHR – in its various forms – also protects provocative forms of expression[1290].

> «[… Freedom] of expression is applicable not only to ‹information› or ‹ideas› that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‹democratic society› […]»[1291].

Denial of crimes against humanity remains excluded from the scope of protection of Art. 10 ECHR[1292]. According to current practice, this applies in particular to the Holocaust as genocide – with the consequence that the Court does not intervene in corresponding complaints *ratione materiae*[1293].

> «There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust […], does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the

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[1290] For example in the form of freedom of art; *e.g.*, *Vereinigung Bildender Künstler v. Austria*, 68354/01 (2007), §§ 26 ff. and Mueller, Fake News or Free Speech?, p. 46.

[1291] *Lehideux and Isorni v. France* (GC), 55/1997/839/1045 (1998), § 55.

[1292] Jacobs/White/Ovey, European Convention, pp. 495 ff. To political speech in Parliament, *see Pastörs v. Germany*, 55225/14 (2019), §§ 36 ff. «While interferences with the right to freedom of expression call for the closest scrutiny when they concern statements made by elected representatives in Parliament, utterances in such scenarios deserve little, if any, protection if their content is at odds with the democratic values of the Convention system. The exercise of freedom of expression, even in Parliament, carries with it ‹duties and responsibilities› referred to in Article 10 § 2 of the Convention […]. Parliamentary immunity offers, in this context, enhanced, but not unlimited, protection to speech in Parliament» (§ 47).

[1293] *Garaudy v. France* (AD), 65831/01 (2003), p. 24 (translation-extract) and p. 29 (French version); *M'Bala M'Bala v. France* (AD), 25239/13 (2015), § 42. Already indicated in *Lehideux and Isorni v. France* (GC), 55/1997/839/1045 (1998), § 47 (*obiter dictum*).

> fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.»[1294]

With recourse to Art. 17 ECHR, the Court refers to the prohibition of abuse of rights:

> *Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*

In the context of freedom of expression (whose essential content consists in the prohibition of censorship), this recourse appears to be delicate. The *Grand Chamber* therefore emphasises the need for unambiguous incompatibility with the values of the Convention.

> «In cases concerning Article 10 of the Convention, it should only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention»[1295]

Finally, however, the Court cannot avoid interpreting even the abuse of rights in the light of the concerned fundamental right itself[1296]. This allows a factual discussion of the scope of protection in the individual case.

> In the judgment in *Lehideux and Isorni v. France*, the *Grand Chamber* not only placed a "revisionist" publication within the scope of protection of Art. 10 ECHR but also recognised the violation of the fundamental right in the criminal conviction that had occurred.

1294 *Garaudy v. France* (AD), 65831/01 (2003), p. 23 (translation-extract) and p. 29 (French version).

1295 *Perinçek v. Switzerland* (GC), 27510/08 (2015), § 114.

1296 *Cf. Lehideux and Isorni v. France* (GC), 55/1997/839/1045 (1998), § 38 («begin by considering the question of compliance with Article 10, whose requirements it will however assess in the light of Article 17»); *Perinçek v. Switzerland* (GC), 27510/08 (2015), § 115 and *M'Bala M'Bala v. France* (AD), 25239/13 (2015), § 40.

> The matter in hand was the assessment of the person of Philippe Pétain. The hero of Verdun in the First World War had been president of the Vichy puppet regime after France's defeat against Hitler's Wehrmacht. After the war he was sentenced to death for treason. Lehideux (a minister in Pétain's cabinet during the war) and Isorni (a defender of Pétain in court) reinterpreted Pétain's behaviour ("double game theory" – which historians unanimously reject).
>
> «As such, it does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17.»[1297]
>
> «There is no doubt that, like any other remark directed against the Convention's underlying values [...], the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10. In the present case, however, the applicants explicitly stated their disapproval of ‹Nazi atrocities and persecutions› and of ‹German omnipotence and barbarism›. Thus they were not so much praising a policy as a man, and doing so for a purpose – namely securing revision of Philippe Pétain's conviction [...].»[1298]

Doctrine classifies denial of genocide as hate speech[1299]. It is disputed whether other genocides should be dealt with in the same way as the (also in its historical assessment) indisputable Holocaust.

> The judgment in *Perinçek v. Switzerland* concerned the Armenian genocide. The Turkish politician *Doğu Perinçek* had repeatedly denied it at public events in Switzerland[1300]. The *Grand Chamber* found that Perinçek's conviction was a violation of Art. 10 ECHR.

1297 *Lehideux and Isorni v. France* (GC), 55/1997/839/1045 (1998), § 47.

1298 *Lehideux and Isorni v. France* (GC), 55/1997/839/1045 (1998), § 47.

1299 Jacobs/White/Ovey, European Convention, pp. 495 ff.; generally critical of restrictions under the title of *hate speech,* Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 683.

1300 *Perinçek v. Switzerland* (GC), 27510/08 (2015), §§ 13 ff.

Switzerland has recognised the Armenian Genocide and has created a sufficiently specific legal basis to punish its denial[1301]. The *prevention of disorder* (Art. 10 para. 2 ECHR) was not a sufficient reason to restrict freedom of expression in Switzerland[1302]. But the *Grand Chamber* did recognise the *protection of the rights of others* as a ground for restriction.

To examine the necessity of interference in a democratic society, the arguments of various parties, organisations and associations were included[1303]. Finally, the Court balanced, *inter alia*, the interests of the applicant against those of the Armenians (*respect for their private life*)[1304].

«Taking into account all the elements analysed above – that the applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance, that the context in which they were made was not marked by heightened tensions or special historical overtones in Switzerland, that the statements cannot be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal-law response in Switzerland, that there is no international-law obligation for Switzerland to criminalise such statements, that the Swiss courts appear to have censured the applicant for voicing an opinion that diverged from the established ones in Switzerland, and that the interference took the serious form of a criminal conviction – the Court concludes that it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case.»[1305]

Thus, the Court emphasises a contextual approach even in dealing with genocide. It stresses that under the given circumstances, a substantive discussion of controversial content can (and must) take place. However, it also follows (*e contrario*) that the *Grand*

1301 *Perinçek v. Switzerland* (GC), 27510/08 (2015), §§ 138 ff.

1302 *Perinçek v. Switzerland* (GC), 27510/08 (2015), § 154.

1303 *Perinçek v. Switzerland* (GC), 27510/08 (2015), §§ 159-195.

1304 *Perinçek v. Switzerland* (GC), 27510/08 (2015), §§ 274 ff.

1305 *Perinçek v. Switzerland* (GC), 27510/08 (2015), § 280.

Chamber would have decided differently in the absence of a public interest or in the case of an assessment as a *call for hatred or intolerance*.

6.2.3. Duties and responsibilities

Journalistic and editorial work is based on the careful and reliable procurement and reproduction of information in good faith[1306]. Journalists and the media bear a special responsibility and special duties as public or social *watchdogs*.

> If misconduct is uncovered and reported, the respective allegations must be carefully examined. And the more serious the allegations are, the more rigorous the examination of the accuracy or at least plausibility of the allegations must be. In addition, such reporting must not be biased. The persons concerned must be heard and their opinion must be expressed[1307].

In the national legal frameworks, there are partly corresponding professional rules or self-obligations of media professionals. These *conventions* extend to the obligation to comply with the principles of journalistic ethics (and thus into extra-legal areas).

Art. 10 para. 2 ECHR explicitly refers to the *duties and responsibilities* associated with the exercise of the freedoms (para. 1). According to the structural integration, non-compliance with these duties and responsibilities (by the holders of the fundamental rights) would constitute a restriction of the fundamental right (while its scope of protection is opened).

> «[…] whoever exercises his freedom of expression undertakes ‹duties and responsibilities› the scope of which depends on his situation and the technical means he uses.»[1308]

The “duties and responsibilities” are less important in connection with the freedom of speech of private individuals, but are of great importance for the exercise of the free-

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[1306] *Bladet Tromso and Stensaas v. Norway* (GC), 21980/93 (1999), § 65; *Orlovskaya Iskra v. Russia*, 42911/08 (2017), § 109.

[1307] Harris/O’Boyle/Bates/Buckley, European Convention (4th ed.), p. 666.

[1308] *Handyside v. The United Kingdom* (Court Plenary), 5493/72 (1976), § 49.

dom of the media. According to case law, the unlawful acquisition or dissemination of information enjoys only limited protection under fundamental rights law.

The ECtHR does not intervene in case of complaints by journalists when they are "experimenting" with criminal methods. The possible motive of discovering gaps in security through their own trial and error and subsequently warning the public is not relevant.

The decision *Erdtmann v. Germany* (AD) concerned the journalist Boris Erdtmann, who «researched the effectiveness of security checks at four German Airports [...] and made a short television documentary about his investigation and findings»[1309]. Therefore, he carried a butterfly knife unnoticed in his camera equipment (hand luggage). After his report was published on TV, the journalist was fined for carrying a weapon on a plane[1310]. The ECtHR denied protection of the delictual conduct by Art. 10 ECHR: «[...] a journalist cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions [...]»[1311]. The penalty of 750 Euro «would not discourage the press from investigating a certain topic or expressing an opinion on topics of public debate»[1312].

The background to the decision *Diamant Salihu and others v. Sweden* (AD) was formed by several shootings in Malmö in 2010. They triggered a discussion on the need for stricter gun policies. Three journalists decided to investigate how easy it was to purchase a firearm. So they bought a gun (without the accompanying ammunition) and immediately handed it over to the police. That was followed by a charge of illegal possession of weapons[1313]. According to the ECtHR, the conviction was *prescribed by law and pursued a legitimate aim*, in particular

1309 *Erdtmann v. Germany* (AD), 56328/10 (2016), § 3.

1310 *Erdtmann v. Germany* (AD), 56328/10 (2016), §§ 6 ff.

1311 *Erdtmann v. Germany* (AD), 56328/10 (2016), § 22.

1312 *Erdtmann v. Germany* (AD), 56328/10 (2016), §§ 26 ff.

1313 *Diamant Salihu and others v. Sweden* (AD), 33628/15 (2016), §§ 3 ff.

the protection of the public and the prevention of crime[1314]. Therefore, there were "relevant and sufficient reasons" and the principle of proportionality was respected[1315]. Although there was a public interest in the issue raised, the realisation could also have taken place without a (prosecutable) purchase or possession of weapons. The Court therefore did not accept the complaint[1316].

Unlawful journalistic conduct can be punished in principle as well[1317]. The Court contrasts the respective interests in each individual case[1318]. As long as journalistic activities as such are not restricted (but only certain means or methods) and as long as there are no excessive (and therefore deterrent) criminal sanctions, restrictions are permissible within the legal framework.

In *Brambilla and others v. Italy*, the applicants had been listening to the police frequencies in order to be able to report from potential (crime) locations as quickly as possible. During a search, the relevant devices were found[1319]. The seizure was not contrary to Art. 10 ECHR[1320]. The «applicants acted in a manner that, according to domestic law and the settled approach of the Court of Cassation, contravened criminal law, which lays down a general prohibition on a person's interception of any conversations not intended for him or her, including those between law-enforcement officers. The applicants' actions [...] involved a technique which they used routinely in the course of their activities as journalists [...].»[1321] The Court made a distinction between the obligation of

1314 *Diamant Salihu and others v. Sweden* (AD), 33628/15 (2016), § 50.

1315 *Diamant Salihu and others v. Sweden* (AD), 33628/15 (2016), § 54.

1316 *Diamant Salihu and others v. Sweden* (AD), 33628/15 (2016), §§ 55, 57 and 61.

1317 *E.g., Brambilla and others v. Italy*, 22567/09 (2016); *Erdtmann v. Germany* (AD), 56328/10 (2016); *Diamant Salihu and others v. Sweden* (AD), 33628/15 (2016); *Tierbefreier EV v. Germany*, 45192/09 (2014).

1318 On different public interests, *Pentikäinen v. Finland* (GC), 11882/10 (2015); on the conflict between private and public interests in covert recordings, *Haldimann v. Switzerland*, 21830/09 (2015), § 58 (in particular).

1319 *Brambilla and others v. Italy*, 22567/09 (2016), §§ 7 ff.

1320 *Brambilla and others v. Italy*, 22567/09 (2016), § 68.

1321 *Brambilla and others v. Italy*, 22567/09 (2016), § 65.

journalists to comply with national legislation and the exercise of professional activities – the latter were not subject to any restriction[1322].

The judgment *Tierbefreier EV v. Germany* was about the filming of laboratory animals. Some of the recordings of monkeys were then shown on television with critical comments and accusations of poisoning the animals[1323]. However, the official inspection of the animal facilities did not reveal any violation of the Animal Welfare Act by the animal keepers[1324]. A civil court prohibited the applicants from further disseminating the documentary. The ECtHR dealt, among other things, with the balancing of the different interests as well as with the origin of the published material (secret filming)[1325]. The Court found the application admissible but did not find a violation of the Convention[1326]. There was no criminal sanction, the civil law restrictions only prevented the further dissemination of the film material and the applicants could continue to freely express their criticism of animal experiments[1327].

When a journalistic activity cannot be sufficiently distinguished from the activity to be reported on, this can become particularly crucial. If the latter – *i.e.*, the subject of a reporting that is permissible as such – is restricted, this has ultimately a certain effect on the exercise of journalistic activity. Even if a reporting is not prohibited, its exercise might be restricted indirectly. Media are not protected if they create the topics for their reporting themselves or if they keep it going on themselves.

The judgment in *Pentikäinen v. Finland* dealt with the behaviour of a journalist during a demonstration. Because civilians and the police had been struck with stones and bottles, the police prohibited the mobile demonstration and only allowed a standing demonstration. The demonstrators were encircled by the

1322 *Brambilla and others v. Italy*, 22567/09 (2016), § 67.

1323 *Tierbefreier EV v. Germany*, 45192/09 (2014), §§ 5 ff.

1324 *Tierbefreier EV v. Germany*, 45192/09 (2014), §§ 23 ff.

1325 *Tierbefreier EV v. Germany*, 45192/09 (2014), §§ 53 ff.

1326 *Tierbefreier EV v. Germany*, 45192/09 (2014), § 60.

1327 *Tierbefreier EV v. Germany*, 45192/09 (2014), § 58.

police. They were asked to leave the spot. Leaving demonstrators then attacked the police with various thrown objects[1328]. All remaining participants were to be stopped and checked. Among them was the journalist *Markus Veikko Pentikäinen*. He continued to stay in the perimeter of the demonstration and indicated to a police officer that he would stay until the end for the purpose of reporting[1329]. Shortly afterwards, the demonstration was broken up by the police and all participants, including Pentikäinen, were controlled[1330]. The journalist «alleged that there had been an interference with his right to freedom of expression [...] because the police had asked him to leave the scene of a demonstration, he had been unable to transmit information during his detention of seventeen and a half hours, and due to the fact that he had been suspected, charged and convicted of a crime, which constituted a ‹chilling effect› on his rights and work»[1331]. The *Grand Chamber* dealt in particular with the question «[...] whether the police orders were based on a reasonable assessment of the facts and whether the applicant was able to report on the demonstration. It will also have regard to the applicant's conduct, including whether he identified himself as a journalist.»[1332] The Court did not find a violation of Art. 10 ECHR, because «[...] the applicant was not prevented from carrying out his work as a journalist either during or after the demonstration. The [...] interference with the applicant's right to freedom of expression can be said to have been ‹necessary in a democratic society› within the meaning of Article 10 of the Convention. The [...] conclusion must be seen on the basis of the particular circumstances of the instant case, due regard being had to the need to avoid any impairment of the media's ‹watchdog› role [...].»[1333]

1328 *Pentikäinen v. Finland* (GC), 11882/10 (2015), §§ 19 ff.

1329 *Pentikäinen v. Finland* (GC), 11882/10 (2015), §§ 24 ff.

1330 *Pentikäinen v. Finland* (GC), 11882/10 (2015), §§ 27 ff.

1331 *Pentikäinen v. Finland* (GC), 11882/10 (2015), § 5.

1332 *Pentikäinen v. Finland* (GC), 11882/10 (2015), § 95.

1333 *Pentikäinen v. Finland* (GC), 11882/10 (2015), § 114.

On the other hand, journalistic *duties and responsibilities* are not respected if, instead of critical contributions or factual debate, there is a call for hatred or violence[1334]. The same can apply to the (indirect) promotion of hatred and violence in the media.

> The judgment in *Leroy v. France* concerned a drawing published in a weekly magazine on 13 September 2001. It showed the destruction of the Twin Towers in New York on 11 September 2001. A text added "*nous en avions tous rêvé, le Hamas l'a fait*" (we have all dreamed of it, Hamas has done it). The French courts saw this as an idealisation of the attack and recognised a complicity in apology for terrorism[1335]. The ECtHR referred to the duties and responsibilities under Art. 10 para. 2 ECHR and reduced the drawer's sentence to a small fine[1336]. In view of the entire article, one should not assume a critique of "American imperialism", but rather a glorification of violence[1337].

Critical and high-profile reporting within the framework of what is legally permissible and ethically legitimate can amount to a balancing act. This can already apply to the *procurement of information*, especially when it comes to uncovering governmental misconduct (such as whistleblowing). The information required is usually not publicly accessible; it may even be specially protected or linked to the personal rights of private individuals. Under certain circumstances, delicate balancing issues further arise in the *dissemination of information*.

> The ECtHR emphasises that due to the technological progress and the associated increase in information («vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players»), journalistic ethics is increasingly of particular importance (regarding social media, *see* noV.6.4)[1338].

1334 Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 663; *Sürek v. Turkey* No.1 (GC), 26682/95 (1999), § 63.

1335 *Leroy v. France*, 36109/03 (2008), § 43.

1336 *Leroy v. France*, 36109/03 (2008), §§ 46 ff.

1337 *Leroy v. France*, 36109/03 (2008), § 43; *cf.* in detail and critically Cueni, Schutz von Satire, pp. 265 ff.

1338 *Stoll v. Switzerland* (GC), 69698/01 (2007), § 104.

6.2.4. Censorship versus sanctioning

The disclosure of sensitive information can harm public interests. The resulting damage is usually irreversible – it occurs at the moment of publication. Preventive measures to restrict freedom of expression are only permissible to an extremely restrictive extent under Art. 10 ECHR[1339]. The sanctioning of unlawful publications in the aftermath of an incident might remain possible[1340].

In this respect, the principle of proportionality must be upheld: «This means, amongst other things, that every ‹formality›, ‹condition›, ‹restriction› or ‹penalty› imposed in this sphere must be proportionate to the legitimate aim pursued»[1341].

> The appropriateness of sanctions is primarily assessed by the severity of a violation of the law. Various types of sanctions are possible: criminal or civil penalties, disciplinary measures and dismissal if a person is employed under public law[1342].

A sanction can have a deterrent effect on future behaviour (*chilling effect*). For media professionals, restrictions on the freedom of the media – depending on the severity – can simultaneously restrict the exercise of their profession[1343].

> In the decision *George Blake v. The United Kingdom*, the ECtHR examined the publication of the biography of the British–Soviet double agent. The publication had correctly not been banned. In fact, the secrets mentioned in it had already lost their protection[1344]. However, the Court upheld the confiscation of the fi-

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1339 Van Dijk/van Hoof/van Rijn/Zwaak, Theory and Practice pp. 785 f.; to censorship and political control, *cf. Manole and others v. Moldova*, 13936/02 (2009), §§ 112 ff.

1340 To the criminal law as the *key battle ground* on freedom of expression issues, *cf.* Jacobs/White/Ovey, European Convention, p. 525.

1341 *Handyside v. The United Kingdom* (Court Plenary), 5493/72 (1976), § 49.

1342 Jacobs/White/Ovey, European Convention, p. 490 with references to *Tolstoy Miloslavsky v. The United Kingdom*, 18139/91 (1995); *Steur v. the Netherlands*, 39657/98 (2003); *Vogt v. Germany* (GC), 17851/91 (1995).

1343 *Bladet Tromso and Stensaas v. Norway* (GC), 21980/93 (1999), § 64; Jacobs/White/Ovey, European Convention, pp. 490 f. and 523 f.

1344 *Blake v. The United Kingdom* (AD), 68890/01 (2005), § 155.

nancial gain. «The relevant ‹chilling effect› in the present case is [...] a warning that members or ex-members of the SIS who publish books in breach of their undertaking of confidentiality may be deprived of the profits of their books, even if the subject matter is no longer confidential, particularly if those profits derive from the notoriety and seriousness of the author's criminal past»[1345]. The amount of revenue from the book publication was exceedingly closely linked to George Blake's earlier criminal behaviour (betrayal of a secret tunnel in Berlin in the middle of the Cold War). With «regard to the special duties and responsibilities on members of the secret services to ensure that their conduct does not undermine the confidence active members may have in their present and future security»[1346] the ECtHR decided to dismiss the case under Art. 10 of the ECHR.

6.3. RESTRICTIONS ON THE FREEDOM OF THE MEDIA IN THE CASE OF USE OF FORCE

National security, the prevention of disorder or crime and the protection of confidential information are particularly important as possible reasons for legal restrictions on the freedom of the media under Art. 10 (para. 2) ECHR in connection with the use of police means of coercion.

When balancing the conflicting interests in connection with police actions, in our opinion, a distinction must be drawn between a *strategic*, an *operational* and a *tactical* level. The proportionality test must take the respective level into account.

6.3.1. Principles

An effective legal distinction between *national security* and *public safety* or the *prevention of disorder or crime* is difficult[1347] because these grounds for restriction are also invoked together and treated in a generalised manner by the Court[1348].

1345 *Blake v. The United Kingdom* (AD), 68890/01 (2005), § 158.

1346 *Blake v. The United Kingdom* (AD), 68890/01 (2005), § 159.

1347 *See also* Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), pp. 632 ff.

1348 *Pentikäinen v. Finland* (GC), 11882/10 (2015), § 75; *Arslan v. Turkey (GC),* 23462/94 (1999), §§ 39 f.; *Erdogdu and Ince v. Turkey* (GC), 25067/94 and 25068/94 (1999), § 43; *Gerard Adams*

For a restriction of the freedom of the media to protect *national security*, particularly serious (concrete) public interests are required[1349].

> Statements made in the context of political activities or debates can serve public interests and therefore hardly be restricted[1350].

> Legitimate restrictions on the exercise of fundamental rights are permissible where violence is openly and directly supported: «Where the views expressed do not comprise incitements to violence – in other words unless they advocate recourse to violent actions or bloody revenge, justify the commission of terrorist offences in pursuit of their supporter's goals or can be interpreted as likely to encourage violence by expressing deep-seated and irrational hatred towards identified persons – Contracting States must not restrict the right of the general public to be informed of them, even on the basis of the aims set out in Article 10 § 2, that is to say the protection of territorial integrity and national security and the prevention of disorder or crime.»[1351]

The *protection of public safety and the prevention of disorder* must also be based on the relevant context and, if necessary, on further considerations.

> In the judgment *Rekvenyi v. Hungary*, the *Grand Chamber* assessed whether a legal ban on political engagement by police officers constitutes a restriction on freedom of expression[1352]. «[... The] desire to ensure that the crucial role of the police in society is not compromised through the corrosion of the political neutrality of its officers is one that is compatible with democratic principles. This objective takes on a special historical significance in Hungary because of that country's experience of a totalitarian regime which relied to a great extent on its police's direct commitment to the ruling party.»[1353] Therefore, it

and Tony Benn (AD), 28979/95 and 30343/96 (1997), *passim* (decision of the commission without page references or paragraphs).

1349 Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 632.

1350 *Arslan v. Turkey (GC),* 23462/94 (1999), § 46.

1351 *Dilipak v. Turkey*, 29680/05 (2015), § 62.

1352 *Rekvenyi v. Hungary* (GC), 25390/94 (1999), §§ 8 ff.

1353 *Rekvenyi v. Hungary* (GC), 25390/94 (1999), § 41.

> is necessary to protect the police from direct influence by political parties[1354]. It is in the spirit of constitutionality to institutionalise a politically neutral police authority[1355].

Restrictions on the fundamental right according to Art. 10 ECHR are only permissible if there are effective safeguards against abuse and if media products are increasing an "actual danger"[1356]. Among other things, restrictions may result in the form of prohibitions on the publication of speech or images. States have margin of discretion in particular when there is a direct link between the exercise of freedom of the media and acts of violence (offences). The necessity and thus the permissibility[1357] of restrictive measures is measured decisively by whether it is a matter of public glorification of violence[1358].

Possible references to homeland security do not affect the criticism of the state and its authorities, which is to be tolerated to a large extent, especially when political issues of (great) public interest are raised.

> In the judgment *Arslan v. Turkey*, the *Grand Chamber* pointed out the differences between individual protection under criminal law and the protection of state interests. The author Günay Arslan was prosecuted for his book *History in Mourning, 33 bullets*, first published in 1989, and his book was confiscated. He was accused of spreading disseminating separatist propaganda: «[…] in his book Mr. Arslan had contended that there were various nations within the Republic of Turkey, described the Turkish nation as barbarous, maintained that the Kurds were the victims of constant oppression, if not genocide, and glorified the acts of insurgents in south-east Turkey […].»[1359]
>
> «[…] There is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest […].

1354 *Rekvenyi v. Hungary* (GC), 25390/94 (1999), § 48.

1355 *Rekvenyi v. Hungary* (GC), 25390/94 (1999), §§ 41 and 46.

1356 Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 634.

1357 *Cf.* the Commission in *Purcell and others v. Ireland* (AD), 15404/89 (1991).

1358 Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 635.

1359 *Arslan v. Turkey* (GC), 23462/94 (1999), § 10.

> Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks [...]. Finally, where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.»[1360]

> The *Grand Chamber* found a violation of the fundamental right – especially in view of the attitude of the Turkish state towards the issue of the Kurds, which is the subject of the book.

The ECtHR emphasises the connection between the question of the necessity of a restriction of the freedom of the media and a sufficient public interest behind this. In its assessment, it reserves a comprehensive scrutiny:

> «[... The] national authorities' aim in applying [...] the Law [...] was to prevent disorder by prohibiting the circulation in France of a book promoting separatism and vindicating the use of violence. Having regard to the current situation in the Basque Country, the Court considers it possible to find that the measure taken against the applicant association pursued [...] namely the prevention of disorder or crime. This is the case whenever [...] a separatist movement has recourse to methods relying on the use of violence [...].»[1361]

[1360] *Arslan v. Turkey* (GC), 23462/94 (1999), § 46.

[1361] *Association Ekin v. France*, 39288/98 (2001), § 48.

> «The adjective ‹necessary›, within the meaning of Article 10 § 2, implies the existence of a ‹pressing social need›. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a ‹restriction› is reconcilable with freedom of expression as protected by Article 10.»[1362]

Restrictions on the freedom of the media to protect *confidential information* may aim to serve national interests. In the leading case *Stoll v. Switzerland*, the *Grand Chamber* emphasised the importance of the principle of proportionality. The fine subsequently imposed on the journalist was relatively minor – it therefore considered the resulting restriction of the freedom of the media to be permissible.

> The «[…] Court considers it appropriate to adopt an interpretation of the phrase ‹preventing the disclosure of information received in confidence› which encompasses confidential information disclosed either by a person subject to a duty of confidence or by a third party and, in particular, as in the present case, by a journalist.»[1363]

6.3.2. Strategic level

In the present context, the strategic level includes both the state's handling of violence of strategic proportions (especially terrorism) and the general classification of the options available to the police. The latter concerns the overall preventive and repressive legal framework as well as the legal classification of state measures.

The strategic level is strongly determined by politics (and possibly also by legal politics). The political impregnation contributes significantly to the fact that restrictions on the freedom of the media (or on the freedom of expression in general) are rarely permissible. In democratic societies, political questions require public discussion.

[1362] *Arslan v. Turkey* (GC), 23462/94 (1999), § 44 and *Association Ekin v. France*, 39288/98 (2001), § 56.

[1363] *Stoll v. Switzerland* (GC), 69698/01 (2007), § 61.

In our opinion, an open debate must also be allowed on political arms of terrorist groups. Critical reporting also seems indispensable in order to engage with actors in the public political discussion.

A historical example of this is the way in which *Sinn Féin* was dealt with: the political aim of the party, which is represented all over the island of Ireland, is the reunification of the Republic of Ireland with the counties of Northern Ireland. This goal connects it with the IRA – moreover, at the time of the terrorist struggle in the second half of the twentieth century (*long war*), connections existed at personal levels between the party and the terrorist organisation. For example, the later leader of Sinn Féin in Northern Ireland, *Gerry Adams*, was a leading member of the Provisional Irish Republican Army (PIRA) in his younger years. Later, Adams was one of the architects of the 1998 Good Friday Agreement.

From October 1988 to September 1994, a broadcasting ban was imposed in the United Kingdom: the news media were forbidden to broadcast the voices of the representatives of ten (sometimes paramilitary) Northern Ireland groups. Among the groups affected was Sinn Féin, which at the same time remained registered as a political party in Northern Ireland[1364].

In October 1993, an exclusion order by the British government had been imposed against Gerry Adams to prevent his appearance in London. The «concern was not that [he] would be attempting personally to engage in acts of violence but that he might say things which could lead to the instigation of terrorism.»[1365] The Commission declared the complaint inadmissible. The reason for this was that Adams was not banned from communicating in principle and that the exclusion order was lifted shortly after the IRA announced a ceasefire. «The [...] sensitive and complex issues arising in the context of Northern Ireland where

[1364] *See also* Combs, Terrorism in the Twenty-First Century, p. 198 and BBC, "Twenty years on: The lifting of the ban on broadcasting Sinn Féin", online unter https://www.bbc.com/news/uk-northern-ireland-25843314 (last visited on 4 June 2022).

[1365] Commission, *Gerard Adams and Tony Benn* (AD), 28979/95 and 30343/96 (1997), *The Law* (decision without page references or paragraphs).

there have been ongoing efforts to establish a peace process acceptable to the various communities and parties involved and where the threat of renewed incidents of violence remains real and continuous»[1366].

Also on the strategic level, in our opinion, is the handling of confessions of terrorist attacks or other acts of violence. The public interest in knowing the opposite side is likely to outweigh the restriction of reporting (by whatever means).

The ECtHR attaches great importance to the public interest in information and discussion, even in the case of domestic conflicts. Neither the mere concern for internal security nor a remotely conceivable threat to representatives of state authority (*prevention of disorder or crime*) can bypass a balancing of interests.

In *Saygılı and Falakaoğlu v. Turkey*, two publishers of a Turkish newspaper were sanctioned by national courts. In one article, the name of a colonel of the gendarmerie was mentioned in connection with a specific incident. According to the prosecution, the mention of the colonel led to his life being threatened by terrorists[1367]. The ECtHR examined whether the restriction on freedom of expression was proportionate and, in particular, necessary[1368].

A «[...] news reporting based on interviews or declarations by others, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of ‹public watchdog›. The punishment of a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to the discussion of matters of public interest, and should not be envisaged unless there are particularly strong reasons for doing so [...]. A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation

[1366] Commission, *Gerard Adams and Tony Benn* (AD), 28979/95 and 30343/96 (1997), *The Law*.

[1367] *Saygili and Falakaoglu v. Turkey*, 39457/03 (2008), §§ 6 (quote) and § 8.

[1368] *Saygili and Falakaoglu v. Turkey*, 39457/03 (2008), §§ 19 and 21.

> is not reconcilable with the press's role of providing information on current events, opinions and ideas [...][1369]
>
> The Court balanced the public interest in the incident in question against a possible endangerment of the colonel (which was not further substantiated by the national authorities): «the article, read as a whole, cannot be construed as incitement to violence against a public official and thus as having exposed Colonel L.E. to significant risk of physical violence»[1370].

In our opinion, a limitation, and, in the same way, an overlap with the operational level (*see* below), arises where messages from criminal organisations are disseminated without any reflection and without journalistic classification – as "propaganda".

> The question of whether the release of terrorist messages in their authentic versions (wording) would also be protected by the freedom of the media is a delicate one. It cannot be answered in the abstract without considering the respective context. Thus, the administrative and legal framework with regard to possible bans of terrorist groups such as Al-Qaeda or the Islamic State as well as the support of these terrorist groups is also relevant as a formal legal basis for restrictions on the freedom of the media.

The legal assessment of the protection of confidential information in the light of the freedom of the media should also be guided by the *Stoll v. Switzerland* judgment in the present context. If public information interests are opposed to the interests of *protecting national security* or *confidential information*, the different public interests must be balanced against each other, taking into account the overall circumstances. As long as a "revealing" report is based on factual and objective information, the exercise of the freedom of the media takes precedence over any restrictions to a large extent.

> The judgment in *Bucur and Toma v. Romania* concerned a *whistleblowing* case about irregularities in state telephone surveillance. The ECtHR examines, *inter alia*, the relationship between the public interest in publicity and the protection

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[1369] *Saygili and Falakaoglu v. Turkey*, 39457/03 (2008), § 23.

[1370] *Saygili and Falakaoglu v. Turkey*, 39457/03 (2008), § 26.

of confidential information. It acknowledged the state's security interests[1371]. However, the public interest in the disclosure of the practice of telephone surveillance was particularly strong, as Romania had known extensive state surveillance in this area under the communist regime. The restriction of Art. 10 ECHR was therefore disproportionate. For the protection of democracy, it was necessary to allow the information to be made public in order to maintain public trust in government structures[1372].

Questions of general strategy on the use of force concern, for example, the structure of the security forces, the requirements for their training, or their equipment and armament. In principle, no permissible reasons for restricting the freedom of the media are apparent in this respect.

6.3.3. Operational level

Terrorists usually act neither spontaneously nor planlessly (*see* nos. III.1 and IV.2.3.2). Terrorist perpetrators are not insane (in the sense of a pathological finding), but usually act deliberately and purposefully (according to their motivation)[1373]. The operational level in the present context[1374] includes both the reactions of the state in general and forms of operation of its security forces vis-à-vis terrorist threats in particular.

Terrorist organisations can be banned or their freedom for acting restricted by the Convention States. In some cases, resolutions of the *U.N. Security Council* require measures to restrict the activities of certain groups or individuals[1375].

This includes specific travel bans, the freezing of financial resources, the prohibition of certain persons from acquiring weapons, intelligence surveillance and the initiation of criminal investigations.

[1371] *Bucur and Toma v. Romania*, 40238/02 (2013), § 84.

[1372] *Bucur and Toma v. Romania*, 40238/02 (2013), §§ 101 ff.

[1373] *Cf.* Richardson, What Terrorists Want, pp. 14 f.

[1374] On the military-historical origin of the term, *cf.* Jomini, The Art of War, pp. 51 ff. ("Theater of Operations").

[1375] https://www.securitycouncilreport.org/un-documents/terrorism (last visited on 4 June 2022); measures against the recruitment of terrorist fighters in particular.

Where there are potential terrorist threats or actual dangers, the Convention States may provide for far-reaching measures to restrict propaganda – «including a ban on broadcasting images or voices of proscribed organizations. Such measures are sometimes considered necessary to deny terrorist or other prohibited organizations unimpeded access to the broadcasting media, and to prevent them inciting to violence, or giving an impression of legitimacy through powerful audio-visual means. Still, the role of the press and media in exploring what they consider to be matters of public interest should be duly taken into account»[1376].

> Restrictions at the operational level can be underlaid by various public interests. Without spectacular images and thrilling, preferably delay-free reporting, terrorist attacks lose their main immediate impact. Given a little distance, they are objectified to what they are: acts of brute, inhuman violence. This minimises the possible "heroisation" of actions and perpetrators. Indirectly, the risk of imitators can be reduced[1377].

However, this raises the question of how far in advance violent propaganda – up to and including hate speech (*argumentum a minore ad maius*) – is allowed to be punished.

> On this, the concurring opinion of judges Ganna Yudkivska and Mark Villiger in the judgment *Vejdeland and others v. Sweden*, which dealt with the inadmissibility of distributing leaflets in schools critical of homosexuality: «Our tragic experience in the last century demonstrates that racist and extremist opinions can bring much more harm than restrictions on freedom of expression. Statistics on hate crimes show that hate propaganda always inflicts harm, be it immediate or potential. It is not necessary to wait until hate speech becomes a real and imminent danger for democratic society.»[1378]

[1376] Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 635.

[1377] On various explanations of the media's effect on terrorism, *cf.* Combs, Terrorism in the Twenty-First Century, pp. 201 f.

[1378] *Vejdeland and others v. Sweden*, 1813/07 (2012), concurring opinion of judge *Yudkivska* joined by judge *Villiger*, § 11.

According to the case law of the ECtHR, such statements are assessed in the overall context, taking into account the potential knowledge of the addressees[1379]. Schematic allocations outside of a specific context are therefore difficult. There is a thin line between a statement glorifying violence (punishable by law) or propaganda and statements that are merely otherwise hurtful or offensive[1380]. Depending on the Convention State concerned, circumstances may be assessed differently (*e.g.,* in the case of historically controversial events[1381]).

In reporting or investigative research related to terrorist organisations, media professionals enjoy fundamental rights guarantees within a broad range. A limitation arises from the compliance with duties and responsibilities and the protection of national security as well as the prevention of criminal offences (*see* no. V.6.3.1). The limitation is only crossed when media act as (compliant) propaganda tools for incitement to violence or hatred.

> This was pointed out by the *Grand Chamber* in the judgment *Erdogdu and Ince v. Turkey*. It concerned the interview with a sociologist in the magazine *"Demokrat Muhalefet!"* ("Democratic Opposition!") about Turkey and the state's policy in the east of the country. The interviewer and the interviewee were sentenced to prison and fined by the Istanbul National Security Court for violating the *Prevention of Terrorism Act*[1382]. «The Court stresses that the ‹duties and responsibilities› which accompany the exercise of the right to freedom of expression by media professionals assume special significance in situations of conflict and tension. Particular caution is called for when consideration is being given to the publication of the views of representatives of organisations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence. At the same time, where such views cannot be categorised as such, Contracting States cannot with reference

[1379] *Jersild v. Denmark (GC)*, 15890/89 (1994), § 34.

[1380] *E.g., Feret v. Belgium*, 15615/07 (2009) and *Perinçek v. Switzerland* (GC), 27510/08 (2015).

[1381] Jacobs/White/Ovey, European Convention, pp. 495 ff. and Jacobs/White/Ovey, European Convention (7th ed.) p. 494.

[1382] *Erdogdu and Ince v. Turkey* (GC), 25067/94 and 25068/94 (1999), §§ 9 and 12.

> to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.»[1383]

In the U.S., media coverage of terrorist violence has been discussed as early as the 1970s. A *Task Force on Disorders and Terrorism* (chaired by Jerry V. Wilson) of the *National Advisory Committee on Criminal Justice Standards and Goals*[1384] came to the conclusion that under the *First Amendment* (freedom of speech) only self-regulation of the media was possible. In our opinion, the recommendations made are still factually correct. Even under Art. 10 ECHR, they do not hinder a critical reporting focused on the public interest (*spectacle* is not a public interest).

> "[...] No hard rules can be prescribed to govern media performance during incidents of extraordinary violence. Whatever principles are adopted must be generated by the media themselves, out of a recognition of special public responsibility. But in general, the essence of an appropriate approach to news gathering is summarized in the principle of minimum intrusiveness: Representatives of the media should avoid creating any obvious media presence at an incident scene that is greater than that required to collect full, accurate, and balanced information on the actions of participants and the official response to them. Similarly, the essence of an appropriate approach to contemporaneous reporting of extraordinary violence lies in the principle of complete, noninflammatory coverage; the public is best served by reporting that omits no important detail and that attempts to place all details in context.
>
> Putting these general principles into practice, however, requires hard choices for the media, both at the organizational policy level and by the working reporter. In particular:
>
> 1. News media organizations and representatives wishing to adopt the principle of minimum intrusiveness in their gathering of news relating to incidents

[1383] *Erdogdu and Ince v. Turkey* (GC), 25067/94 and 25068/94 (1999), § 54.

[1384] National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on Disorders and Terrorism, *passim*.

of extraordinary violence should consider the following devices, among others:

a. *Use a pool of reporters to cover activities at incident scenes or within police lines;*

b. *Self-imposed limitations on the use of high-intensity television lighting, obtrusive camera equipment, and other special news-gathering technologies at incident scenes;*

c. *Limitations on media solicitation of interviews with barricaded or hostage-holding suspects and other incident participants;*

d. *Primary reliance on officially designated spokesmen as sources of information concerning law enforcement operations and plans; and*

e. *Avoidance of inquiries designed to yield tactical information that would prejudice law enforcement operations if subsequently disclosed.*

2. News media organizations and representatives wishing to follow the principle of complete, noninflammatory coverage in contemporaneous reporting of incidents of extraordinary violence should consider the following devices, among others:

a. *Delayed reporting of details believed to have a potential for inflammation or aggravation of an incident that significantly outweighs their interest to the general public;*

b. *Delayed disclosure of information relating to incident location, when that information is not likely to become public knowledge otherwise and when the potential for incident growth or spread is obviously high;*

c. *Delayed disclosure of information concerning official tactical planning that, if known to incident participants, would seriously compromise law enforcement efforts; ·*

d. *Balancing of reports incorporating self-serving statements by incident participants with contrasting information from official sources and with*

data reflecting the risks that the incident has created to non-involved persons;

e. Systematic predisclosure verification of all information concerning incident-related injuries, deaths, and property destruction; and

f. Avoidance, to the extent possible, of coverage that tends to emphasize the spectacular qualities of an incident or the presence of spectators at an incident scene."[1385]

Finally, at the operational level, for the state authorities it is a matter of coordinating information demands and the exercise of media freedom with the deployment requirements of the security forces and planning accordingly.

An example of this is NATO's *Public Affairs Handbook*[1386]. Although it refers to a military context, its principles illustrate the relevant requirements for civilian operations as well.

In particular, it recommends that media work should already be taken into account in the individual cells of the planning staff[1387]. A media concept is recommended for dealing with the media[1388]. The responsible persons should "be prepared to respond to media inquiries, issue statements, conduct briefings and interviews, arrange for access to permanent and operational units, distribute information including imagery, etc., all as a means to develop relations with the purveyors and the consumers of news"[1389].

An important instrument in the hands of the authorities is the *media embargo*[1390]. This allows reporting to be limited in time to ensure the success of operations in general and to protect persons at risk. The public interest in information remains intact.

1385 National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on Disorders and Terrorism, pp. 387 f.

1386 *NATO ACO/ACT*, Public Affairs Handbook, *passim*.

1387 *NATO ACO/ACT*, Public Affairs Handbook, pp. 13 ff..

1388 *NATO ACO/ACT*, Public Affairs Handbook, pp. 66 ff.

1389 *NATO ACO/ACT*, Public Affairs Handbook, p. 66.

1390 *NATO ACO/ACT*, Public Affairs Handbook, p. 71.

6.3.4. Tactical level

The tactical level refers to concrete operations or actions by the state or its security forces. The respective circumstances are determined in particular by the available personnel resources as well as the tactical means of deployment, the permissible procedure and temporal aspects.

a. Anti-terrorist actions carried out under command

In carrying out actions to counter terrorism, it is of crucial importance for security forces to preserve and *exploit tactical advantages*. Insofar as it proves necessary to prevent reporting, the protection of national security according to Art. 10 para. 2 ECHR may be applied as a justification.The further required specific legal basis for access restrictions, expulsions, film bans and similar police measures are found in the respective police laws.

On the tactical level, however, a conflict can arise between the principles of protecting the right to life and the exercise of the freedom of the media. State security forces are obliged to protect the lives of people who are holders of the freedom of the media – *i.e.,* reporters, cameramen or filmmakers – from concrete dangers (when they are pursuing their activities). From this perspective, it is not decisive whether threats are caused by endangerers or arise as a result of the activities of the security forces. Conversely, security forces or third parties (hostages or other persons in the vicinity) can be (indirectly) endangered by (timely) reporting.[1391].

> An example for the latter would be the *Munich Olympic assassination* of 1972[1392]. Terrorists from *Black September* took Israeli athletes as hostages. Two athletes were killed immediately, the remaining nine died during the police rescue operation through the hands of the terrorists. Television stations reported the events live. The terrorists also followed the coverage[1393]. The police forces in-

[1391] On the "symbiotic relationship between terrorists, who seek attention from an audience, and news organizations, which seek dramatic stories to increase their readership and ratings", Combs, Terrorism in the Twenty-First Century, p. 193.

[1392] *Cf., e.g.,* Hoffman, Inside Terrorism, pp. 66 ff.

[1393] Klein, Striking Back, pp. 48 f. (without references); Combs, Terrorism in the Twenty-First Century, pp. 280 and 287 f.; Bundeszentrale für politische Bildung, https://www.bpb.de → Politik →

volved were poorly trained, equipped and organised[1394]. As a direct result of the attack, the German Federal Police created the (SOF) Grenzschutzgruppe 9[1395]. Operational from April 1973, GSG 9 carried out its most significant operation to date in Mogadishu in October 1977: the successful hostage rescue operation of the Lufthansa aircraft *Landshut*[1396]. Prior to the Munich attack and the Baader-Meinhof gang's activities, the creation of such a special formation would have provoked strong public resistance[1397].

Another example was the *Hanafi Muslim Siege* in Washington D.C. in March 1977. A reporter called the leader of the hostage-takers to tell him that he might be double-crossed by the police[1398].

If the duty to protect arising from the right to life collides with claims arising from the freedom of the media, the former generally has priority. The freedom for acting (control) – insofar as it can be conclusively assigned – lies either with the state security forces or with terrorist actors. In our opinion, under these circumstances, media professionals cannot agree (informed consent) to a lethal risk with regard to their own endangerment. A specific formal legal basis for *mission-related* restrictions on the freedom of the media is not necessary. However, legitimate information needs to be taken into account at the operational level.

In our opinion, media workers can be expelled from the spot (limited in time and place) to avert immediate danger to themselves or to other people.

As far as media workers become accomplices of terrorist perpetrators by passing on information to them or otherwise directly supporting them, in our opinion criminal law applies (also judging the participation in unlawful acts).

Hintergrund-aktuell → September 2012 → Olympia 1972: *Geiselnahme 04.09.2012* (last visited on 4 June 2022).

1394 On the operational and tactical mistakes of the German police forces, *cf.* Klein, Striking Back, pp. 82 ff. (without references).

1395 Hoffman, Inside Terrorism, p. 68; Martin, Essentials of terrorism, p. 215.

1396 Hughes, Military's Role, p. 37.

1397 Combs, Terrorism in the Twenty-First Century, p. 280.

1398 Combs, Terrorism in the Twenty-First Century, p. 200.

b. Individual actions and spontaneous use of force

A different approach, in our opinion, applies to the spontaneous use of coercive means, such as controlling, arresting, direct intervening in offences and other police actions.

As a rule, neither the lives of the media workers, the intervention forces nor other people are directly endangered in such situations. The restriction of media work – *i.e.,* the journalistic research or the taking of pictures – cannot be based on national security. But the rights of other persons (in particular their right to privacy) may be relevant (*see* no. V.6.2.1).

The public interests in upholding the principle of proportionality in policing – which includes in particular the use of coercive measures – weigh particularly heavily.

> A sad counter-example for endangering both the media professionals themselves, the security forces and the victims was the hostage drama of *Gladbeck* in Germany. The bank robbers and hostage-takers, Rösner and Degowski, were on an odyssey through northern Germany from 16 to 18 August 1988: at a first stop they shot a boy. They made a later stop in a pedestrian zone in Cologne. The perpetrators and their two hostages were soon surrounded by numerous media representatives who were interviewing all four persons. This not only prevented the planned police intervention by undercover agents. One of the media workers even advised the perpetrators to hold the loaded gun in the face of the kidnapped *Silke Bischoff* for a more spectacular picture (one of the perpetrators then really did that). The kidnappers were finally guided out of the city by journalists and were able to escape with the hostages for the moment. During the subsequent seizure on the motorway, which took place under chaotic circumstances, 18-year-old Silke Bischoff was killed by a bullet from the gun of one of the hostage-takers (her gravestone reads "WARUM" [WHY])[1399].

[1399] https://gladbeck.rnd.de (last visited on 4 June 2022), *including* the judgment of the Essen Regional Court of 22 March 1991.

> The hostage drama, which lasted several days, revealed massive organisational failures on the part of the police at several levels. However, the behaviour of the media representatives did not correspond to their duties and responsibilities to any extent. In our opinion, the freedom of the media cannot provide the slightest justification for the (deeply opportunistic and inhuman, sometimes downright "bloodthirsty") behaviour of journalists in that case.

6.4. SPECIFICS OF THE INTERNET AND SOCIAL MEDIA

According to Bruce Hoffman, terrorism has one thing in common with the internet: "most people have a vague idea or impression of what (it) is but lack a more precise, concrete, and truly explanatory definition of the word"[1400].

In the following, the two terms are also used without clarifying them (for the – lacking – scientific definition of terrorism, *see* no. III.1). The phenomena of the internet and social media are touched upon in the context of freedom of opinion and freedom of the media. In doing so, a functional view is followed, in that the focus is on the character of the media.

6.4.1. Scope of protection of the freedom of the media

With the appearance of the internet (www) as a medium as well as internet-based social media, questions about the *personal scope* of protection of the freedom of the media are increasingly arising[1401]. The ECtHR does not limit the scope of freedom of expression for media to traditional or "established" media (such as publishers and newspapers or radio and television).

> The «Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest.»[1402]

[1400] Hoffman, Inside Terrorism, p. 1.

[1401] Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), pp. 682 f.

[1402] *Ahmet Yildirim v. Turkey*, 3111/10 (2012), § 55.

Rather, the Court applies the principles applicable to the media also to news portals[1403], online comments posted there[1404], blogs[1405] or social media[1406].

> According to the *Grand Chamber's* judgment in *Magyar Helsinki Bizottság v. Hungary*, a non-governmental organisation (NGO) running a blog can also perform the function of a *watchdog*[1407] – a connection of the NGO to a traditional medium is not required for this purpose. The same applies to bloggers or users of other social media:The «function of creating various platforms for public debate is not limited to the press but may also be exercised by, among others, non-governmental organisations, whose activities are an essential element of informed public debate. [... When] an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press [...] and may be characterised as a social ‹watchdog› warranting similar protection under the Convention as that afforded to the press [...].»[1408]

From the perspective of the scope of protection of Art. 10 ECHR, there may nevertheless be differences between traditional and new media. As long as a medium fulfils its supervisory role as a watchdog, the Court seems to rule in a media-friendly manner.

> For example, in *Magyar Jeti Zrt v. Hungary*, the legal liability of an online news portal was questioned. The ECtHR treated the portal's link to a third-party site as a *reference*. The content behind a link is changeable. The person who sets a link has no control over the linked content itself: «Because of the particular nature of the Internet, the ‹duties and responsibilities› of Internet news portals

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1403 *Cf., e.g., Magyar Jeti Zrt v. Hungary,* 11257/16 (2018).

1404 *Cf., e.g., Delfi AS v. Estonia* (GC), 64569/09 (2015).

1405 *Cf., e.g., Magyar Helsinki Bizottság v. Hungary* (GC), 18030/11 (2016).

1406 *E.g.,* YouTube; *cf. Cengiz and others v. Turkey*, 48226/10 and 14027/11 (2015).

1407 On the role of the press as a public watchdog, *cf.* Jacobs/White/Ovey, European Convention, pp. 503 ff.
The Court addresses the issue of a *social watchdog* (as apparently for the first time in *Társaság a Szabadságjogokért v. Hungary*, 37374/05 [2009], § 36: *«social watchdog, like the press»;* there in connection with an association [Hungarian Civil Liberties Union]). The relationship between social and public watchdog still needs to be clarified. However, the ECtHR seems to want to distinguish.

1408 *Magyar Helsinki Bizottság v. Hungary* (GC), 18030/11 (2016), § 166.

> for the purposes of Article 10 may differ to some degree from those of a traditional publisher, as regards third-party content [...]. (Information society service providers) should not be held responsible for content emanating from third parties unless they failed to act expeditiously in removing or disabling access to it once they became aware of its illegality [...]. The absence of a sufficient legal framework at the domestic level allowing journalists to use information obtained from the Internet without fear of incurring sanctions seriously hinders the exercise of the vital function of the press as a ‹public watchdog›.»[1409]

Also, in the broader international context, the *concept of the media* seems to be dissolving; respectively a functional meaning is becoming dominant.

> Thus, NATO's (innovative) *Public Affairs Handbook* focuses on a functional meaning when it defines the media generally as "any organisation or person who gather and disseminate news; also refers to the mediums by which news is transmitted (newspapers, TV, radio, Internet, etc.)"[1410].

6.4.2. Importance of the fundamental rights classification as a medium

With the diffusion of social media, challenges in dealing with the freedom of the media are increasingly accentuated[1411]. For instance, an NGO that runs a human rights blog can claim the right of access to information that comes from (state) sources that are not generally accessible[1412].

> «[...] Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may

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[1409] *Magyar Jeti Zrt v. Hungary,* 11257/16 (2018), §§ 63 ff.

[1410] *NATO ACO/ACT*, Public Affairs Handbook, p. 256 (Appendix E: Lexicon of Terms).

[1411] *Cf., e.g.,* Mueller, Fake News oder Free Speech?, *passim*.

[1412] On the further requirements, *cf. Magyar Helsinki Bizottság v. Hungary* (GC), 18030/11 (2016), §§ 157 ff. The role of the applicant is one of four criteria examined by the ECtHR to assess a right of access to state information; *cf.*, *e.g.,* Jacobs/White/Ovey, European Convention, pp. 514 f.

> result in those working in the media or related fields no longer being able to assume their ‹watchdog› role effectively, and their ability to provide accurate and reliable information may be adversely affected [...].»[1413]

Even individuals can build their own digital communication platforms and thus become independent, current and widely perceptible voices, for example scientists who maintain their own websites.

> «[... A] high level of protection also extends to academic researchers [...] and authors of literature on matters of public concern [...]. The Court would also note that given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information [...], the function of bloggers and popular users of the social media may be also assimilated to that of ‹public watchdogs› in so far as the protection afforded by Article 10 is concerned.»[1414]

This allows people to take on the role of *watchdogs* analogous to the press[1415].

6.4.3. Special restrictions for online and social media?

The ECtHR notes that different rules are required for online media than for traditional print products. Due to the worldwide accessibility of the internet, there is a greater risk of rights violations[1416].

> The «fact that such a measure, by rendering large quantities of information inaccessible, was bound to substantially restrict the rights of Internet users and to have a significant collateral effect.»[1417]

Nevertheless, special restrictions on online media in general and social media in particular hardly seem permissible in connection with the use of police means of coercion

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1413 *Magyar Helsinki Bizottság v. Hungary* (GC), 18030/11 (2016), §§ 167.

1414 *Magyar Helsinki Bizottság v. Hungary* (GC), 18030/11 (2016), §§ 167 f. (Hungarian Civil Liberties Union).

1415 *Társaság a Szabadságjogokért v. Hungary*, 37374/05 (2009), § 36.

1416 *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, 33014/05 (2011), § 63.

1417 *Cengiz and others v. Turkey*, 48226/10 and 14027/11 (2015), § 64.

at the *strategic* and *operational* level. *General bans* on online media (censorship) are likely to lack proportionality already due to the technical circumstances[1418].

In the case of *Ahmet Yildirim v. Turkey*, the ECtHR found a violation of Art. 10 ECHR precisely in the fact that, in addition to a specific website, a «wholesale blocking of all the sites hosted by Google Sites» had taken place[1419]. Thus, in addition to the critical scientist (*Ahmet Yildirim*), third parties were also affected by the restriction measures.

In *Cengiz and others v. Turkey*, the ECtHR confirmed, in the context of the blocking of *YouTube* for an extended period of time, that internet media may not be restricted as such[1420].

However, the duties and responsibilities of media professionals can have a special significance in *live media*. Verifying the authenticity of material in the context of journalistic due diligence sometimes proves complex or virtually impossible.

For example, it can be almost impossible to determine even the authorship of information due to the rapid speed and modes of dissemination.

In this respect, the permissibility of restrictions is largely determined by the supervisory function of the media. Traditionally, the press enjoys the privilege of being the *public watchdog*. New media can play the role of *social watchdogs*. On the other hand, this role does not necessarily belong to *private individuals*; however, with regard to them, it will not primarily be a question of restricting the (general) freedom of opinion, but rather questions of the specific scope of protection of the freedom of the media.

6.4.4. Streaming as a challenge

More recently, terrorist actions have been streamed on social media by randomly present persons as well as by the perpetrators themselves. Due to their event-related nature,

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1418 *Cf.* Jacobs/White/Ovey, European Convention, pp. 492 f.

1419 *Ahmet Yildirim v. Turkey*, 3111/10 (2012), §§ 68 f.

1420 *Cengiz and others v. Turkey*, 48226/10 and 14027/11 (2015), §§ 57 and 59 ff.

the recordings were accessible to a broad public on online portals or in classic news broadcasts without delay[1421].

> This is how scenes after the attacks on *Charlie Hebdo* in Paris were broadcast on social media and shortly afterwards on television, for example the perpetrators' shots from an automatic pistol at a (weakly equipped) police patrol.
>
> In recent years, individual perpetrators have also deliberately broadcast their attacks with helmet cameras. Thereby they have explained their crime and carried their deadly "message" unfiltered to the public.

In our opinion, recordings of violent terrorists are not protected by freedom of expression. It is true that the scope of protection of Art. 10 ECHR has traditionally been very broad. However, a *terrorist action* is neither an *opinion* nor an *idea* in itself. An underlying ideology or political intention fulfils these requirements without further ado – but not the means of violence (*mutatis mutandis* – on the established case law on the *denial of crimes against humanity, see* no. V.6.2.2). Information demands of the public are satisfied indirectly, in compliance with journalistic duties and responsibilities.

> It could be questioned whether recordings of perpetrators (*e.g.,* with helmet cameras) are protected by the freedom of the media if they are *published afterwards*, even if the recordings were not intended for the public and document injustice in terms of content.
>
> From an official perspective, it would first have to be clarified whether the recordings are to be classified as confidential information. The recordings could possibly be used as evidence in judicial proceedings and would then have to be protected temporarily. Furthermore, they can be used for failure analysis and further training of the emergency services. If such recordings are made public shortly after an operation, (special) tactical procedures of the security forces may become apparent.

[1421] *Cf.* Hoffman, Inside Terrorism, pp. 225 f.

In addition, potentially dramatic visual material (such as the display of a killing) can be made accessible. There may be a legal basis for restricting such material (*e.g.,* as protection against violence). Furthermore, the personal rights of victims or their relatives may be opposed to publication. This is particularly relevant if the victims are not persons of contemporary history (*see* no. V.6.2.1), but victims by accident.

Depending on the context, such recordings can also be understood as calls to violence, hatred or genocide.

Finally, it is crucial to consider the respective context of a publication. Thereby, time-related and other surrounding conditions of the law can also have an impact.

When dealing with spontaneous streaming by third parties, we believe that distinctions must be made in several respects. Insofar as third persons do not exercise a supervisory function (as a *social watchdog*), they do not fall under the (personal) scope of protection of the freedom of the media. If they then disseminate terrorist events as the *opinions of others – i.e.,* the perpetrators – they do not enjoy protection by freedom of expression. Because, in our opinion, these are not opinions within the meaning of the material scope of Art. 10 ECHR (*see* no. V.6.2.2).

In these circumstances, we believe that *live streaming* by third persons may be prohibited within the limits provided for by the national legal framework and limited in time and space to an incident.

If third persons act as *social watchdogs* (analogous to police photographers in the traditional media), they are more likely to enjoy protection. Based on the fundamental permissibility of reporting without a time delay, also via social media, possible restrictions on a tactical level must be considered (*see* no. V.6.3.4): if structures, tactical procedures, available resources and the like regarding security forces are communicated to the public in real time, restrictions on reporting may be permissible. If human lives are at stake (be it hostages, bystanders or security forces), this may justify restrictions as well. The duty to protect under Art. 2 applies on its own and in conjunction with the permissible restrictions under Art. 10 (para. 2) ECHR.

Such limitations may already be driven by the preservation of tactical advantages. This includes uncertainty about the operational options and the tactics used by the intervening agencies. This can determine the success of actions and even operations or at least increase chances of success.

A media embargo with the stipulation of a subsequent publication will not be an appropriate instrument for streaming by third parties. If lives are endangered, it would therefore be permissible in our opinion to interrupt mobile phone and internet connections locally and for a limited time or to restrict them to calls (throttling of transmission rates). Recordings are then still possible even for any third party – but they cannot be published without a time delay.

However, once dangerous situations have been resolved, the reasons for restrictions no longer apply. A shift to the operational level can take place (*see* no. V.6.3.3). Then it is the task of the authorities to put possible *fake news* into the correct context.

6.5. ROLE OF THE MEDIA BETWEEN PUBLIC WATCHDOG AND CATALYST

Terrorist violence is directed towards gaining media attention and *media coverage*. Media coverage and political discourse are the lifeblood of the democratic state. When terrorist organisations or individual perpetrators invade the public sphere through the media, delicate questions arise regarding both the scope of protection of the *freedom of the media* and the permissible restrictions of this fundamental right.

Art. 10 ECHR largely protects *freedom of expression* but does not apply absolutely. Thus, clear, non-deniable crimes against humanity do not enjoy protection in terms of communication. In our opinion, the same applies to pure violence and terrorist forms of action. If the most serious violence is used as a "form of communication", in our opinion Art. 17 ECHR is relevant. When dealing with violent phenomena, however, a distinction must be made.

In the light of the freedom of the media as a specific content of freedom of expression, the *duties and responsibilities* of media professionals (Art. 10 para. 2 ECHR), at least in connection with terrorist threats, constitute limitations (not just restrictions) of

the scope of protection under fundamental rights (according to para. 1)[1422]. For the exercise of a journalistic function, legal protection is closely connected to professional duties or journalistic ethics. Within this framework (and "margin"), fair, critical and truthful reporting should take place. This precludes terrorist actors from invoking the fundamental rights of free communication. Therefore, for example, streaming by terrorists of their attacks or rampages does not fall within the factual scope of protection of Art. 10 ECHR – there is no right to instrumentalise the media or to spread fear and terror. However, there is a great public interest in a discourse on what can threaten public security (in abstract).

> However, this also means that under certain circumstances, the same audio track, the same visual material, etc. may very well be covered by the scope of protection of Art. 10 ECHR, depending on the specific circumstances or persons involved – or, conversely, may just not deserve any protection. This in itself represents a breach within the concept of fundamental rights to free communication.
>
> For example, an interview with a terrorist leader may fall under the protection of Art. 10 ECHR, provided that the duties and journalistic responsibilities are respected. It can and must be possible to report on a terrorist threat. In contrast, the uncommented transmission of a monologue by this person in connection with his or her role in a terrorist network and the "glorification" of the motives or verbal incitement to hatred and violence would, in our opinion, not be protected.

To the extent that the scope of protection of Art. 10 ECHR is accessible for a form of communication, the Convention States enjoy a margin of discretion for *legal restrictions*. In connection with the use of means of coercion by law enforcement officials, the protection of national security and public safety are particularly relevant. Specific restrictions are conceivable for the protection of confidential information; corresponding protective interests can collide with other public interests. If there is a scope of protec-

[1422] Otherwise, the denial of the Holocaust, for example, would also be covered by the scope of protection; the corresponding cases would have to be declared admissible – but the permissibility of restrictions would then have to be interpreted broadly.

tion by the freedoms of communication, a censorship is prohibited. Public debates are desired – also and especially those on controversial and sensitive issues.

The *Grand Chamber* has developed its standards for dealing with the public interest and the balancing of other interests in particular in three leading judgments: *Handyside v. The United Kingdom*, *Stoll v. Switzerland* and *Von Hannover v. Germany (No. 2)*. The role of the media as public watchdog is to critically scrutinise state action. The purpose of questioning is to protect social interests in a democratic state. Unpleasant and unmasking (even disturbing and irritating) contributions can also serve to uncover grievances or undesirable developments. The question of admissibility must be assessed on a case-by-case basis, so that public and private interests can also be included in a possible balancing of interests. There is a strong public interest in reporting on threats to internal security. The decisive factors are the manner and, if necessary, the timing of media coverage. Reporting in compliance with the pertinent duties and obligations contributes to socially and politically necessary or desirable debates. It raises critical issues and – with due objectivity – also deals with phenomena of violence, so that the public can be able to form a verdict. Censorship contradicts both a free democratic order and the goal of exposing terrorism for what it is: organised crime with perfidious means. Dealing with the whole matter leads to social resilience and removes the breeding ground for terrorist activities.

With regard to *possible restrictions* on the freedom of the media due to police action, in our opinion a distinction must be drawn between strategic, operational and tactical levels. The strategic level is determined by the general requirements of the scope of protection of the freedom of the media, the permissible restrictions and possible information claims. Specific questions arise at the operational and tactical levels. At the operational level, the main challenge is how legitimate information interests of the public can be coordinated with the respective specific obligations depending on the form of communication. At the tactical level, fundamental rights conflicts between freedom of the media and the right to life – be it of victims, of perpetrators or of bystanders as well as of media professionals themselves – are resolved in favour of Art. 2 ECHR. Under certain circumstances, restricting reporting in a temporally and spatially limited manner corresponds precisely to a state duty to protect.

The state authorities are also challenged to provide truthful information of the public within the specific conditions applicable. The *information policy of the authorities* can address the flood of recent information on various channels[1423]. A claim for information weighs the heavier the fewer possibilities the media have for independent investigation or other information gathering.

7. CONCLUSION: A TIGHTLY MESHED NETWORK AND FAR-REACHING GUIDELINES

Police operations differ from everyday policing. The jurisprudence on Art. 2 ECHR sets out legal requirements not only for the use of potentially lethal force in the tactical sense but also for operations by security forces. Convention States may, under certain circumstances, be obliged not only to act at all, but to act in a certain way. What the obligation to *act in a proper manner* means can only be described in general terms in advance. When assessing police operations as a whole, various aspects are subjected to a legal assessment depending on the facts of the case. The Convention States do not have a duty to succeed – but they do have a duty to act adequately and to prevent avoidable mistakes.

When carrying out anti-terrorist operations, the general duties are closely related to the pre-operational duties (*see* no. IV). It is a matter of *applying* the general requirements (*see* no. III) in specific situations: plans turn into operations, risk assessments lead to specific intelligence requirements and directives, assessments and special situation evaluations develop into contingency plans, abstract legal principles become concrete guidelines for the actions of the security forces and orders to act are derived from duties to protect. In contrast to preparatory measures, police operations are usually subject to enormous time pressure.

Art. 2 ECHR does not provide any direct guidelines for the allocation or design of the command and control of police operations (not even the positive obligation does). But if, in the context of fundamental rights interventions, the primary focus is on an operation as a whole according to the negative obligation, and if the procedural obligation

[1423] Various TV programmes, social media platforms, newspapers, etc.

requires that responsibility for state conduct (action and omission) must be clarified in retrospect, this *indirectly* presupposes operational command and command structures. In particular, the leading command must have clear and solid responsibilities, be in possession of the necessary general and specific intelligence (or be capable of obtaining it), be able to conduct police action to achieve a goal, develop contingency plans, communicate clearly internally and externally, and be based on an organisational structure (or on a permanent core staff) with an appropriate command infrastructure.

The direction of police action towards a goal is a multi-layered task for which the objective legal framework only provides an overall perspective. *Rules of engagement* are used to specify, coordinate and, not least, conduct operations. As steering instruments, they are based on the legal foundations established for the security forces involved (whether police or military forces or SOF) and refer to a specific situation (specific area, specific opposing force and specific challenges). They are designed to suit a concrete operation and thus complete operational orders. Specific orders and instructions remain reserved.

In our opinion, the creation of ROE presupposes that *national legal frameworks* provide a sufficiently definite basis for the actions of the actors involved (powers, tasks and responsibilities), the permissible measures and the use of police force in general, as required by the positive obligation arising from Art. 10 ECHR and by the principle of legality in general. An essential aspect of state regulation is to either open up or exclude margin of discretion for security forces. The *UN Basic Principles* serve as a guideline.

For security forces, the handling of a special or extraordinary situation in compliance with legal requirements aims at gaining or retaining dominance (control of the action). This requires not only a precise *situational picture* but also constant questioning and verification, evaluation and further planning. To fulfil the procedural obligation, decisions must be justified, documented and communicated. In our opinion, there is a *de facto* obligation to maintain a *journal* (log)[1424].

[1424] In our opinion, short entries in the authorities' digital platorms are sufficient for this purpose. These are widely used for operations by state security forces (police as well as fire and rescue services). In the armed forces, there are also digital command and information systems that can also fulfil the duty to record.

Operational means must be both available in a timely manner and controllable. Improper use of means that are permissible in themselves can lead to a violation of Art. 2 ECHR, as can a disregard of absolute necessity in the use of potentially lethal means of coercion.

Under certain circumstances, the *release* of coercive means may already be stipulated in ROE (then as a specification of legal norms) – or may take place individually. The control of the use of special means of coercion (heavy means, special forces, etc.) is carried out in the sense of a concretisation of the *principle of proportionality* in operations. It is possible that there are abstract limitations to this: this can occur in the sense of the impermissibility of certain means of coercion, or through the requirement of distinction – the legal sources can lie in national law (*e.g.,* through the positivisation of permissible means – and *vice versa* through interdictions) or can be based on the interpretation of valued judgments under international law.

According to the normative wording of Art. 2 ECHR, the use of potentially lethal means of coercion must be based on absolute necessity (as to the conceptual adjusting screw, *see* no. III.5). In our opinion, the decision in most of the remaining possible constellations of cases is already determined by their factual circumstances. The decisive factor is then the assessment of these circumstances *ex ante* according to *honest belief*. Aspects of fundamental rights are relevant due to an existing duty to protect and therefore to act, and require the state to *intervene* with appropriate means. Then, the focus is no longer on the use of means, but on the minimisation of risks. In our opinion, the principle of risk minimisation also applies to the state's own security forces – even if they are not subject to a special duty to protect during anti-terrorist operations.

Dealing with the media in accordance with the Convention is part of risk minimisation in a broader sense. Reporting finds its limits where journalists endanger themselves or other people. Since freedom of the media also applies to anti-terrorist operations, the public's interest in information must be taken into account. A public interest exists both with regard to police operations and with regard to threats to national security.

VI. POST-OPERATIONAL DUTIES

«The Court acknowledges that [...] some measure of disorder is unavoidable. [...] However, in the circumstances the rescue operation [...] was not sufficiently prepared, in particular because of the inadequate information exchange between various services, the belated start of the evacuation, limited on-the-field coordination of various services, lack of appropriate medical treatment and equipment on the spot, and inadequate logistics.»

Finogenov *and others v. Russia*,
18299/03 (2011), § 266.

1. SPECIAL IMPORTANCE OF THE POSITIVE AS WELL AS THE PROCEDURAL OBLIGATION

After an anti-terrorist operation, the situation is *resolved* from a police perspective: the perpetrators are caught or neutralised. If an operation did not require the (active) use of potentially lethal means of coercion, there may no longer be any specific obligations under Art. 2 ECHR.

Post-operational obligations may occur in particular with regard to the care of injured persons (both victims and security forces as well as perpetrators), and to the preservation of evidence and the investigation and review of events. The Court assesses post-operational phases with *closer scrutiny*[1425]: state security forces are aware of the situation, have more or less complete control and have both more time and further resources at their disposal (*see* no. IV.3, and the «*Tagayeva-criteria*»).

For example, in the judgment *Finogenov and others v. Russia*, the ECtHR allows the use of potentially lethal narcotic gas against both hostage-takers (perpetrators) and hostages (victims) in order to liberate hostages who are in lethal danger[1426]. In the phases after the situation has been rectified, the Court applies

[1425] Jacobs/White/Ovey, European Convention, pp. 145 ff.

[1426] *Finogenov and others v. Russia*, 18299/03 (2011), § 235.

> the usual, strict standards to the assessment of legality and to the existence of any special duties to protect: The «[…] subsequent phases of the operation may require a closer scrutiny by the Court; this is especially true in respect of such phases where no serious time constraints existed and the authorities were in control of the situation.»[1427]

Post-operationally, the positive obligation to protect human life as well as the procedural obligation from Art. 2 ECHR demand full application. The negative obligation expands to its entire effect again. A distinction between perpetrators (attackers) and victims is no longer allowed to apply. Questions of proportionality may have to be solved differently or measured against stricter criteria.

The close temporal proximity between operations as such and post-operational tasks and obligations is challenging. The different phases of state action (preparation, implementation, completion) partly overlap.

2. CARE FOR INJURED PERSONS

The fundamental right to life protects life as a legal asset. All human beings are equally entitled to it on the basis of their humanity. However, the obligations of the Convention States arising from Art. 2 of the ECHR may be pronounced differently in some respects.

2.1. DUTY TO PROVIDE AFTERCARE

The ECtHR recognises the specific duty of states to be concerned about the health of persons in state custody (*see* nos. III.2.2.5 and III.2.2.6 and there in particular the case of *Paul and Audrey Edwards v. The United Kingdom*).

> The judgment *Anguelova v. Bulgaria* dealt with the detention of *Anguel Zabchekov*, who was heavily intoxicated and injured (*see* no. VI.4.2.4). His health situation increasingly worsened and he did not receive immediate medical assistance. He later died in hospital[1428]. According to the ECtHR, persons in

[1427] *Finogenov and others v. Russia*, 18299/03 (2011), § 214.

[1428] *Anguelova v. Bulgaria*, 38361/97 (2002), § 125.

such situations are «in a vulnerable position and the authorities are under an obligation to account for their treatment»[1429]. Thus, the officials should have prioritised the care of Zabchekov over other tasks: «[... After] 3 a.m. the police officers realised that Mr Zabchekov's condition was deteriorating. [... Instead] of calling for an ambulance, they contacted their colleagues who had arrested the boy. Those officers, who were on patrol duty, saw fit to abandon their patrolling tasks and drive back to the police station to verify the situation. Having seen Mr Zabchekov's condition, they took the time to drive to the hospital and then return, followed by an ambulance, instead of calling for one. [... The] behaviour of the police officers [...] constituted a violation of the State's obligation to protect the lives of persons in custody.»[1430]

The judgment in *Frick v. Switzerland* was based on the death of a man who had been temporarily detained by the police. The man had caused a self-inflicted accident with his car while under the influence of medication[1431]. Despite taking antidepressants and expressing suicidal intent, the man remained in his cell without being observed for over 40 minutes – where he hanged himself with his trousers[1432]. The ECtHR found the lack of monitoring of the vulnerable man was violating Art. 2 of the ECHR[1433].

The state's duties to protect do not end with the completion of an immediate prevention of a danger. The state is under a continuing obligation to ensure the protection of human life. Its duty includes the medical care of injured persons and, if necessary, the psychological care of relatives of the victims. If the state exercises custody over persons, it may find itself in a position of guarantor.

Consequently, in our opinion, a general state duty of aftercare can be derived from the right to life for persons injured or taken into custody during police actions.

1429 *Anguelova v. Bulgaria*, 38361/97 (2002), § 110.

1430 *Anguelova v. Bulgaria*, 38361/97 (2002), §§ 125 and 130.

1431 *Frick v. Switzerland,* 23405/16 (2020), § 4.

1432 *Frick v. Switzerland,* 23405/16 (2020), §§ 7, 11 ff. and 26.

1433 *Frick v. Switzerland,* 23405/16 (2020), § 98.

2.2. REQUIREMENTS FOR RESCUE OPERATIONS

Rescue operations are strongly oriented towards the presumed number of injured people and the local conditions. For the extraction and initial treatment of the injured, sufficient and adequately qualified rescue forces are needed on site as quickly as possible.

> The execution of a salvage depends on the assessment of the situation. If a danger by perturbators persists, the salvage is not carried out by medical personnel, but by better protected emergency forces. If the salvage forces had to worry about their own safety as well, effective care of the injured would only be possible to a limited extent. This would require close coordination between rescue and intervention forces – and ultimately also require basic medical knowledge among the intervention forces. It is possible to start salvaging casualties in certain sectors of the operation while the intervention continues in other sectors.
>
> First aid can already be given on the spot. In terrorist attacks, it is crucial to first stop bleeding on injured persons, thus preventing victims from bleeding to death. For this purpose, emergency forces are currently being equipped with *tourniquets*.

People must be rescued immediately. The longer they have to wait for medical – and incidentally also psychological – care, the higher is the probability of permanent harm or death[1434]. A delayed rescue operation can lead to a violation of Art. 2 ECHR (*see* no. IV.3.2.2.d, with reference to *Finogenov and others v. Russia,* § 266).

In order to prioritise the available resources, a triage of the injured persons is necessary. An initial assessment serves to estimate the urgency of the need for medical action required depending on each person. This can and must lead to a certain schematisation. The first priority is to save lives (of the most vulnerable persons).

> In *Finogenov and others v. Russia*, no triage of the injured was carried out. In its assessment, the ECtHR remains close to the facts presented and applies great rigour with a high degree of detail. It also indirectly demands such rigour from the national investigations: «[… It] is unclear what order of priorities was set

[1434] *Finogenov and others v. Russia*, 18299/03 (2011), § 285.

> for the medics. The Government claimed that, as part of the original plan, the medical personnel were supposed to sort the victims into four groups, depending on the gravity of their condition. However, no such sorting could be seen on the video: the bodies were placed on the ground in a seemingly haphazard way, and many witnesses confirmed that in fact there had been no filtering [...] or that it was inefficient, since dead bodies had been placed in the same buses as people who were still alive [...]. Further, the purpose of sorting is itself unclear. The Government did not indicate whether, after the sorting, if any, priority was given to the most serious cases or to those victims whose chances of recovery were higher. The purpose of the sorting is not specified: the Court cannot thus tell whether it was to be carried out to ensure even distribution of the burden amongst the hospitals or to ensure that the most serious cases were sent to the closest (or better prepared) hospitals. Most importantly, the Government did not explain how information on the respective ‹category› of each victim was communicated to the ambulance doctors, doctors in the city buses and in the hospitals. The Court submitted questions on those points to the Government but received no replies. The materials of the domestic investigation do not elucidate those matters. The Court concludes that this aspect of the rescue operation was not thought through, and that in practice the ‹sorting› was either non-existent or meaningless.»[1435]

The best possible preservation of the physical integrity of persons must also be taken into account to transport the patients to medical facilities. In view of its *closer scrutiny*, the ECtHR does not seem to allow any far-reaching exceptions. Thus, the Court (still in the judgment *Finogenov and others v. Russia*) questions the appropriateness of patient transport, which is partly carried out by regular buses and without medical care, as well as patient distribution.

> «[... Although] the original plan provided for the mass transportation of victims in the city buses, it did not make provision for medical assistance in those buses. Many witnesses noted a lack of medical personnel and equipment in the buses transporting victims: sometimes there was only one paramedic for a

[1435] *Finogenov and others v. Russia*, 18299/03 (2011), § 249.

> bus containing 22 victims in a critical state; sometimes there were no escorting medics in the buses at all […]. Although there is no exact information about how much time was needed to transport the victims to the hospitals […], it is clear that the lack of medical personnel in the buses might have been yet another negative factor. […] Everything] suggests that there was no clear plan for the distribution of victims amongst various hospitals. […] As a result, the dispatching of the victims to hospitals was more or less unstructured: thus, four or five buses followed the ambulances and all arrived at the same destination, City Hospital no. 13, almost simultaneously. That hospital received 213 victims of the gas within 30 minutes […], many of them in a critical state. […] It] is very likely that medical assistance to the majority of those 213 hostages was seriously delayed. […].»[1436]

In a rescue operation, the Convention State finds itself in a legally delicate situation. If it is waiting and seeing, it is (latently) violating the duty to protect according to Art. 2 ECHR. If it does not act in time, or acts incorrectly or insufficiently, it also violates the fundamental right. Therefore, for anti-terrorist operations, rescue operations must already be anticipated in the operational planning, and coordination with other operational forces must be ensured in advance (*see* no. IV.3.3.4 and IV.3.4). The actual rescue operation then focuses on the specific allocation of resources as well as on command and communication.

Once injured persons have reached medical facilities – especially hospitals – from a fundamental rights perspective, the generally applicable principles for medical care take effect (*see* no. III.2.2.6).

2.3. DUTY OF AFTERCARE TOWARDS STATE ACTORS

Long-term operations with high psychological pressure or major incidents with numerous casualties in particular can place a psychological strain or even traumatise the involved forces[1437].

[1436] *Finogenov and others v. Russia*, 18299/03 (2011), §§ 249 f.

[1437] On the traumas of helpers after the attack by Anis Amri on *Breitscheidplatz* in *Berlin*, *see* https://www.deutschlandfunk.de → search → "Drei Jahre nach dem Breitscheidplatz-Attentat: Von Helfern, die selbst Hilfe brauchen", of 19 December 2019 (last visited on 4 June 2022).

> For "*Operation Banner*", the figures on the killing of security forces are available (*see* no. III.3.2.3), but no official figures on indirect fatalities: Edwards points to around 70 suicides among police forces and up to 1,300 deaths among military personnel due to traffic accidents, suicides and post-traumatic stress[1438].

No *direct* obligation to protect the *psychological integrity* of state actors arises from Art. 2 ECHR (on the duty to protect, *see* no. V.V.5.1). The *UN Basic Principles* recommend that law enforcement officials are given access to stress counselling after certain events (§ 21):

> *Governments and law enforcement agencies shall make stress counselling available to law enforcement officials who are involved in situations where force and firearms are used.*

In our opinion, a *claim* for members of security forces to receive counselling and special care can be justified in various ways. In principle, it is in the state's own interest to protect its forces and to prevent future misconduct towards other people (*e.g.,* because of traumas suffered). To the extent that there is an increased risk of suicide, in our opinion the state's duty to act as guarantor applies – *mutatis mutandis* (*see* no. VI.2.1). In addition, the state as employer is likely to fulfil special obligations for the protection of professional security and rescue staff according to national legal provisions (*e.g.,* labour law, civil service law or military law).

> In some Convention States the right to mental integrity is constitutionally enshrined along with the fundamental right to physical integrity[1439]. This also results in a state duty to protect. The states partially implement this in their legal foundations. In the case of the principles for the use of weapons, a Swiss

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The challenges of recognising and treating mental harm in security and emergency forces and medical staff are not trivial; *cf.* to the programme *Soigner les soignants* in France, the website of the Universities of Paris-Diderot and Toulouse-Paul Sabatier http://diu-soignerlessoignants.fr (last visited on 4 June 2022).

1438 Edwards, Northern Ireland Troubles, p. 88.

1439 Art. 10 para. 2 the Swiss Federal Constitution: *Everyone has the right to personal liberty, in particular to physical and mental integrity (…).*

regulation, for example, contains a specific duty of care[1440] to army members; in addition, a report must be made immediately and the military police must be called in instantly to secure evidence.

Under certain circumstances, psychological aftercare should take place very quickly. The so-called *15-minute rule* (known in psychology) means that the processing should start in the first 15 minutes after an incident. However, psychological stress can also become noticeable in the aftermath.

Depending on the situation, aftercare can also be creative. For example, *tea time* has been known since "*Operation Banner*". After patrols or missions, the participating law enforcement forces have drunk tea and used this time for debriefings (*see* below) and to process their experiences. What sounds trivial can help to classify and personally cope with events – and thus reduce psychological stress.

A debriefing may also reveal whether measures are necessary to support or cope with the psychological stress of the persons involved. Depending on the circumstances, further debriefings may be useful at a later stage[1441].

The ECtHR has not yet ruled on whether the Convention States have obligations to physically protect members of security forces in their *private surroundings*. The Commission did not intervene in a corresponding application because it was submitted too late[1442].

The part-time Territorial Army sergeant-major killed by the *National Liberation Army* and «his family lived in a strongly republican area and had suffered the following intimidations: The house was attacked with a petrol

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[1440] Art. 17 (para. 6) of the Ordinance on the Police Powers of the Armed Forces of 26 October 1994 (VPA, SR 510.32): *The member of the military police organs who has made use of the weapon shall be cared for*.

[1441] For some years now, police psychology has been firmly established in several countries (*e.g.,* Switzerland, Germany or the United Kingdom). In addition to providing support in recruitment and training, one of its main tasks is the supervision of officers. *Cf.* www.polizeipsychologie.ch → Was ist Polizeipsychologie; www.bdp-verband.de → Broschüren → BDP-Berufsbild Psychologie (→ PDF); www.careersinpsychology.org → research careers → psychologists → police psychologist (last visited on 4 June 2022).

[1442] *M. v. The United Kingdom and Ireland* (AD), 9837/82 (1985), The Law, §§ 13 f.

> bomb [...]. The house was stoned. The children were attacked and abused in the street. Threats were made to burn down the house, especially when the applicant refused to allow a gang to cut down the tree in the front garden for a barricade. [... During] the ‹H› block protests, slogans were written on the gable of the house.»[1443]

In such cases, the rather restrained (as the requirements are very specific) case law to the concrete aversion of danger (*see* no. III.2.2.5) should apply.

> In the case mentioned above, in our opinion, the threat would have been sufficient to justify a duty to protect.

3. LESSONS LEARNED

The *UN Basic Principles* recommend not only specific training for security forces (*top-down principle*; *see* no. IV.4.2) but also the inclusion of lessons learned in training (*bottom-up principle*; *see* § 20, second sentence):

> *Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.*

A first step for both intelligence collection, aftercare and postprocessing is *debriefing* with (or among) the actors involved. For this purpose, events and anomalies can be recapitulated and tactics or procedures relevant to the mission can be discussed retrospectively. As a result, insights can be gained and lessons learned for future improvements.

> In a *debriefing*, for example, it can be checked whether the tactics used succeeded and whether the desired result was achieved. In particular, (potential) sources of error are discussed and analysed in order to be able to make appropriate suggestions for improvement. Debriefings should be carried out in a timely manner, as the memories are then still present and questioning is possible[1444].

[1443] *M. v. The United Kingdom and Ireland* (AD), 9837/82 (1985), The Law, § 4.

[1444] FIP, § 11.1; Zeitner, Einsatzlehre, p. 139.

> A debriefing is always a learning process in itself. It can help improve approaches for future events[1445]. Debriefings can be realised on different levels: on the tactical level for the directly deployed forces, or on the operational level for the commanders[1446], or, in our opinion, even at the strategic level (at the higher levels, however, the tool would rather be the *after-action review*).

In our opinion, in the *debriefing*, but also when further post-processing of events or operations takes place, state authorities act in their supervisory function. Therefore, it must be ensured that a process for post-processing exists and is applied. The resulting findings should be implemented by the respective authorities to the best of their ability. Under specific circumstances, there may also be a duty to assess one's own means and possibilities and, if necessary, to initiate political decisions[1447].

> For longer-lasting operations (or longer-lasting specific threats), it is essential to gain knowledge and initiate learning processes. However, in order to be able to avoid recurring failures, it requires the will to recognise and admit mistakes[1448].

> Conversely, preventing false instructions or avoiding the perpetuation of out-of-date instructions is a real challenge[1449]. This also involves recognising changes in the behaviour of a counterparty and drawing conclusions[1450].

1445 FIP, §§ 11.6 f.; Zeitner, Einsatzlehre, pp. 140 f.

1446 Zeitner, Einsatzlehre, p. 140.

1447 As an illustration, the judgment of the Zurich Court of Cassation of 17 June 1987 ("Rote Zora"; Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht No. 88 [1987], pp. 545 ff.): A former prostitute had first been stalked by eight men, then kidnapped, held captive for days and was finally abused. The police had not responded adequately to her emergency call. A patrol had not been sent to her because the woman, who was known to the police, tended to exaggerate and often lied. The court found that the police's failure to respond was unlawful. Furthermore, according to the court, the state had to maintain a police corps that can fulfil its tasks, and it is not acceptable to give priority to financial considerations in such an important matter as the security of persons and property. The size of the police corps is essentially controlled by the political authorities – government and parliament – through financial and expenditure decisions. Therefore, the decision-making authorities must be informed of any shortcomings in order to be able to make decisions at all.

1448 Edwards, Northern Ireland Troubles, p. 84.

1449 Edwards, Northern Ireland Troubles, p. 84 (with reference to wrong conclusions from the tactics of the IRA).

1450 Following to a saying, for the *carpenter* every problem is basically a *nail* – because his usual working instrument is the *hammer*.

Finally, (tactical) post-processing can be indirectly related to the duty to investigate (*see* no. VI.4) – *i.e.,* when it is a matter of assessing the diligence of state action (be it in tactics, organisation, deployment of resources, etc.).

4. DUTY TO INVESTIGATE AFTER ANY USE OF FORCE

When potentially lethal means of coercion are used (regardless of the actual consequences), the requirements for an investigation under the procedural obligation of Art. 2 ECHR are stricter than in other areas (*see* no. III.2.4)[1451].

> «The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.»[1452]

In its case law, the ECtHR has developed criteria that such an investigation must meet.

> Those «responsible for carrying out the investigation must be independent from those implicated in the events; the investigation must be ‹adequate›; its conclusions must be based on thorough, objective and impartial analysis of all relevant elements; it must be sufficiently accessible to the victim's family and open to public scrutiny; and it must be carried out promptly and with reasonable expedition. In order to be ‹adequate› the investigation 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.»[1453]

1451 *McCann and others v. The United Kingdom* (GC), 18984/91 (1995), § 161; Jacobs/White/Ovey, European Convention, pp. 157 ff.

1452 *Mastromatteo v. Italy* (GC), 37703/97 (2002), § 89; *Varnava and others v. Turkey* (GC), 16064/90 (2009), § 191; *Hugh Jordan v. The United Kingdom*, 24746/94 (2001), § 105; *Kelly and others v. The United Kingdom*, 30054/96 (2001), § 94; *McShane v. The United Kingdom*, 43290/98 (2002), § 94; *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 69; *Finucane v. The United Kingdom*, 29178/95 (2003), § 67; *Isayeva v. Russia*, 57950/00 (2005), § 210; *Gongadze v. Ukraine*, 34056/02 (2005), § 175; *Opuz v. Turkey*, 33401/02 (2009), § 150.

1453 *Tagayeva and others v. Russia,* 26562/07 (2017), § 496, with reference to *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), §§ 232–239.

The duty to investigate also applies in principle to the use of coercive means against civilians in armed conflicts (*see* no. III.4.5) – but under certain circumstances it is relativised there[1454].

In the aftermath of the use of potentially lethal means of coercion, investigations other than state investigations are excluded a priori (*see* no. III.2.4.4). In such cases, it is also prohibited to bypass an investigation with possible compensation payments.

> «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 […]. Moreover, the procedural obligation of the State under Article 2 cannot be satisfied merely by awarding damages […].»[1455]

4.1. DUTY TO CARRY OUT AN EFFECTIVE INVESTIGATION

The duty to investigate comprises various elements (*see* no. III.2.4) which sometimes cannot be clearly distinguished from each other; this causes a certain dogmatic openness. The ECtHR interprets the duty to investigate in police operations in a broad sense – it covers all phases of operations.

> As an example, the *Grand Chamber* stated in the judgment *Al-Skeini and others v. The United Kingdom* on the deployment of soldiers in Iraq: «[…] Article 2 required an independent examination, accessible to the victim's family and to the public, of the broader issues of State responsibility for the death, including the instructions, training and supervision given to soldiers undertaking tasks such as this in the aftermath of the invasion»[1456].

[1454] *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 164.

[1455] *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 165; quite similarly, in *McKerr v. The United Kingdom*, 28883/95 (2001), § 121.

[1456] *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 174.

In the case of use of force by state agents, the investigation requires a strict examination of the respective incidents by the investigating authority[1457]; in our opinion, the duty to investigate is condensed into a *duty to carry out an effective investigation*[1458] (*see* no. III.2.6).

Accordingly, the criteria of independence of an investigating authority (*see* no. VI.4.2.1) and the adequacy of the investigation (*see* no. VI.4.2.2) are to be regarded as elements of its effectiveness.

The duty to investigate after a use of force also serves – in addition to its function as an individual law – a further, far-reaching purpose: guaranteeing public confidence in the exercise of the *state's monopoly on the use of force*[1459] and in the lawfulness of state action[1460]. Finally, an effective investigation in individual cases is related to the guarantee of an *effective legal framework* with regard to the exercise of state power.

In *Hugh Jordan v. The United Kingdom*, a motorist (*Pearse Jordan*) was caught in a police stop in Belfast. «On stopping the car, the officers had fired several shots at the driver, fatally wounding him a short distance from where his car had been abandoned. No guns, ammunition, explosives, masks or gloves had been found in the car and the driver, had been unarmed.»[1461] «Following the death of Pearse Jordan, an investigation was commenced by the RUC. On the basis of that investigation, there was a decision by the [Director of Public Prosecutions] not to prosecute any officer.»[1462] Among other things, the ECtHR recognised this as a violation of the duty to investigate under Art. 2 ECHR: «The essential purpose of such investigation is to secure the effective

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1457 *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), § 234.

1458 *Cf.* Jacobs/White/Ovey, European Convention, pp. 157 f.; Reid, Practitioner's Guide, 75-016; Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), 217; Chevalier-Watts, Effective Investigations, pp. 702 f.

1459 *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), § 232; *Ramsahai and others v. The Netherlands* (GC), 52391/99 (2007), § 325.

1460 *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 167; *Isayeva v. Russia*, 57950/00 (2005), § 213.

1461 *Hugh Jordan v. The United Kingdom*, 24746/94 (2001), § 13.

1462 *Hugh Jordan v. The United Kingdom*, 24746/94 (2001), § 116.

> implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.»[1463]

There is also a close link between an effective investigation by an independent authority and a *publicly accessible* and *transparent* assessment of the circumstances of a use of force. It should be possible to examine and to understand whether a behaviour was appropriate or not. A proper review strengthens the public's trust in the lawfulness of governmental law enforcement. It is one of the cornerstones for learning from actual incidents and for drawing consequences in a broader sense.

> In this respect, there is a *de facto* parallelism between individual legal claims of victims under Art. 2 ECHR and a public interest in effective investigations and the uncovering of inadequate legal bases or of abuses in the application of the law. In individual cases, the ECtHR examines how far the participation of victims – and in the case of a fatal use of force in particular of survivors – should extend in proceedings[1464].

Whether there is a duty to investigate must (in principle) be assessed *ex ante*.

> The *Grand Chamber* emphasises the principle in the judgment *Giuliani and Gaggio v. Italy*. However, it also stresses the – rare – possibility of exceptions: whether «or not an investigation had been conducted properly had to be assessed *ex ante*, on the basis of the facts known when the decision was taken, and not *ex post facto*. An investigation was defective for the purposes of the Convention if the shortcomings identified undermined its capability of establishing the circumstances of the case or the persons responsible […]. Only unusual circumstances had led the Court, in certain cases, to find a procedural violation of Article 2 without finding a substantive violation of the same provision or of Article 38 of the Convention […], and this had in any case given rise to dissenting opinions […]. In the instant case, the conclusions of the domestic authorities as to the existence of self-defence had been endorsed by the Cham-

[1463] *Hugh Jordan v. The United Kingdom*, 24746/94 (2001), § 105.

[1464] Chevalier-Watts, Effective Investigations, p. 715.

ber. Accordingly, any defect there might have been in the investigation had no impact on its effectiveness.»[1465]

Among these exceptions is the judgment *Hugh Jordan v. The United Kingdom* (*see* above and no. VI.4.2.1).

4.2. CRITERIA OF AN EFFECTIVE INVESTIGATION IN THE CASE OF A USE OF FORCE

To be effective, an investigation must be able to be conducted adequately and in a timely manner by an independent authority[1466].

4.2.1. Organisational-formal element: Independence of the investigating authority

A first, organisational-formal criterion is the *formal independence* of the (competent) authority charged with the investigation of a (potentially) lethal use of force. The investigating authorities or the persons entrusted with the investigation must be independent from the agencies and persons involved in a use of force[1467].

«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 [...].»[1468]

[1465] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 269.
In the case of targeted killing, an *ex post* assessment is sometimes required in addition to strict legal evidence; *cf.* MacDonald, Lawful Use of Targeted Killing, p. 138.

[1466] Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), pp. 217 f.; Reid, Practitioner's Guide, 75-016.

[1467] *Cf.* Leach, European Court, Rz. 6.75 and on the cases concerning the United Kingdom Dickson, ECHR and the Conflict in Northern Ireland, pp. 268 ff.

[1468] *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), § 232. Quite similarly, in *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 167; *Mastromatteo v. Italy* (GC), 37703/97 (2002), § 91; *Isayeva v. Russia*, 57950/00 (2005), §§ 211 and 213 f. or *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 70; quite similarly, in *Turluyeva v. Russia,* 63638/09 (2013), § 109.

The criterion is obviously violated if the investigating authority is already involved in the incidents to be investigated. This deficiency cannot be remedied. It is not sufficient if there is merely supervision by a third, independent authority.

> In the case of *Hugh Jordan v. The United Kingdom* (on the facts, *see* no. VI.4.1) «[…] the investigation into the killing by a RUC police officer was headed and carried out by other RUC officers, who issued the investigation report on the file. The […] investigation was supervised by the ICPC, an independent police monitoring authority. […] There was nonetheless a hierarchical link between the officers in the investigation and the officers subject to investigation, all of whom were under the responsibility of the RUC Chief Constable, who plays a role in the process of instituting any disciplinary or criminal proceedings […]. The power of the ICPC to require the RUC Chief Constable to refer the investigating report to the DPP for a decision on prosecution or to require disciplinary proceedings to be brought is not, however, a sufficient safeguard where the investigation itself has been for all practical purposes conducted by police officers connected with those under investigation.»[1469]

Bias on the part of the investigating authority may lead to inaccurate or incomplete results[1470]. Investigations may not be carried out adequately if there is a lack of independence (*see* no. VI.4.2.2), which may also complicate the sanctioning of those responsible.

In addition to the investigating authority's formal independence, the ECtHR expects its *actual independence*. In this regard, the relationship between the investigating authority and the other authorities involved in the investigation is relevant. The latter may neither decide whether an investigation takes place nor how to deal with the result of the investigation.

> In the case of *Al-Skeini and others v. The United Kingdom*, the degree of independence of the *Royal Military Police*'s special unit with its own chain of command was to be assessed in the investigation of various deaths in Iraq.

[1469] *Hugh Jordan v. The United Kingdom*, 24746/94 (2001), § 120.

[1470] *Finogenov and others v. Russia*, 18299/03 (2011), § 282.

> The ECtHR found a violation of Art. 2 of the ECHR[1471], because it did «[…] not consider that this was sufficient to comply with the requirements of Article 2. It is true that the Royal Military Police, including its Special Investigation Branch, had a separate chain of command from the soldiers on combat duty whom it was required to investigate. However […], the Special Investigation Branch was not, during the relevant period, operationally independent from the military chain of command. It was generally for the Commanding Officer of the unit involved in the incident to decide whether the Special Investigation Branch should be called in. If the Special Investigation Branch decided on its own initiative to commence an investigation, this investigation could be closed at the request of the military chain of command […]. On conclusion of a Special Investigation Branch investigation, the report was sent to the Commanding Officer, who was responsible for deciding whether or not the case should be referred to the Army Prosecuting Authority. The […]the fact that the Special Investigation Branch was not ‹free to decide for itself when to start and cease an investigation› and did not report ‹in the first instance to the [Army Prosecuting Authority]› rather than to the military chain of command, meant that it could not be seen as sufficiently independent from the soldiers implicated in the events to satisfy the requirements of Article 2.»[1472]

Even in the case of major investigations involving entire teams, the representatives of authorities that have been involved in the planning and execution of operations are excluded from the later investigating. Also, if persons with expert knowledge are concerned, they are excluded.

> In *Finogenov and others v. Russia*, representatives of the domestic intelligence service were improperly involved in the investigation of the anti-terrorist operation. The «investigative team was not independent: although it was headed by an official from the Moscow City Prosecutor Office's, and supervised by the General Prosecutor's Office, it included representatives of the law-enforcement

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1471 *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), §§ 175 and 177.

1472 *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 172.
The examination of independence is based on the specific circumstances; *c.f., e.g., Mustafa Tunç and Fecire Tunç v. Turkey* (GC), 24014/05 (2015), § 237 ff.

> agencies which had been directly responsible for the planning and conduct of the rescue operation, namely the FSB […]. Experts in explosive devices were from the FSB […]. The key forensic examinations of the victims' bodies and their medical histories were entrusted to a laboratory that was directly subordinate to the Moscow City Public Health Department […]. The head of that Department […] was personally responsible for the organisation of medical aid to the victims and was therefore not disinterested. In sum, the members of the investigative team and the experts whose conclusions were heavily relied on by the lead investigator had conflicts of interests, so manifest that in themselves those conflicts could have undermined the effectiveness of the investigation and the reliability of its conclusions.»[1473]

The independent investigating authority must have autonomous access to information that allows it to assess the further circumstances of the police action. In addition to the precise circumstances of the individual case, this also includes the possibility of assessing operations as a whole.

> In *Ergi v. Turkey*, the circumstances of the death of *Havva Ergi* during an alleged clash were to be judged. The public prosecutor investigating the death of this girl were heavily relying on the information provided by the gendarmes involved in the incident. «Nor was any detailed consideration given by either the district gendarmerie commander or the public prosecutor to verifying whether the security forces had conducted the operation in a proper manner. Although [gendarmerie major] Ahmet Kuzu had stated to the delegates that the operations should as far as possible not be planned in or about civilian areas and that in the instant case the plan had been to restrict the activity to the north of the village, it would appear that no inquiry was conducted into whether the plan and its implementation had been inadequate in the circumstances of the case. [… The] authorities failed to carry out an effective investigation into the circumstances surrounding Havva Ergi's death. [… Neither] the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investiga-

[1473] *Finogenov and others v. Russia*, 18299/03 (2011), § 281.

tion is conducted into the deaths arising out of clashes involving the security forces, more so in cases such as the present where the circumstances are in many respects unclear.»[1474]

The question may arise as to what stage of the proceedings the formal and actual independence of the investigating authority must be granted. The ECtHR requires compliance to this criterion already in the *initial stages* of the investigation.

The case of *Brecknell v. The United Kingdom* concerned a murderous attack by loyalist gunmen on Donnelly's Bar in 1975. The perpetrators could not be identified and the investigation was closed in 1981[1475]. In 1999, RUC officer John Weir stated that the police had colluded with loyalist paramilitaries in the mid-1970s. A police investigation subsequently took place, «whether Weir's allegations should be assessed as sufficiently credible to require a full investigation.»[1476] A RUC report in February 2000 found Weir untrustworthy but concluded to continue the investigation; in 2004, a *Serious Crimes Review Team* was formed to investigate the case, and in 2005, a *Detective Chief Superintendent* of the *London Metropolitan Police Force* took over the overall supervision[1477]. For the ECtHR, the decisive factor was, «that for a considerable period the case lay under the responsibility and control of the RUC»[1478]. The «lack of independence of the RUC during the initial stages of the investigation begun in 1999» and constituted a violation of Art. 2 ECHR[1479].

1474 *Ergi v. Turkey,* 66/1997/850/1057 (1998), § 84 f.
In *Tanrıkulu v. Turkey*, 23763/94 (1999), § 103, the «Court points out that the obligation mentioned above is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is the issue of whether members of the deceased's family or others have lodged a formal complaint about the killing with the competent investigation authorities decisive. In the instant case the mere fact that the authorities were informed of the murder of the applicant's husband gave rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death [...].»

1475 *Brecknell v. The United Kingdom*, 32457/04 (2007), §§ 7 and 15 ff.

1476 *Brecknell v. The United Kingdom*, 32457/04 (2007), §§ 18 ff. and 22 (quote).

1477 *Brecknell v. The United Kingdom*, 32457/04 (2007), §§ 23 f.

1478 *Brecknell v. The United Kingdom*, 32457/04 (2007), § 76.

1479 *Brecknell v. The United Kingdom*, 32457/04 (2007), verdict, § 1 (unanimous).

In our opinion, it is realistic for the law enforcement authorities involved to secure evidence, find witnesses and establish the facts of the case during or immediately after operations (or incidents). However, this implies a dutiful discretion to inform the competent investigating authority as early as possible – and, if necessary, to transfer the further investigations or enquiries to an authority that fulfils the criterion of independence.

> The theoretically conceivable involvement of the investigating authority already during the execution of certain operations is not required according to case law. With good reason – because this could lead to an impairment of their objectivity. An independent investigation should precisely have an unbiased perspective in order to be able to meet the requirements of Art. 2 ECHR. Neutrality requires a certain distance.

4.2.2. Substantive element: Adequacy of the investigation (objectivity)

There is some discretion in assessing the *appropriateness* of an investigation[1480]. This includes both the collection of the facts[1481] (or evidence) and the examination of the legitimacy of the use of force (according to the specific circumstances) as well as the identification of those responsible (and their possible sanctioning)[1482].

> «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 in the circumstances [...] and of identifying and if appropriate punishing those responsible [...]. This is not an obligation of result, but of means.»[1483]

As a result, the outcome of the investigation must (be able to) rely on carefully established, objective and unambiguous facts[1484].

[1480] Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 217.

[1481] *Cf.* Leach, European Court, Rz. 6.90 ff. (with examples).

[1482] *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), § 233; Jacobs/White/Ovey, European Convention, p. 168.

[1483] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 301; *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 166; quite similarly, in *Isayeva v. Russia*, 57950/00 (2005), § 212.

[1484] *Finogenov and others v. Russia*, 18299/03 (2011), § 272; *Kolevi v. Bulgaria*, 1108/02 (2009), § 201.

> «The authorities must take the reasonable steps available to them 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 clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard [...]»[1485]

a. Finding facts and securing evidence

The obligation to carry out an adequate investigation includes an objective, comprehensive and immediate (as close to the event as possible) preservation of evidence within the legally provided framework. This should allow for a reconstruction of the facts that is as comprehensive as possible.

> In the case of *Tagayeva and others v. Russia*, this was not achieved. The ECtHR «[...] reiterates that as this was a situation of violent loss of life, once the identifications had been carried out, individual and more conclusive scrutiny about its causes should have been one of the crucial tasks of the investigation. Where the exact causes of deaths were not established with precision, the investigation failed to provide an objective ground for the analysis of the use of lethal force by the State agents.»[1486]

The effectiveness of an investigation corresponds to an independent element of the procedural obligation. With the required establishment of facts and the securing of evidence, the foundation is provided for the examination of a possible violation of the positive or of the negative obligation from Art. 2 ECHR[1487].

> «The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness

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[1485] *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 166; quite similarly, in *Isayeva v. Russia*, 57950/00 (2005), § 212.

[1486] *Tagayeva and others v. Russia,* 26562/07 (2017), § 507.

[1487] Jacobs/White/Ovey, European Convention, pp. 166 f.; *Mustafa Tunç and Fecire Tunç v. Turkey* (GC), 24014/05 (2015), §§ 174 ff.

> testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death [...]. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.»[1488]

The establishment of facts also includes locating witnesses and securing evidence; forensic evidence or forensic medical examinations may be required. If this is not carried out, or if it is carried out inadequately, the procedural obligation under Art. 2 ECHR is infringed[1489].

> In the judgment *Kaya and others v. Turkey*, the Court does not consider the mere disappearance of a journalist to be a violation of Art. 2 ECHR[1490]. It states, however, that no adequate measures have been taken for a sufficient investigation, whether for identifying further witnesses or securing evidence in the vicinity from which the missing person was kidnapped[1491]. Therefore, Art. 2 ECHR was violated with regard to the duty to investigate.
>
> In the judgment *Makaratzis v. Greece*, the Court held that the investigating authority had failed to identify all police officers involved in the escape. No deployment lists were requested and no other precautions were taken to locate possible participants. Furthermore, only limited evidence had been collected, which, given the overall circumstances[1492], made it impossible to draw an effective and objective conclusion[1493].

1488 *Hugh Jordan v. The United Kingdom*, 24746/94 (2001), § 107.

1489 Leach, European Court, Rz. 6.81; *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 301.

1490 *Kaya and others v. Turkey*, 4451/02 (2006), §§ 33 f.

1491 *Kaya and others v. Turkey*, 4451/02 (2006), §§ 39 ff.

1492 Several shots were fired at the person concerned, but only three projectiles were recovered; *Makaratzis v. Greece* (GC), 50385/99 (2004), § 76.

1493 *Makaratzis v. Greece* (GC), 50385/99 (2004), §§ 76 ff.

b. Plausibility

The conduct of the investigating authorities must be consistent and ultimately comprehensible to external parties. This excludes the participation of persons in the investigation who are not independent enough. The risk of a contamination of the examination by the collection of dubious evidence has to be minimised.

In the judgment *Mikheyev v. Russia*, the failure to search for possible eyewitnesses[1494] and the delay in conducting forensic medical examinations[1495] were complained. In addition, the officers accused of torture had been deployed to find and interrogate witnesses and had displayed questionable conduct in doing so[1496]. The ECtHR considers the fact that fictional reports and findings were used in the investigation to be particularly serious: «The investigator stated that [...] the applicant had been released from custody, but then arrested again for disturbing the peace at the railway station. However, by that time it had been officially confirmed that the reports of inspectors N, T and D (who had allegedly arrested the applicant at the railway station) had been fabricated, and that at the relevant time the applicant had been in the hands of the police. Nevertheless this account of events *was repeated* in the decision to discontinue the proceedings [...]. This fact [...] is such as to discredit the consistency of the official investigation in the eyes of any independent observer.»[1497]

In the judgment *Paul and Audrey Edwards v. The United Kingdom*, the court declared Art. 2 ECHR as infringed based on a «lack of compulsion of witnesses who are either eyewitnesses or have material evidence related to the circumstances of a death»; as this «must be regarded as diminishing the effectiveness of the inquiry as an investigative mechanism»[1498].

1494 *Mikheyev v. Russia,* 77617/01 (2006), § 112.

1495 *Mikheyev v. Russia,* 77617/01 (2006), § 113.

1496 One of the officers reported that he had not found the said witness – however, the witness later stated that no one from the police had ever tried to visit him at home; *cf. Mikheyev v. Russia,* 77617/01 (2006), § 116.

1497 *Mikheyev v. Russia,* 77617/01 (2006), § 119.

1498 *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 79.

In our opinion, the absence of contradictions and the comprehensibility are to be understood as a uniform criterion. However, consistency does not mean that the result of an investigation must be completely seamless. Rather, in practice it frequently occurs that testimonies contradict each other, that there are indications in one direction or the other. It is expected to converge as close as possible to the actual facts of the case (on the shifting of the burden of proof, *see* no. VI.4.2.4).

c. Overall assessment

The ECtHR often examines the criterion of *objectivity* together with the independence and effectiveness of an investigation. A clear separation of these elements does not appear to make sense, as the individual aspects are ultimately closely interrelated[1499]. The findings from an investigation lead to an overall assessment of whether the use of force was in compliance with the Convention – and if not, to the identification of the possible requirement for sanctions[1500].

> «In particular, the investigation's conclusions must be based on 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 [...]».[1501]

Accordingly, in situations of terrorist activities, for example, compliance with the procedural obligation requires investigating not only the behaviour of the unlawful attackers but also the reactions of the authorities.

[1499] In the literature, the various aspects are each presented in different contexts; *cf.* Leach, European Court, Rz. 6.75; Reid, Practitioner's Guide, 75-016 (in general) and 85-021 (use of force); Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), pp. 217 f. (the authors list several sub-elements under the main criterion of effectiveness, such as appropriateness; the latter also include objectivity).

[1500] *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), § 234; Jacobs/White/Ovey, European Convention, p. 168.

[1501] *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), § 234 (in connection with the effectiveness of the investigation).

Thus, in *Finogenov and others v. Russia*, the procedural obligation was infringed as the investigation remained incomplete in several regards[1502]: «The Court stresses that it is not concerned with the investigation into the terrorist act itself. In this part the investigation appeared to be quite ample and successful. Thus, the terrorists and their supporters were identified, the circumstances of the hostage-taking were established, the explosives and firearms used by the terrorists were examined, and at least one person (the terrorists' accomplice outside the building) was brought to trial and convicted. The question is whether the investigation was equally successful in examining the authorities' own actions during the hostage crisis.»[1503]

The investigation was already manifestly incomplete by the fact that the composition of the narcotic gas used was not disclosed[1504]. In addition, there were other reasons that made the investigation appear incomplete: neither all persons directly involved nor random witnesses had been interviewed[1505]. Moreover, other relevant facts for the investigation had not been established: «For instance, the investigative team did not establish how many doctors were on duty on the day of the storming in each hospital which participated in the rescue operation. They did not identify what preliminary instructions had been given to the ambulances and city buses as to where to transport the victims. They did not identify all of the officials who had coordinated the efforts of the doctors, rescue workers and military personnel on the spot, and what sort of instructions they had received. They did not establish why the mass evacuation had started only about two hours after the start of the storming, or how much time it had taken to kill the terrorists and neutralise the bombs.»[1506]

The ECtHR seems to recognise a further infringement of the duty to an effective investigation in the destruction of the operational documents – potentially

1502 *Finogenov and others v. Russia*, 18299/03 (2011), § 282.

1503 *Finogenov and others v. Russia*, 18299/03 (2011), § 274.

1504 *Finogenov and others v. Russia*, 18299/03 (2011), § 277.

1505 *Finogenov and others v. Russia*, 18299/03 (2011), § 278.

1506 *Finogenov and others v. Russia*, 18299/03 (2011), § 280.

> important evidence: «Even assuming that some of them might have contained sensitive information, indiscriminate destruction of all documents, including those containing information about general preparations, distribution of roles amongst members of the crisis cell, logistics, methods of coordination of various services involved in the operation, etc., was not justified.»[1507]

In certain circumstances, investigating authorities may have to examine tangible factual elements related to security force operations and (theoretically possible) alternative conduct. An investigation must allow an independent review of the evidence obtained.

> As an example, in the judgment in *Isayeva v. Russia*, in the result, the duty to an effective investigation was infringed in several respects. There were long delays before the opening of the investigation[1508]. Various mistakes were then made during the investigation itself[1509]: «In the investigation file reviewed the Court has found no evidence from the servicemen who manned the roadblocks at the two exits from the village about the circumstances of the exit and the nature of the orders they had received. Most importantly, the head of the Katyr-Yurt administration, to whom the military witnesses constantly referred as their interlocutor, was questioned only once. No questions were put to him concerning his contacts with the military.»[1510]

The ECtHR's case law on the duty to investigate in the context of a use of force is not always uncontroversial and sometimes varies. This is related to the overall assessment of the circumstances in each case.

> In the judgment *Giuliani and Gaggio v. Italy*, the ECtHR accepted that no proceedings had been opened against the police command. After the fatal shooting of *Carlo Giuliani*, essentially a self-defence situation had to be assessed (*see* no. II.2.5). The *Grand Chamber* did not see any violation of Art. 2 ECHR – neither with regard to the use of lethal force nor the "domes-

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1507 *Finogenov and others v. Russia*, 18299/03 (2011), § 279.

1508 *Isayeva v. Russia*, 57950/00 (2005), § 217.

1509 *Isayeva v. Russia*, 57950/00 (2005), § 218.

1510 *Isayeva v. Russia*, 57950/00 (2005), § 221.

tic legislative framework governing the use of lethal force or as regards the weapons issued to the law-enforcement agencies at the G8 summit in Genoa» nor to the «organisation and planning of the policing operations"[1511] or the «procedural aspects»[1512].

A joint partly dissenting opinion by seven of the judges challenges the non-violation of the procedural aspect of the right to life. In particular «whether the lack of an investigation aimed at establishing possible liability on the part of certain police officials breached the procedural obligations arising out of Article 2»[1513].

The dissenting opinion is based on a – also dissenting – view that the organisation of the policing operations at the G8 summit in Genoa was insufficient[1514]. The risks of riots in the planning would have been underestimated. The selection of the forces should have excluded inexperienced police officers. Consequently, the planning of the operation would have required a more detailed investigation, so that the persons responsible could have been held accountable. However, according to the dissenting opinion, a disciplinary investigation would also have been adequate[1515].

4.2.3. Temporal elements

a. Promptness and reasonable expedition as the main principle

The investigation must be carried out without delay. In addition, the investigating authority must strive to minimise delays during an investigation.

[1511] *Cf.* Reid, Practitioner's Guide, 85-021 and 85-018.

[1512] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), Judgment of the Court, §§ 1–4.

[1513] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), Joint Partly Dissenting opinion of Judges Rozakis, Tulkens, Zupancic, Gyulumyan, Ziemele, Kalaydjieva and Karakas, § 18.

[1514] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), Joint Partly Dissenting opinion of Judges Rozakis, Tulkens, Zupancic, Gyulumyan, Ziemele, Kalaydjieva and Karakas, §§ 7 ff.

[1515] *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), Dissenting opinion of Judges Rozakis, Tulkens, Zupancic, Gyulumyan, Ziemele, Kalaydjieva and Karakas, §§ 20 f.

> «A requirement of promptness and reasonable expedition is implicit in the context of an effective investigation within the meaning of Article 2 of the Convention.»[1516]

The temporal requirements serve both to clarify the individual case and to protect confidence in the constitutional state; no doubts shall arise regarding the toleration of possibly unlawful actions (also through the filibustering of proceedings)[1517]. The benchmark for assessing the temporal progress of an investigation depends on the circumstances.

> In the case of *Nagmetov v. Russia*, an application for a forensic examination of the possible weapons of crime had taken eight months. Another three months passed before the results were received. The investigation was then suspended without substantive reasons, but resumed almost two years later. This was an unnecessary delay[1518]. This was accompanied by the loss of important evidence during the delay which had a severe impact on the effectiveness of the investigation[1519]. In conclusion, the Court considered that not all possible and feasible measures had been taken on the part of the authorities to investigate the circumstances of the case[1520].

Sometimes the conduct of parties to proceedings can contribute to delays in the investigation. The ECtHR seems to be strict at least when there are doubts as to whether the

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[1516] *Opuz v. Turkey,* 33401/02 (2009), § 150. Quite similarly, in *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), § 237; *Mustafa Tunç and Fecire Tunç v. Turkey* (GC), 24014/05 (2015), § 178; *Mocanu and others v. Romania* (GC), 10865/09 (2014), § 232; *Jaloud v. The Netherlands* (GC), 47708/08 (2014), § 186; *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 305; *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 167; *Makaratzis v. Greece* (GC), 50385/99 (2004), § 74.

[1517] *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), § 237; *McDonnell v. The United Kingdom*, 19563/11 (2014), § 86.

[1518] *Nagmetov v. Russia* (GC), 35589/08 (2017), § 45 (the Chamber's Judgment, § 57).

[1519] The evidence provided to the Court, that the Russian authorities had taken the necessary and reasonable precautions to secure and preserve the evidence and that the necessary investigations had been carried out into the loss of the main evidence, was found to be insufficient; *Nagmetov v. Russia* (GC), 35589/08 (2017), § 45 (the Chamber's Judgment, § 52).

[1520] *Nagmetov v. Russia* (GC), 35589/08 (2017), § 45 (judgment of the section §§ 52 ff.); *McDonnell v. The United Kingdom*, 19563/11 (2014), § 90.

investigative procedure is structurally capable of ensuring both the expeditious handling of the proceedings and the adequate participation of third parties[1521].

Thus, in the judgment *McKerr v. The United Kingdom*, it concluded that there had been a breach of the procedural obligation: A «number of the adjournments were requested by the applicant's family. They related principally to legal challenges to procedural aspects of the inquest which they considered essential to their ability to participate – in particular, access to the documents. While it is therefore the case that the applicant's family contributed significantly to the delays, this to some extent resulted from the difficulties facing relatives in participating in inquest procedures [...]. It cannot be regarded as unreasonable that the applicant made use of the legal remedies available to him to challenge these aspects of the inquest procedure.»[1522]

b. Exceptions on factual impediments

An investigation can be complicated in particular due to factual circumstances. The *Grand Chamber* demands a prompt investigation especially in difficult cases and indirectly emphasises its importance for maintaining trust in the authorities.

For example, in the judgment *Varnava and others v. Turkey*, the case had to be judged against the historical background of Turkey's military intervention from Cyprus in summer 1974: «Even where there may be obstacles which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.»[1523]

A duty of prompt investigation applies not only to the use of force by state's authorities, but in general. Thus, for example, in the judgment *Opuz v. Turkey* on the exercise of domestic violence during the tensions in south-eastern Turkey

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1521 *McKerr v. The United Kingdom*, 28883/95 (2001), § 155.

1522 *McKerr v. The United Kingdom*, 28883/95 (2001), § 153.

1523 *Varnava and others v. Turkey* (GC), 16064/90 (2009), § 191.

at the end of the 1990s: «It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of tolerance of unlawful acts.»[1524]

However, in the judgment *Nježić and Štimac v. Croatia*, the ECtHR found no violation of Art. 2 ECHR. The death of seven civilians killed in Bukovac in 1991 during the Yugoslav civil war had still remained unsolved 22 years later. The investigation was also hampered by factual circumstances: two eyewitnesses had emigrated to Canada and no longer wished to testify; moreover, some of the possible perpetrators had already died[1525]. «The [...] prosecuting authorities did not remain passive and [...] significant efforts have been made to prosecute war crimes. Thus, by 31 December 2012 the prosecuting authorities had opened investigations in respect of 3'436 alleged perpetrators altogether and there had been 557 convictions [...] The Court finds that, taking into account the special circumstances prevailing in Croatia in the post-war period and the large number of war-crimes cases pending before the local courts, the investigation has not been shown to have infringed the minimum standard required under Article 2.»[1526]

In our opinion, factual impediments do not acquire any separate significance. What is and remains decisive is whether the competent state authorities do everything possible and feasible to conduct an investigation with reasonable expedition. The guarantee of Art. 2 ECHR is complied with even if (major) obstacles cannot be overcome despite corresponding efforts.

c. Long duration of proceedings

The national legal systems know both limitation periods and requirements for procedural acceleration. Neither the ECtHR nor the case law on the duty to conduct an effective

[1524] *Opuz v. Turkey*, 33401/02 (2009), § 191.

[1525] *Nježić and Štimac v. Croatia*, 29823/13 (2015), §§ 65 and 69.

[1526] *Nježić and Štimac v. Croatia*, 29823/13 (2015), §§ 72 f.

investigation under Art. 2 ECHR set absolute time limits on the permissible duration of proceedings. Nevertheless, in individual cases, an excessive length of proceedings can result in a violation of the Convention.

In *McDonnell v. The United Kingdom*, the fatal heart attack following an assault of a detainee in prison was to be assessed. Various delays arose. «[…] Mr. McDonnell died in March 1996 and that the inquest proper did not begin until April 2013, more than seventeen years later»[1527]. The ECtHR recognised a violation of the duty to conduct an effective investigation solely due to the delay – the reasons for the delay were no longer relevant: «In conclusion, whatever the individual responsibility, or lack of responsibility, of those public officials involved in the investigation process, these delays cannot be regarded as compatible with the State's obligation under Article 2 to ensure the effectiveness of investigations into suspicious deaths, in the sense that the investigative process, however, it be organised under national law, must be commenced promptly and carried out with reasonable expedition. To this extent, the foregoing finding of excessive investigative delay, of itself, entails the conclusion that the investigation was ineffective for the purposes of Article 2 of the Convention. There has, accordingly, been a violation of Article 2 under its procedural aspect by reason of excessive investigative delay.»[1528]

In the case of *McCaughey and others v. The United Kingdom*, investigations were still ongoing 23 years after the shooting of the two IRA gunrunners *Martin McCaughey* and *Desmond Grew* by special forces. The ECtHR found a violation of the procedural obligation under Art. 2 ECHR due to excessive investigative delay[1529].

[1527] *McDonnell v. The United Kingdom*, 19563/11 (2014), §§ 10 and 87 (quote).

[1528] *McDonnell v. The United Kingdom*, 19563/11 (2014), § 90; similarly, the rationale in *Collette and Michael Hemsworth v. The United Kingdom*, 58559/09 (2013), § 74 – even 13 years after Mr Hemsworth's death, important procedural steps were still outstanding (§ 70).

[1529] *McCaughey and others v. The United Kingdom*, 43098/09 (2013), §§ 130 ff. (on the undue delays) and 121 ff. (on admission).

d. Entitlements to a retrial?

Conversely, the question of an entitlement to a retrial of completed proceedings may arise. The ECtHR does not allow any assertion or allegation to constitute a claim for the conduct of new proceedings. However, it does require that the state authorities carefully examine information or objects, «which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further»[1530].

> In the judgment in *Brecknell v. The United Kingdom* (*see* no. VI.4.2.1), a person already involved in the original proceedings claimed his own involvement in the crime some 24 years later. «There is no absolute right […] to obtain a prosecution or conviction […] and the fact that an investigation ends without concrete, or with only limited, results is not indicative of any failings as such. The obligation is of means only […]. However […] it may be that some time later, information purportedly casting new light on the circumstances of the death comes into the public domain. The issue then arises as to whether, and in what form, the procedural obligation to investigate is revived.»[1531] 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. The steps that it will be reasonable to take will vary considerably with the facts of the situation. 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. [… 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

[1530] *Brecknell v. The United Kingdom*, 32457/04 (2007), § 70. On possible fresh obligations, *cf.* Reid, Practitioner's Guide, 85-010.

[1531] *Brecknell v. The United Kingdom*, 32457/04 (2007), § 66.

prosecution. The importance of the right under Article 2 does not justify the lodging, willy-nilly, of proceedings.»[1532]

The ECtHR assesses new facts (or circumstantial evidence) according to the circumstances of each case and new allegations depending on the credibility of the authorship. From the Court's (procedural) perspective, this is eventually a matter of admissibility.

In the decision *Sylvia Hackett v. The United Kingdom*, for example, the ECtHR did not accept the complaint of violation of the procedural obligation under Art. 2 ECHR. Michael Stone, who was convicted of the murder in 1988, claimed in a book in 2003 that he had not shot *Dermot Hackett*. Rather, Hackett had fallen victim to a conspiracy in which the Northern Ireland security authorities had been involved. The *Chief Constable of the Police Service of Northern Ireland* appointed an officer of the *Metropolitan Police* to investigate the allegations. The ECtHR found no evidence of a lack of independence in the investigation. By contrast, Michael Stone was «a person already convicted of serious crimes, who on his own admission has been prepared to lie to mislead the authorities for his own purposes»[1533]. From the ECtHR's view, it was enough to assign an independent official to an investigation after the new allegations had been made[1534].

e. Excursus: "Retroactive" effect of the right to an effective investigation?

For the Convention States, the guarantees under the ECHR have only led to future obligations (*see* no. III.2.5.2). This principle, which is clear on its own, can lead to questions regarding the duty to investigate with regard to temporal aspects. It is conceivable that the procedural obligation takes on a retroactive character, at least partially.

In the judgment *Šilih v. Slovenia*, the ECtHR dealt with the temporal limits of the procedural obligation under Art. 2 ECHR. The case concerned a death that had occurred

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[1532] *Brecknell v. The United Kingdom*, 32457/04 (2007), § 71.

[1533] *Sylvia Hackett v. The United Kingdom* (AD), 34698/04 (2005), p. 6.

[1534] *Sylvia Hackett v. The United Kingdom* (AD), 34698/04 (2005).

prior to Slovenia's ratification of the ECHR, but whose investigation had only begun after that date[1535]. The *Grand Chamber* did not dismiss the case *ratione temporis*, but declared it to be admissible[1536]. The rationale for this is known as the *Šilih test*:

> «Firstly, where the death occurred before the critical date, the Court's temporal jurisdiction will extend only to the procedural acts or omissions in the period subsequent to that date. Secondly, the procedural obligation will come into effect only if there was a ‹genuine connection› between the death as the triggering event and the entry into force of the Convention. Thirdly, a connection which is not ‹genuine› may nonetheless be sufficient to establish the Court's jurisdiction if it is needed to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective way. The Court will examine each of these elements in turn.»[1537]

The *Šilih test* has met criticism mainly because of its third element[1538]. The *Grand Chamber* has clarified and restricted its practice in the judgment *Janowiec and others v. Russia*[1539], as it did not recognise a link between the *Katyn massacre* and the temporal scope (entry into force) of the ECHR.

> The judgment deals with the Red Army's massacre of around 25,000 mainly Polish prisoners of war in Katyn in April and May 1940[1540]. For «a ‹genuine connection› to be established, both criteria must be satisfied: the period of

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1535 *Šilih v. Slovenia* (GC), 71463/01 (2009), § 128. *Cf. Varnava and others v. Turkey* (GC), 16064/90 (2009), §§ 121 ff.

1536 Critically, however, the minority opinions of Judges Bratza and Türmen and Erönen in *Varnava and others v. Turkey* (GC), 16064/90 (2009).

1537 *Šilih-Test*, thus summarised in *Janowiec and others v. Russia* (GC), 55508/07 and 29520/09 (2013), § 141; in the original judgment *Šilih v. Slovenia* (GC), 71463/01 (2009), § 163 and there, the third element still as *obiter dictum*, when the Court notes that it «would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner».

1538 *Cf.* Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), pp. 101 f.

1539 *Janowiec and others v. Russia* (GC), 55508/07 and 29520/09 (2013), §§ 142 ff. (on *procedural acts and omissions* in the post entry into force period), §§ 145 ff. (on the *genuine connection test*) and §§ 149 ff. (on the *convention values test*).

1540 *Janowiec and others v. Russia* (GC), 55508/07 and 29520/09 (2013), §§ 18 f.

time between the death as the triggering event and the entry into force of the Convention must have been reasonably short, and a major part of the investigation must have been carried out, or ought to have been carried out, after the entry into force.»[1541]

Russia ratified the ECHR on 5 May 1998. «In the early 1990s a significant number of procedural steps were undertaken by the Soviet and subsequently the Russian authorities. […] As regards the post entry into force period, it is impossible, on the basis of the information available in the case file and in the parties' submissions, to identify any real investigative steps after 5 May 1998. The Court is unable to accept that a re-evaluation of the evidence, a departure from previous findings or a decision regarding the classification of the investigation materials could be said to have amounted to the ‹significant proportion of the procedural steps› which is required for establishing a ‹genuine connection› for the purposes of Article 2 of the Convention. Nor has any relevant piece of evidence or substantive item of information come to light in the period since the critical date. That being so, the Court concludes that neither criterion for establishing the existence of a ‹genuine connection› has been fulfilled.»[1542]

And finally, the *Grand Chamber* stated that, «whether there were exceptional circumstances in the instant case which could justify derogating from the ‹genuine connection› requirement by applying the Convention values standard. [… The] events that might have triggered the obligation to investigate under Article 2 took place in early 1940, that is, more than ten years before the Convention came into existence. The Court therefore upholds the Chamber's finding that there were no elements capable of providing a bridge from the distant past into the recent post entry into force period.»[1543]

From a (material) fundamental right's perspective, the treatment of the temporal aspects ultimately forms the *litmus test* for the autonomy of the procedural obligation under Art. 2 ECHR (*see* no. III.2.4.1). To this end, it is irrelevant whether the death of a victim

[1541] *Janowiec and others v. Russia* (GC), 55508/07 and 29520/09 (2013), § 148.

[1542] *Janowiec and others v. Russia* (GC), 55508/07 and 29520/09 (2013), § 159.

[1543] *Janowiec and others v. Russia* (GC), 55508/07 and 29520/09 (2013), § 160.

occurred before or after the entry into force of the fundamental right. Rather, the course of an investigation (its effectiveness) must be taken into consideration, which can also be characterised by omissions or delays[1544].

> It should also be borne in mind that the fundamental rights content of the ECHR as a *living instrument* can evolve over time. Even then, it would not be appropriate to draw time limits. In our opinion, fundamental rights always require interpretation.

4.2.4. Shifting the burden of proof in special circumstances?

There are questions as to how deaths are to be reviewed under the procedural obligation if the facts of the case cannot be established – for example, because no witnesses are available or because the evidence proves not to be conclusive[1545].

According to the ECtHR's jurisdiction, the duty to conduct an effective investigation may be further enhanced: in three case constellations, the burden of proof that a particular person has not been unlawfully harmed lies with the state authorities[1546].

> «In assessing evidence, the Court has generally applied the standard of proof ‹beyond reasonable doubt› [...]. However, such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities [...], 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.»[1547]

In our opinion, the procedural shift in the burden of proof is closely related to the existence of a material obligation on the part of the state to guarantee the protection

[1544] However, it would make no sense to extend the duty to investigate potentially to all unexplained deaths at the time of the entry into force of the ECHR for the respective contracting states.

[1545] *Cf., e.g.,* Gerards, Right to Life, in: van Dijk/van Hoof/van Rijn/Zwaak (Eds.), Theory and Practice, pp. 360 f. and Harris/O'Boyle/Warbrick, European Convention (3th ed.), pp. 222 f. and 227.

[1546] Harris/O'Boyle/Warbrick, European Convention (3th ed.), p. 223.

[1547] *Salman v. Turkey* (GC), 21986/93 (2000), § 100; *Anguelova v. Bulgaria*, 38361/97 (2002), § 111.

of life in certain situations (on the positive obligation, *see* no. III.2.2). In the sense of a *narrowly defined duty to succeed*, the state must then be able to provide documentation of its irresponsibility for any threats to life.

> This is clearly expressed in the case of *Anguelova v. Bulgaria*. Seventeen-year-old *Anguel Zabchekov* died in police custody a few hours after his arrest. When he was arrested, Zabchekov was heavily intoxicated; his body later showed a fractured skull and numerous other injuries. The authorities' explanation that he may have injured himself did not convince the ECtHR[1548]: «Persons in custody are in a vulnerable position and the authorities are under an obligation to account for their treatment. Consequently, where an individual is taken into police custody in good health but later dies, it is incumbent on the State to provide a plausible explanation of the events leading to his death.»[1549]

Finally, a shift in the burden of proof does influence the role of the ECtHR in the corresponding proceedings: insofar as it creates a presumption of responsibility on the part of the Convention States involved, a shift in the burden of proof relieves the Court from establishing the factual elements itself. Conversely, this factually strengthens the requirement of the *cooperation* on the part of the states with the Court.

> In *McKerr v. The United Kingdom*, the ECtHR declined to establish facts itself. In «the circumstances of this case it would be inappropriate and contrary to its subsidiary role under the Convention to attempt to establish the facts of this case by embarking on a fact-finding exercise of its own by summoning witnesses. Such an exercise would duplicate the proceedings before the civil courts which are better placed and equipped as fact-finding tribunals. While the European Commission of Human Rights has previously embarked on fact-finding missions in Turkish cases where there were proceedings pending against the alleged security-force perpetrators of unlawful killings, it may be noted that these proceedings were criminal and that they had terminated, at first instance at least, by the time the Court examined the applications. In those cases, it

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[1548] *Anguelova v. Bulgaria*, 38361/97 (2002), §§ 10, 117 and 121.

[1549] *Anguelova v. Bulgaria*, 38361/97 (2002), § 110.

was an essential part of the applicants' allegations that the defects in the investigation were such as to render those criminal proceedings ineffective.»[1550]

a. Persons in custody of the state

A shift in the burden of proof applies to the state when it is *directly responsible* for the lives of people because it holds them in *custody*. In such specific situations, the bearers of fundamental rights are under the exclusive control of the authorities[1551].

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, death or disappearances occurring during such detention. The burden of proof may then be regarded as resting on the authorities to provide a satisfactory and convincing explanation [...].»[1552]

Mikheyev v. Russia (*see* no. VI.4.2.2.a) dealt with a person who had been taken to a police station for interrogation. According to his own statements, *Aleksey Yevgenyevich Mikheyev* was «unable to withstand the torture and left unattended for a moment, he had broken free and jumped out of the window of the second floor of the police station in order to commit suicide. He had fallen on a police motorcycle parked in the courtyard and broken his spine.»[1553] In the investigation conducted under Art. 3 ECHR, the ECtHR held «that allegations of ill-treatment must be supported by appropriate evidence [...]. To assess this evidence, the Court adopts the standard of proof ‹beyond reasonable doubt›. However, 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

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[1550] *McKerr v. The United Kingdom,* 28883/95 (2001), § 117 and subsequently – *mutatis mutandis* – for example *Aydan v. Turkey*, 16281/10 (2013), § 69.

[1551] *Cf. Varnava and others v. Turkey* (GC), 16064/90 (2009), § 181 (principle) and from the literature Harris/O'Boyle/Warbrick, European Convention (3th ed.), pp. 222 f. and Reid, Practitioner's Guide, 85-012 (but conflating exlucive control and use of force).

[1552] *Varnava and others v. Turkey* (GC), 16064/90 (2009), § 183 quite similarly, in *Anguelova v. Bulgaria*, 38361/97 (2002), § 111 (detention).

[1553] *Mikheyev v. Russia*, 77617/01 (2006), § 22.

control in custody (as in the present case), strong presumptions of fact will arise in respect of injuries occurring during such detention. In such cases the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation [...] In the absence of such explanation the Court can draw inferences which may be unfavourable for the respondent Government [...].»[1554] Since the Russian government refrained from providing «any observations as to the substance of the case», «the Court considers that it can draw inferences from the Government's conduct and examine the merits of the case on the basis of the applicant's arguments and existing elements in the file, even though the materials and information submitted by the applicant leave certain facts unclear.»[1555]

b. Exclusive control of the authorities of the state

The same applies if a person is in violent conflict in an area within the exclusive control of the authorities of the state. When «there is prima facie evidence that the State may be involved, the burden of proof may also shift to the Government since the events in issue may lie wholly, or in large part, within the exclusive knowledge of the authorities»[1556]. This means, for example, major operations by security forces in specific areas (this criterion would not be fulfilled in the case of individual actions; but possibly the next criterion would be; *see* c). this criterion would not be fulfilled in the case of individual actions but possibly in the case of the use of force by state security forces

In the case of *Akkum and others v. Turkey*, the deaths of *Mehmet Akkum*, *Mehmet Akan* and *Derviş Karakoç* were to be examined. Together with other inhabitants of a village near Diyarbakır, the three men were out in the mountains looking after their sheep. They got caught up in a military operation. According to witnesses and pictures, the three died violently (shot at close range and abused). According to the government, an operation against the PKK took place in the

[1554] *Mikheyev v. Russia*, 77617/01 (2006), § 102.

[1555] *Mikheyev v. Russia*, 77617/01 (2006), §§ 103 and 104.

[1556] *Varnava and others v. Turkey* (GC), 16064/90 (2009), § 184; confirmed in *Finogenov and others v. Russia*, 18299/03 (2011), § 237.

> mountains[1557]. However, the investigating authorities could not conclusively explain the deaths. Thus, according to the ECtHR, a shift in the burden of proof occurred under the (solidified) procedural obligation of Art. 2 ECHR. It was «[…] legitimate to draw a parallel between the situation of detainees, for whose well-being the State is held responsible, and the situation of persons found injured or dead in an area within the exclusive control of the authorities of the State. Such a parallel is based on the salient fact that in both situations the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities. It is appropriate, therefore, […] where it is the non-disclosure by the Government of crucial documents in their exclusive possession which is preventing the Court from establishing the facts, it is for the Government either to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred, failing which an issue under Article 2 and/or Article 3 of the Convention will arise.»[1558]

In the case of deaths that occurred during operations in areas under its exclusive control, the state's responsibility can thus be similarly heavy as in the case of its guardianship over prisoners. In our opinion, the ECtHR correctly includes a possible violation of Art. 3 ECHR (inhuman treatment or torture) in such cases.

c. Use of force by state security forces

A shift in the burden of proof occurs in the use of coercive means if state security forces are *directly responsible* for the death or endangerment of people's lives[1559].

> In the judgment *Soare and others v. Romania*, a police officer shot at a person in an ambiguous situation. A suspected man (who, together with his brother, had been pursuing his brother-in-law) was being pursued by a single civilian officer. This resulted in the (non-fatal) release of a shot, which hit the man

[1557] *Akkum and others v. Turkey*, 21894/93 (2005), §§ 12 ff., 178 and 183.

[1558] *Akkum and others v. Turkey*, 21894/93 (2005), § 211.

[1559] Harris/O'Boyle/Warbrick, European Convention (3th ed.), pp. 223 and 227 as well as Reid, Practitioner's Guide, 85-012 (too restrictive: killing by state officers).

in the head[1560]. There were no eyewitnesses to the incident. The injured man stated that there had been no reason to use a firearm against him. The civilian officer, in contrast, claimed self-defence or unintentional firing. The government certified that the officer had exercised a necessary, proportionate and legitimate defensive reaction[1561]. The ECtHR found a violation of Art. 2 ECHR also due to the deficient investigation: lack of independence[1562], unnecessary delays of several months[1563], no information for those affected and lack of information for the general public[1564].

d. Importance of a shift in the burden of proof

In the three categories of cases, it is not required that a death cannot be explained at all (*see* above, a to c). A shift in the burden of proof already occurs if an investigation leads to an *inconsistent* result.

In the case of *Akkum and others v. Turkey*, for example, the investigation by a judicial body had revealed that there «was no evidence that the three deaths had been caused by the actions of members of the security forces. [...] In the Government's view, the oral evidence of the applicants and their witnesses was insufficient to establish beyond reasonable doubt the accuracy of the applicants' allegations. The testimonies of the gendarme witnesses, on the contrary, were coherent and shed light on the events in question.»[1565]

The shift in the burden of proof leads to a *presumption of state responsibility*. In practical terms, the proceedings before the ECtHR are about refuting the arguments of the applicants[1566]. The corresponding investigations (as far as they are still necessary in view of the presumption) are carried out by the ECtHR itself.

[1560] *Soare and others v. Romania*, 24329/02 (2011), §§ 7 ff. and 24 ff.

[1561] *Soare and others v. Romania*, 24329/02 (2011), § 123.

[1562] *Soare and others v. Romania*, 24329/02 (2011), §§ 170 f.

[1563] *Soare and others v. Romania*, 24329/02 (2011), § 173.

[1564] *Soare and others v. Romania*, 24329/02 (2011), §§ 174 f.

[1565] *Akkum and others v. Turkey*, 21894/93 (2005), §§ 183 f.

[1566] *Mansuroğlu v. Turkey*, 43443/98 (2008), § 99.

> For example, in the case of *Akkum and others v. Turkey* mentioned above: «The Government have failed to adduce any argument from which it could be deduced that the documents withheld by them contained no information bearing on the applicant's claims. Therefore, the Court will examine whether the Government have discharged their burden of explaining the killings of the applicants' two relatives and the mutilation of the body of Mehmet Akkum. In doing so, the Court will assess the oral evidence given before the delegates and will also have particular regard to the investigation carried out at domestic level in order to establish whether that investigation was capable of leading to the identification and punishment of those responsible [...].»[1567]

If the presumption of state responsibility cannot be disproven, this results in a violation of the procedural aspect of Art. 2 ECHR.

> «The Court has already established that Derviş Karakoç was killed by the soldiers [...]. The respondent Government initially averred that the three persons had been killed in an armed clash with security forces who were acting in self-defence in the struggle against terrorism. Subsequently, they denied that it was the soldiers who had shot Derviş Karakoç; they have not sought to argue that the use of force was not more than absolutely necessary for one or more of the legitimate purposes set out in paragraph 2 of Article 2 of the Convention. The Court, considering that this should have been a matter for the Government to advance, does not deem it necessary to examine whether the killing of Derviş Karakoç was justified under Article 2 § 2 of the Convention. [...] It follows that there has been a violation of Article 2 of the Convention in respect of the killing of Derviş Karakoç.»[1568]

It is the burden of the respective Convention State to prove the material aspects of the absolute necessity and the strict proportionality of the use of coercive means[1569].

[1567] *Akkum and others v. Turkey*, 21894/93 (2005), § 212.

[1568] *Akkum and others v. Turkey*, 21894/93 (2005), § 240.

[1569] *Mansuroğlu v. Turkey*, 43443/98 (2008), § 81.

e. Relevance

The relevance of the (procedural) shift of the burden of proof for a Convention State is (materially) to be understood in the context of both the positive and the negative obligation under Art. 2 ECHR. An examination of the violation of the procedural obligation under Art. 2 ECHR in practice always takes place *after* a potential violation of the positive or the negative obligation.

The benefit of the shift of the burden of proof does not lie in a shortening of the procedure for condemning the Convention States in specific cases (although, in the result, it certainly simplifies the procedure to the disadvantage of the contracting states). Rather, the shift of the burden of proof should indirectly have a general "leverage effect" in order for the Convention States to take preventive precautions for situations of their special responsibility to protect human life. The procedural obligation under Art. 2 (and 3) ECHR requires, in the result, the documentation and the guarantee of reproducibility of the conduct of state actors. In a broader sense, however, in our opinion it is actually about preventing violations of the substantive obligations of the fundamental right. The shift in the burden of proof is justified where there *could* be a risk of abuse of the state's monopoly on the use of force.

> A state would not be acting in conformity with the Convention if, knowing about the shift in the burden of proof, it carried out a deliberately negligent or deficient investigation or influenced an investigation. Convention States have a duty to conduct adequate investigations and, in particular, to provide the necessary resources to do so. Collusive practice can only be uncovered if corresponding cases can be brought with complaints to higher national or independent international bodies[1570].

The ECtHR does *not examine individual responsibility* of members of state security forces even under the procedural obligation. Therefore, if the burden of proof is shifted against a *Convention State*, an incoherent result cannot be excluded in the relationship

[1570] As for possible examples, *see Akkum and others v. Turkey*, 21894/93 (2005) and *Soare and others v. Romania*, 24329/02 (2011).

between the criminal law assessment of individual responsibility by national courts and the fundamental law assessment of state responsibility by the ECtHR.

> Members of state security forces can in principle invoke their fundamental rights in criminal proceedings in the same way as other citizens. These include the presumption of innocence anchored in Art. 6 para. 2 ECHR. This is an elementary principle of criminal procedure for the legal assessment of an individual conduct. An analogous shift in the burden of proof would therefore be impermissible in individual criminal proceedings.
>
> However, it seems that the ECtHR's judgments give less weight to the (individual) presumption of innocence when the burden of proof is shifted (against a state) compared to the preservation of evidence and the (public) establishment of the truth. In our opinion, this can lead to conflicts in terms of content. For example, an official would be protected by the presumption of innocence in the case of personal involvement in (criminal) proceedings, but in the case of a shift in the burden of proof in the context of the duty to investigate according to Art. 2 ECHR, this protection would at least be limited as a result. The question arises as to whether this could lead to legal uncertainty among those affected as well as a loss of confidence in the state and the constitutionality of the proceedings. The balancing of public and private interests on the victim's side (which can also include relatives) with the interests of accused officials can at best legitimise an indirect restriction of procedural rights. In our opinion, the public or private interests must clearly outweigh any restriction of the presumption of innocence, in particular.

In the result, it seems consistent for the ECtHR not to carry out (*de novo*) an examination of the substantive aspects of a case in the event of a violation of the procedural obligation after the shift in the burden of proof has taken place (*see, e.g., Akkum and others v. Turkey*).

The shift in the burden of proof is formally limited to the procedural obligation. Therefore, it seems acceptable not to assess further questions on a merely insufficient factual basis (whereby, in specific terms, it would probably mostly be a matter of assessing a possible violation of the negative obligation under Art. 2 ECHR). By contrast, it seems

unsatisfactory to judge a Convention State solely on the basis of procedural obligations that have not been complied with, if at the same time its conduct would have been manifestly disproportionate. This ultimately undermines an essential aspect of the procedural obligation as such: the assurance or creation of confidence in the procedures for the imposition of sanctions.

The occurrence of a shift in the burden of proof should be prevented as far as possible. Flanking measures in the respective categories of cases can serve this purpose. Preventive measures to ensure adequate preservation of evidence as well as organisational measures are of primary importance. Appropriate safeguards can also avoid possible conflicts with the presumption of innocence of the officers involved.

An approach for improving the *preservation of evidence* could be to require law enforcement officials to act in pairs as a matter of principle. Potential individual misconduct without witnesses would then no longer or only rarely be possible. However, this approach appears to be of limited practical use. Acting permanently as a pair is often not possible at all. In addition, this would make it more difficult to perform police duties and increase the need for human resources among security forces (especially in prisons). An alternative could be to supply the individual officers with appropriate recording technology (especially body cameras or trackers for recording location data). Combined with an individual or regulatory recording obligation, this would at least facilitate the preservation of evidence. In the case of data transmission in real time – for example to a *Tactical Operations Centre* – the possibility of direct control and supervision of individual behaviour would also be easier.

General obligations of an *organisational nature* already result from the positive and negative obligations of Art. 2 ECHR, both for individual actions and for operations by security forces. With regard to the procedural obligation, organisational measures are to be supplemented by those for control, traceability and finally also for the preservation of evidence. In the everyday life of law enforcement officials, there are usually documentary requirements for both the police and military forces (such as the obligation to keep a journal).

4.3. SPECIFIC QUESTIONS

Depending on the circumstances, specific questions or further requirements may arise regarding the effectiveness of an investigation. These include, in particular, the requirements of adequate participation of the survivors or of the public. It is possible that the time limit for applications to the ECtHR may prove to be a (too) high hurdle in individual cases, especially if the facts of the case are unclear. Particularly in the fight against terrorist activities, there may also be a need for international cooperation, for example in cross-border cases. Or the question arises as to whether national security interests can conflict with an appropriate examination of the facts. Furthermore, it must be clarified what the required sanctioning of those responsible implies in the context of fundamental rights.

4.3.1. Participation of relatives and creation of publicity

The state's duty to conduct a reasonable investigation under Art. 2 ECHR conveys a right to the relatives of victims to *requisite access* to within the proceedings[1571].

In dealing with reprimanded violations of this right, the ECtHR also refers to the need to establish publicity in the investigation of deaths in *obiter dicta,* when confidence in the lawfulness of state conduct is in doubt.

> «To maintain public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts [...]»[1572] There «must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.»[1573]

[1571] Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 219; *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (2010), § 89.

[1572] *Hugh Jordan v. The United Kingdom*, 24746/94 (2001), §§ 108 f.

[1573] *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 167; already *Hugh Jordan v. The United Kingdom*, 24746/94 (2001), §§ 108 f.; similarly, in *Isayeva v. Russia*, 57950/00 (2005), §§ 211 and 213 f.

In *Aslakhanova and others v. Russia*, the ECtHR expresses itself more cautiously – but more aptly – on the relationship between private and public participation in proceedings. The «victims' legitimate interests» have also «a bearing on maintaining a sufficient element of public scrutiny of the investigation or its results [...].»[1574]

In our opinion, a special public interest can influence the interpretation on the admissibility of individual complaints[1575].

With regard to a possible violation of Art. 2 ECHR through a use of force, we believe that the individual claim is combined with a public interest in information and possibly access to the results of the investigation. However, the public interest is probably not independently enforceable under the ECHR[1576].

In general, the *publication* of investigation results and, for criminal proceedings, the guarantee of *judicial publicity* will be sufficient to establish a certain degree of publicity. A stricter benchmark may apply if relatives of victims cannot participate adequately in proceedings, for example because they are excluded from essential findings or procedural stages.

In the judgment *Edwards v. The United Kingdom* (*see* no. III.2.2.6), misconduct by prison authorities had to be assessed. The detailed results of the investigation had been published, but the «inquiry sat in private during its hearing

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[1574] *Aslakhanova and others v. Russia*, 2944/06 (2012), § 123.

[1575] *See also* Lemmens, General Survey of the Convention, in: van Dijk/van Hoof/van Rijn/Zwaak (Eds.), Theory and Practice, pp. 50 f. (with reference to cases about environmental pollution and nuisances).

[1576] According to the ECHR, state complaints (Art. 33) and individual complaints (Art. 34) are possible; however, the ECHR does not recognise an *actio popularis*; *cf. İlhan v. Turkey* (GC), 22277/93 (2000), § 52 (victims «must be able to show that they were ‹directly affected› by the measure complained of») and (on infringements on fundamental rights by the legislator) the early landmark *Klass and others v. Germany* (Court Plenary), 5029/71 (1978), § 33: An «individual applicant should claim to have been actually affected by the violation he alleges [...]. [Article 34 ECHR] does not permit individuals to complain against a law in abstracto simply because they feel that it contravenes the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment.»

> of evidence and witnesses»[1577]. «The [...] parents of the deceased were only able to attend three days of the inquiry when they themselves were giving evidence. They were not represented and were unable to put any questions to the witnesses [...]. They had to wait until the publication of the final version of the inquiry report to discover the substance of the evidence about what had occurred. Given their close and personal concern with the subject matter of the inquiry, the Court finds that they cannot be regarded as having been involved in the procedure to the extent necessary to safeguard their interests.»[1578]
>
> In its rationale, however, the ECtHR went beyond the interest of the parties to the proceedings. Where «[...] the deceased was a vulnerable individual who lost his life in a horrendous manner due to a series of failures by public bodies and servants who bore a responsibility to safeguard his welfare, the Court considers that the public interest attaching to the issues thrown up by the case was such as to call for the widest exposure possible.»[1579]

A right to participate in proceedings (and thus indirectly to the establishment of publicity) does not apply absolutely. Restrictions are permissible or even necessary if the disclosure of information could jeopardise ongoing investigations or if there is the possibility of a public prejudgment of persons involved[1580].

In addition, the ECtHR seems to recognise an interest in secrecy on the part of states with regard to certain operational tactics or means of deployment in anti-terrorist operations as well as in cases of public unrest[1581]. Thereby, the obligations deriving from Art. 2 ECHR have to be balanced against each other. At least with regard to the possible causal links, the right to an effective investigation prevails.

1577 *Edwards v. The United Kingdom*, 46477/99 (2002), § 82.

1578 *Edwards v. The United Kingdom*, 46477/99 (2002), § 84.

1579 *Edwards v. The United Kingdom*, 46477/99 (2002), § 83.

1580 *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), §§ 235 f.; *Kelly and others v. The United Kingdom*, 30054/96 (2001), § 115.

1581 *Finogenov and others v. Russia*, 18299/03 (2011), § 266; *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 304; *Collette and Michael Hemsworth v. The United Kingdom*, 58559/09 (2013), § 65.

In the case of *Tagayeva and others v. Russia* (*see* no. II.2.3), investigation documents were withheld from the surviving relatives of the hostages who were killed. These documents dealt with the causes of the first explosion during the hostage rescue operation: «The value of these two reports [...] laid precisely in dispelling public doubts about the circumstances of the deaths and injuries suffered by the hostages [...]. These reports should have secured the investigation's conclusions and served to persuade the victims of its effectiveness on this key question. The victims who had lost their family members or received injuries in the disputed circumstances had a legitimate right to be fully acquainted with these important documents and to be able to participate effectively in challenging their results. In such circumstances, it appears unjustifiable that these documents were not made available to the victims in the framework of the criminal investigation. The victims' inability to acquaint themselves with these findings and challenge their results seriously affected their legitimate rights in the criminal proceedings, on a question that was of key importance to them.»[1582]

The ECtHR then reverses the relationship between the possibility for victims to participate in the proceedings and the guarantee of publicity: The «public scrutiny aspect of the investigation was breached by the victims' restricted access to the key expert reports, notably those concerning the origin of the first explosions.»[1583] In our opinion, this is delicate. The duty to investigate can be invoked if a person is personally affected. Any claims by the public (*e.g.,* the media) would have to be examined via the fundamental right of access to information (freedom of information).

The possible contradictory nature of investigation documents does not argue against but rather in favour of making them accessible.

This was again noted by the ECtHR in *Tagayeva and others v. Russia*: The «investigation likewise relied on a number of reports, some of them prepared by experts working at the army or the FSB structures. Certain conclusions are

[1582] *Tagayeva and others v. Russia,* 26562/07 (2017), § 535.

[1583] *Tagayeva and others v. Russia,* 26562/07 (2017), § 538.

> difficult to reconcile, for example where the reports indicated the different places and yield of the first explosions […]. This incoherence on one of the most important aspects of the events makes the investigation's unconditional reliance on them questionable. Where allegations are made against security and military servicemen, the element of public scrutiny plays a special role, and if the investigation bases its conclusions on confidential documents prepared by the staff of the same agencies that could be held liable, it risks undermining public confidence in the independence and effectiveness of the investigation and gives the appearance of collusion in, or tolerance of, unlawful acts.»[1584]

The extent of participation in proceedings must be assessed separately on a case-by-case basis, taking into account the respective circumstances. Claims to participation or to publication of documents may be postponed[1585]. The circumstances of the individual case also include the relationship of the participants in the proceedings to a death victim.

> In the judgment *Paul and Audrey Edwards v. The United Kingdom*, the participation of the parents of *Paul Edwards*, who was killed in prison by a fellow inmate, was to be assessed (*see* no. III.2.2.6). The ECtHR placed the personal proximity between parents and son in the context of the course of the proceedings as well as the general participation in the proceedings: «The […] parents of the deceased, were only able to attend three days of the inquiry when they themselves were giving evidence. They were not represented and were unable to put any questions to the witnesses […]. They had to wait until the publication of the final version of the inquiry report to discover the substance of the evidence about what had occurred. Given their close and personal concern with the subject matter of the inquiry, the Court finds that they cannot be regarded as having been involved in the procedure to the extent necessary to safeguard their interests.»[1586]

1584 *Tagayeva and others v. Russia,* 26562/07 (2017), § 537.

1585 Thus, access cannot take place at the requested time, but due to a partial completion or the advanced state of the investigation, it will be feasible to ensure access in a later stage; *cf. McKerr v. The United Kingdom*, 28883/95 (2001), § 129; *Giuliani and Gaggio v. Italy* (GC), 23458/02 (2011), § 304.

1586 *Paul and Audrey Edwards v. The United Kingdom*, 46477/99 (2002), § 84.

Finally, when considering the possibility of participation, the character of the respective investigation must be taken into account. In principle, survivors can also participate in the question of a possible later reopening of the investigation. However, their right to participate is less far-reaching if, for example, it is merely a matter of examining the credibility of new accusations.

> In the case of *Sylvia Hackett v. The United Kingdom* (*see* no. VI.4.2.3.d), the family of the murdered person was able to meet with the investigating officer.[1587]. This was sufficient in this case: «As regards the limited nature of the investigation, this has the status of a preliminary enquiry into the credibility of Stone's assertions and depending on its conclusions may, in due course, lead to further steps being taken. Meanwhile the PSNI and the independent officer have been in contact with the applicant and she has had the opportunity to make representations. Given the preliminary nature of the investigation, which may or may not lead to suspicions arising against other persons and the possibility of criminal charges, the Court is not persuaded that the interests of the family require any closer involvement in the process at this stage. Nor does it find any problem of lack of public scrutiny emerging from this procedure. Insofar as the applicant complains that she has not been given, at her request, copies of the earlier prosecution and trial documents, it is not apparent that any final decision has been taken. Where there is an ongoing review of available material, the procedural requirement cannot be interpreted as requiring that the family, or indeed the public, enjoy simultaneous access to such material. In due course, they should be informed, in at least some degree, of findings and recommendations.»[1588]

The entitlement to participate in proceedings includes a duty to actively inform at least about the discontinuation of proceedings. The possibility to challenge the respective decision is a *last resort* in order to obtain participation in the proceedings by appeal.

> In the case of *Isayeva v. Russia*, the victims of the military attack on civilians in a village were deprived of the possibility to lodge a complaint against the

[1587] *Sylvia Hackett v. The United Kingdom* (AD), 34698/04 (2005), pp. 3 f.

[1588] *Sylvia Hackett v. The United Kingdom* (AD), 34698/04 (2005), p. 6.

> termination of the proceedings. The addressees had not been directly informed by the competent authorities. «Instead, a letter was sent to the Head of Government of Chechnya asking them to take steps to locate and inform the victims accordingly. The list of names appended to the letter contained no personal details of the victims, such as their permanent or temporary addresses, dates of birth or any other relevant data. There is no indication that the Government of Chechnya complied with the request and informed the applicant and other victims of this development in the proceedings. The Court does not accept the Government's assertion that the applicant had been properly informed of the proceedings and could have challenged its results.»[1589]

Ultimately, it results that the persons who may be entitled to participate in the proceedings must be identified at an earlier stage. In our opinion, an obligation to participate arises from the right to an adequate investigation (*see* no. VI.4.2.2). letztendlich

4.3.2. Admissibility criteria

Art. 35 (para. 1) ECHR establishes two general admissibility criteria: on the one hand, the national courts must have been exhausted; on the other hand, a time limit of six months (then) applies for appeals to the ECtHR[1590]:

> *The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.*

The *Grand Chamber* has dealt with the start of the six-month period in situations without final decisions in the sense of the usual procedural stages.

> «As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset, however, that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date

[1589] *Isayeva v. Russia*, 57950/00 (2005), § 222.

[1590] On the non-applicability of the *six-month rule* to continuing situations, *cf.* Harris/O'Boyle/Bates/Buckley, European Convention (4th ed.), p. 66.

of knowledge of that act or its effect on or prejudice to the applicant [...]»[1591]
«and, where the situation is a continuing one, once that situation ends [...].»[1592]

In individual cases where the right to life is affected[1593] and in particular where there is a use of force, the Court is willing to consider complaints admissible even after more than six months[1594]. The benchmark then becomes whether the facts in question are (or should have been) known to the authorities and whether a complaint would have been reasonable within the time limit.

The judgment in *Mocanu and others v. Romania* shows that the requirements for a later admission of a complaint are quite strict. The case concerned the ill-treatment of the applicants by state security forces during violent events in June 1990. A criminal investigation was launched shortly afterwards. It was not until June 2001 that the applicant filed a criminal complaint, and it was not until June 2008 that he filed his application in Strasbourg[1595]. In assessing the admissibility, the ECtHR took into account that very few of the victims of the events in question had lodged a timely complaint with the national authorities. It linked this circumstance to the personal condition of the applicant: «The Court can only conclude, having regard to the exceptional circumstances in issue, that the applicant was in a situation in which it was not unreasonable for him to wait for developments that could have resolved crucial factual or legal issues [...]. [...] Regard being had to the foregoing, the Court considers that the applicant's vulnerability and his feeling of powerlessness, which he shared with numerous other victims who, like him, waited for many years before lodging a complaint, amount to a plausible and acceptable explanation for his inactivity [...].»[1596] Moreover, the authorities knew or could have discovered the

[1591] *Varnava and others v. Turkey* (GC), 16064/90 (2009), § 157; *Mocanu and others v. Romania* (GC), 10865/09 (2014), § 259; quite similarly, in *Lopes de Sousa Fernandes v. Portugal* (GC), 56080/13 (2017), § 131.

[1592] *Mocanu and others v. Romania* (GC), 10865/09 (2014), § 259.

[1593] *Cf. Lopes de Sousa Fernandes v. Portugal* (GC), 56080/13 (2017), §§ 127 ff.

[1594] *Cf., e.g.,* Reid, Practitioner's Guide, 85-010.

[1595] *Mocanu and others v. Romania* (GC), 10865/09 (2014), § 270.

[1596] *Mocanu and others v. Romania* (GC), 10865/09 (2014), § 275.

> applicant's possible victim status without any real difficulties[1597]. In addition, there was the particularity that the applicant had in some cases been granted the right to participate in the national proceedings[1598]. Finally, the ECtHR balanced an admission of the complaint with a possible appropriateness of an investigation more than 10 years later: «it cannot be concluded that Mr Stoica's delay in lodging his complaint was capable of undermining the effectiveness of the investigation»[1599].

As a result, the requirements for an application to be admitted after (far) more than six months in the case of a use of force are rarely met. The psychological vulnerability of the potential victims in question may be a key factor, but it is not the only one in determining whether the time limit requirement of Art. 35 ECHR may be exceeded[1600].

The ECtHR is more generous when dealing with the disappearance of persons in circumstances of death. The Court then focuses on the interaction between the authorities and the applicants.

> Thus the *Grand Chamber* in the case of *Varnava and others v. Turkey* (*see* no. III.4.4.2): «[Applications] can be rejected as out of time in disappearance cases where there has been excessive or unexplained delay on the part of applicants once they have, or should have, become aware that no investigation has been instigated or that the investigation has lapsed into inaction or become ineffective and, in any of those eventualities, there is no immediate, realistic prospect of an effective investigation being provided in the future. Where there are initiatives being pursued in regard to a disappearance situation, applicants may reasonably await developments which could resolve crucial factual or legal

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1597 *Mocanu and others v. Romania* (GC), 10865/09 (2014), § 276.

1598 *Mocanu and others v. Romania* (GC), 10865/09 (2014), §§ 276 f. (Two decisions «[…] had ordered the investigators to identify all of those victims. […] Moreover, the Court notes that the decision […] not to bring a prosecution, […], applied to all of the victims. The conclusion adopted with regard to the statutory limitation of criminal liability applied equally to those victims who had lodged complaints in the days following their assault and to those who, like the applicant, had complained at a later date.»

1599 *Mocanu and others v. Romania* (GC), 10865/09 (2014), § 278.

1600 Reid, Practitioner's Guide, 85-010 (less restrictive).

issues. Indeed, as long as there is some meaningful contact between families and authorities concerning complaints and requests for information, or some indication, or realistic possibility, of progress in investigative measures, considerations of undue delay will not generally arise. However, where there has been a considerable lapse of time, and there have been significant delays and lulls in investigative activity, there will come a moment when the relatives must realise that no effective investigation has been, or will be provided. When this stage is reached will depend, unavoidably, on the circumstances of the particular case.»[1601]

4.3.3. International cooperation

Usually, the duty to conduct an effective investigation concerns only the state on whose territory an event has occurred[1602]. But when countering terrorism, there are often cross-border references in Europe. Then not only the directly affected Convention State is obliged to provide means and ways to obtain evidence in another state – even a third state can be obliged to cooperate[1603]. The ECtHR takes existing inter-state obligations into account (therefore third states cannot be brought into the law in the absence of corresponding obligations).

In the case of *Rantsev v. Cyprus and Russia*, the conditions of the fatal fall of the Russian cabaret performer *Oxana Rantesva* from the balcony of her chamber in Limassol (Cyprus) were to be assessed[1604]. The forensic examination revealed, among other things, physical injuries that had been inflicted on her immediately before her death[1605]. The background to the case was the trafficking and sexual exploitation of persons in Cyprus[1606]. In order to clarify the case, investigations had to be carried out both in Cyprus and in Russia.

1601 *Varnava and others v. Turkey* (GC), 16064/90 (2009), § 165.

1602 *Rantsev v. Cyprus and Russia* 25965/04 (2010), § 243.

1603 *Cf.* Reid, Practitioner's Guide, 75-016.

1604 *Rantsev v. Cyprus and Russia* 25965/04 (2010), §§ 18 ff.

1605 *Rantsev v. Cyprus and Russia* 25965/04 (2010), § 45.

1606 *Rantsev v. Cyprus and Russia* 25965/04 (2010), § 222.

The Cypriot authorities violated their procedural obligation under Art. 2 ECHR by failing to exhaust the available legal remedies[1607]: For «an investigation into a death to be effective, member States must take such steps as are necessary and available in order to secure relevant evidence, whether or not it is located in the territory of the investigating State. [… Both] Cyprus and Russia are parties to the Mutual Assistance Convention and have, in addition, concluded the bilateral Legal Assistance Treaty […]. These instruments set out a clear procedure by which the Cypriot authorities could have sought assistance from Russia in investigating the circumstances of Ms Rantseva's stay in Cyprus and her subsequent death. The Prosecutor General of the Russian Federation provided an unsolicited undertaking that Russia would assist in any request for legal assistance by Cyprus aimed at the collection of further evidence […]. However, there is no evidence that the Cypriot authorities sought any legal assistance from Russia in the context of their investigation. In the circumstances, the Court finds the Cypriot authorities' refusal to make a legal assistance request to obtain the testimony of the two Russian women who worked with Ms Rantseva at the cabaret particularly unfortunate given the value of such testimony in helping to clarify matters which were central to the investigation. […].»[1608]

In contrast, the Russian authorities had not violated Art. 2 ECHR[1609]: The «Court does not consider that Article 2 requires member States' criminal laws to provide for universal jurisdiction in cases involving the death of one of their nationals. There are no other special features which would support the imposition of a duty on Russia to conduct its own investigation. Accordingly, the Court concludes that there was no free-standing obligation incumbent on the Russian authorities under Article 2 of the Convention to investigate Ms Rantseva's death.

1607 *Rantsev v. Cyprus and Russia* 25965/04 (2010), § 242.

1608 *Rantsev v. Cyprus and Russia* 25965/04 (2010), § 241.

1609 *Rantsev v. Cyprus and Russia* 25965/04 (2010), § 247.

> However, the corollary of the obligation on an investigating State to secure evidence located in other jurisdictions is a duty on the State where evidence is located to render any assistance within its competence and means sought under a legal assistance request. [...] [... The] responsibility for investigating Ms Rantseva's death lay with Cyprus. In the absence of a legal assistance request, the Russian authorities were not required under Article 2 to secure the evidence themselves.»[1610]

National borders can prove to be factually insurmountable. In cross-border cases, the Convention States are required at least to make an effort to carry out an adequate investigation.

> In the case of *Brecknell v. The United Kingdom* (*see* no. VI.4.2.1), John Weir, who had accused himself of involvement in the crime, had disappeared to Ireland. While he was untraceable for the UK authorities, the Dublin police had no difficulty in speaking to him. The ECtHR stated true to life, «[...] that Weir refrained from coming within the jurisdiction, where he might well have risked further criminal charges being lodged against him or retaliatory steps from those whom he had been naming in the press. It sees no reason to disbelieve the Government's statement that they took steps to locate Weir, including approaching his last known address and making inquiries from the Irish police [...].»[1611]

4.3.4. Restriction of the investigation due to national interests?

The fundamental right to an investigation does not apply absolutely. Particularly in the case of countering terrorist threats in general or in anti-terrorist operations in particular, legitimate interests in secrecy on the part of the state can lead to the restriction of individual aspects of an objective investigation.

[1610] *Rantsev v. Cyprus and Russia* 25965/04 (2010), §§ 244 f.

[1611] *Brecknell v. The United Kingdom*, 32457/04 (2007), §§ 73 (quote) and 81. *See* also *Güzelyurtlu and Others v. Cyprus and Turkey* (GC), 36925/07 (2019), §§ 191, 194 and 258 ff.

a. Factual restriction and shift of the duty to investigate

The fact that interests of national security are affected does not constitute an explicit criterion of inadmissibility for applications to the ECtHR. In our opinion, it would be conceivable, under certain circumstances, to rule in a decision on inadmissibility on the basis of the abuse clause (Art. 35 [para. 3 letter a] in conjunction with Art. 17 ECHR).

> Within the affection of the fundamental right to life, there is no known case in which the Strasbourg organs have declared an application inadmissible due to national security interests (*mutatis mutandis* on the more recent practice of intervening even in cases of military missions in non-Convention states, *see* no. III.2.5).

National security interests are rarely invoked by the Convention States in connection with the procedural obligation under Art. 2 ECHR. The ECtHR shows some difficulty in dealing with this matter when they are invoked in exceptional cases. The Court then seems willing to accept *de facto* limitations of Convention guarantees.

> In the judgment *Finogenov and others v. Russia*, the ECtHR accepted that the exact composition and dose of the narcotic gas used by the security forces was not disclosed. The Court balanced the state's interest in keeping parts of the operation secret against the procedural obligation regarding the objectivity of the investigation. It thus did not recognise an obligation to investigate the direct effect of the agent on the hostages[1612] (*see* no. V.4.5.2).
>
> In our opinion, as long as the *potentially lethal effect* of the gas is not in question, this is in conformity with the requirement of objectivity of the investigation. However, the ECtHR is not very definite on this matter[1613] and transfers the legal assessment to the planning and conduct of the subsequent rescue operation. There, an effective investigation is of significance for the Court again[1614]. By

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[1612] *Finogenov and others v. Russia*, 18299/03 (2011), §§ 235 and 277.

[1613] *Finogenov and others v. Russia*, 18299/03 (2011), verdict, § 3: The Court holds «that there has been no violation of Article 2 of the Convention on account of the decision by the authorities to resolve the hostage crisis by force and to use the gas».

[1614] *Finogenov and others v. Russia*, 18299/03 (2011), § 232

shifting the legally relevant issue, the ECtHR is *de facto* surrendering to Russia's security interests[1615]. It is not obvious where these interests lie in precise terms. It should be borne in mind that the use of a narcotic gas based on phentanyl and its effects are publicly known.

In our opinion, it is not convincing that Art. 2 ECHR should finally be violated only because of a failure to conduct an effective investigation into the rescue operation[1616]. The cause of death – also for the hostages – was already set by the use of the narcotic gas. If one came to a different conclusion (and did not judge the effect of the gas as potentially lethal), then it would be logical to recognise an obstruction of the investigation in the refusal to disclose the composition of the chemical substance.

The case illustrates that an investigation as such must not be prevented. Indirectly, the inadequate command and control of a police operation can already lead to a *de facto* restriction of the (later) investigation, for example when decisions cannot be reconstructed subsequently, and responsibilities cannot be attributed (*see* no. V.2.2).

Therefore, violations of the positive and procedural obligations under Art. 2 ECHR often go hand in hand[1617]. In relation to each other, the procedural obligation has a fall-back function (*see* no. V.4.6.4).

b. Reasons for restrictions

Particularly in the context of anti-terrorist operations, the question arises as to whether a Convention State may legitimately retain evidence or information despite an existing duty to investigate. The existence of a practice or a definition of good reasons in case law is not yet apparent.

[1615] *Finogenov and others v. Russia*, 18299/03 (2011), § 266: «The Court [...] recognises the need to keep certain aspects of security operations secret.»

[1616] *Finogenov and others v. Russia*, 18299/03 (2011), verdict.

[1617] *E.g., Tagayeva and others v. Russia,* 26562/07 (2017), verdict § 4 and 5; *Finogenov and others v. Russia*, 18299/03 (2011), verdict § 4 and 5; *Isayeva v. Russia*, 57950/00 (2005), verdict § 2 and 3 (albeit somewhat less distinctly).

In our opinion, interests of secrecy can be at stake, for example, if

- an investigation jeopardises (further) anti-terrorist operations,
- a Convention State would have to reveal the identity of covert informants,
- international intelligence cooperation would be jeopardised.

Restrictions on procedural obligations justified in this manner can formally result from national legal frameworks: be it as reservations in criminal procedural law or be it in the restriction of appeals in national law (such as exceptions for *actes de gouvernement* in the field of homeland security or external security of a Convention State).

> "*Personal*" *interests* of persons involved in state operations are not sufficient for the EctHR to restrict an investigation. If there is reasonable evidence of a threat to individuals (real and immediate risk), however, a state duty to protect these individuals may apply (*see* no. III.2.2.5).

To ensure tactical implementation, it may be necessary to protect critical information prior to as well as during the actual execution of an anti-terrorist operation. Later on, secrecy interests may disappear. There is no interest in secrecy with regard to tactics in anti-terrorist operations *per se*; if tactics are relevant to an investigation at all, they are usually accessible.

> However, *police tactics* or *operational procedures* in fighting terrorist threats must not be presented in proceedings in a manner that they could pose a threat to public safety. An investigation must not indirectly serve to create a blueprint for future terrorist actions or generally motivate further actions[1618]. But it should be borne in mind that the *doctrine* of state security forces may be publicly known to a certain extent.

c. Alternatives and areas of tension with the publicity of an investigation

State secrecy interests have in common that they are less in a possible conflict with an investigation as such, but with the element of *publicity* of an investigation. Therefore, in

[1618] Some parts of *Tagayeva and others v. Russia*, 26562/07 (2017) are written quite vividly in some certain sections.

our opinion, it is conceivable in specific cases to conduct an in-principle "unrestricted" investigation but to place parts of it under secrecy protection.

The retention of information in the face of an existing procedural obligation under Art. 2 ECHR requires, in our opinion, a separate review and can only be carried out *ultima ratio*. The requirements for an effective investigation can generally only be met if all necessary information is available. An interest in secrecy can therefore only be examined under the specific circumstances of the individual case.

> For this purpose, a balancing of interests must be carried out between the procedural obligation and a possible threat to national security. In our opinion, there must be a (considerable and) specific threat in order for secrecy to be considered at all in the context of the investigation. The difficulty for Convention States will consist in being able to sufficiently justify the interest in secrecy without violating it through the justification itself.

4.3.5. Sanctioning of those responsible

An effective investigation aims to clarify the responsibility of the state in terms of its fundamental rights obligations (*see* no. III.2.4.3). The required effective sanctioning of those responsible depends on the national legal bases. The EctHR's assessment focuses on whether the national legal bases are sufficient to achieve the purpose pursued by Art. 2 ECHR (which, in our opinion) is strongly related to the positive obligation.

> «It is true that it is not for the Court to rule on the degree of individual guilt […], or to determine the appropriate sentence of an offender, those being matters falling within the exclusive jurisdiction of the national criminal courts. However, under Article 19 of the Convention and under the principle that the Convention is intended to guarantee not theoretical or illusory, but practical and effective rights […], the Court has to ensure that a State's obligation to protect the rights of those under its jurisdiction is adequately discharged. In cases of deaths occurring as a result of the use of excessive force, it must in particular verify whether the State has complied with its duty under Article 2 to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by

> law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions, and by not allowing life-endangering offences to go unpunished [...].»[1619]

> «It follows that while the Court should grant substantial deference to the national courts in the choice of appropriate sanctions for ill-treatment and homicide by State agents, it must exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed. Were it to be otherwise, the States' duty to carry out an effective investigation would lose much of its meaning, and the right enshrined by Article 2, despite its fundamental importance, would be ineffective in practice.»[1620]

There should at least be a certain likelihood that those responsible can be identified and sanctioned. This appears to be problematic if the jurisprudence of the EctHR fails to have its "preventive" effect (in particular on the assessment of the reversal of the burden of proof in special cases, *see* no. VI.4.2.4.e) and if only after a Strasbourg judgment there is a (new) more appropriate investigation and possibly an examination of individual responsibilities at the national level.

> Should the ECtHR find a violation of the Convention due to insufficient investigation, the question arises as to how far a subsequent national investigation concerning the identification and sanctioning of those responsible can effectively take place. «The lack of objective and impartial information about the use of [...] weapons constituted a major failure by the investigation to clarify this key aspect of the events and to create a ground for drawing conclusions about the authorities' actions in general and individual responsibility.»[1621]

If an investigation is delayed or carried out insufficiently, the identification of those responsible may no longer take place, especially since an – adequate – investigation

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1619 *Nikolova and Velichkova v. Bulgaria*, 7888/03 (2007), § 61.

1620 *Nikolova and Velichkova v. Bulgaria*, 7888/03 (2007), § 62; quite similarly, in *Armani Da Silva v. The United Kingdom* (GC), 5878/08 (2016), §§ 238 f.

1621 *Tagayeva and others v. Russia,* 26562/07 (2017), § 524.

at a later stage tends to be more costly and difficult than a timely investigation due to the passing of time.

> In the case of *Makaratzis v. Greece* «[...] an administrative investigation was opened. A number of police officers and other witnesses were interviewed and laboratory tests were conducted. After the investigation a criminal prosecution was brought against seven police officers, who were eventually acquitted [...]. [... However], the domestic authorities failed to identify all the policemen who took part in the chase. [... Some] policemen left the scene without identifying themselves and without handing over their weapons; thus, some of the firearms which were used were never reported. [...] It also seems that the domestic authorities did not ask for the list of the policemen who were on duty in the area when the incident took place and that no other attempt was made to find out who these policemen were. Moreover, [...] only three bullets were collected and that, other than the bullet which was removed from the applicant's foot and the one which is still in his buttock, the police never found or identified the other bullets which injured the applicant.»[1622]

In addition, the respective limitation periods under national law may be relevant in clarifying individual responsibility. Limitation periods can preclude sanctions. This seems to be particularly delicate when an investigation is opened, but it is foreseeable that the time conditions will not allow for a legally binding conclusion of the proceedings within the prescribed period.

Ultimately, it depends on whether an investigation to elucidate the responsibilities for infringements of the right to life (as a rule, probably as a criminal investigation) is duly conducted at all. It must be shown, by exhausting the available means, that an inadmissible (and especially disproportionate) use of force with life-threatening or lethal consequences will not remain unsanctioned[1623]. A procedure shall ensure that public

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[1622] *Makaratzis v. Greece* (GC), 50385/99 (2004), §§ 75 f.

[1623] *Nikolova and Velichkova v. Bulgaria* (GC), 7888/03 (2007), § 57 (e): «While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts.»

confidence in the constitutional state is protected in those cases in which the highest legal assets (*see* no. III.2), or a fundamental right that cannot be derogated in a public emergency (*see* no. III.3), are at stake.

4.4. RELATIONSHIP OF ARTICLE 2 TO ARTICLE 13 ECHR

Parallel to the existence of a duty to investigate under Art. 2 ECHR, the right to an effective remedy can claim validity[1624]. Art. 13 ECHR provides the persons concerned (or, in the case of death, their relatives) the right to lodge a complaint with a national authority[1625]. A violation of the rights or freedoms protected by the Convention is eligible for appeal.

> In *McKerr v. The United Kingdom* the applicant had «complained that he had no effective remedy in respect of his complaints»[1626]. The ECtHR has (*inter alia*) discussed the meaning of Art. 13 ECHR in the context of a lethal use of force: «The [...] case-law indicates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an ‹arguable complaint› under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision.»[1627]

The procedural requirements under the right to an effective remedy are broader than those under the right to life, according to the ECtHR[1628].

[1624] *Kılıç v. Turkey,* 22492/93 (2000), §§ 91 ff. On the relationship between Art. 2 and Art. 13 ECHR, *cf.* Sturm, Gewaltanwendung, pp. 27 ff.

[1625] There is no direct connection between Art. 2 and Art. 6 ECHR (right to a fair trial). The wording of Art. 6 ECHR focuses on *civil rights* and *criminal charges* (to be interpreted autonomously). In the case of a violation of the right to life, this provision only concerns the assessment of the conduct of a possible offender.

[1626] *McKerr v. The United Kingdom,* 28883/95 (2001), § 167.

[1627] *McKerr v. The United Kingdom,* 28883/95 (2001), § 170.

[1628] *Salman v. Turkey* (GC), 21986/93 (2000), § 123; *Hugh Jordan v. The United Kingdom*, 24746/94 (2001), § 160; *Kılıç v. Turkey,* 22492/93 (2000), § 93; *Shanaghan v. The United Kingdom*, 37715/97 (2001), § 135; *Kelly and others v. The United Kingdom*, 30054/96 (2001), § 154;

> «In cases involving the use of lethal force or a suspicious death, [...] Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure [...]. In a number of cases [...] there has been a violation of Article 13 where no effective criminal investigation had been carried out into a suspicious death, noting that the requirements of Article 13 were broader than the obligation to investigate imposed by Article 2 of the Convention.»[1629]

The claim to an effective investigation according to the procedural obligation of the right to life is directed at the circumstances of use of force as well as any subsequent liability. Even if the scope of the duty to investigate under Art. 2 ECHR turns out to be narrower than under Art. 13 ECHR, an examination is in our opinion *more detailed*: The purpose of an investigation within Art. 2 ECHR is to comprehensively assess all state action. In contrast, Art. 13 ECHR focuses on civil claims for satisfaction by victims or their relatives[1630].

> Art. 2 and Art. 13 ECHR may be violated and complained about jointly[1631]. This does not mean, however, that the ECtHR examines a possible violation both fundamental rights separately[1632].

McShane v. The United Kingdom, 43290/98 (2002), § 141; *Gongadze v. Ukraine*, 34056/02 (2005), § 192; *Akkum and others v. Turkey*, 21894/93 (2005), § 265; *Kaya and others v. Turkey*, 4451/02 (2006), § 53; *Erdoğan and others v. Turkey*, 19807/92 (2006), § 104.

1629 *McKerr v. The United Kingdom*, 28883/95 (2001), § 171.

1630 Jacobs/White/Ovey, European Convention, p. 167.

1631 For example in *Isayeva v. Russia*, 57950/00 (2005), §§ 224 and 230 as well as in *Gongadze v. Ukraine*, 34056/02 (2005), §§ 164 ff. and 190 ff.

1632 *Cf. McCaughey and others v. The United Kingdom*, 43098/09 (2013), § 140 (no separate examination of Art. 13 ECHR); the Court went even further in *Hugh Jordan v. The United Kingdom,* 24746/94 (2001), §§ 164 f. («As regards the applicant's complaints concerning the investigation into the death carried out by the authorities, these have been examined above under the procedural aspect of Article 2 [...] The Court finds that no separate issue arises in the present case. The Court concludes that there has been no violation of Article 13 of the Convention.»).

4.5. DAMAGES TO AVOID PROCEDURAL OBLIGATIONS?

An investigation in compliance with the Convention can require considerable human, material and financial resources. An effective investigation can, furthermore, lead to indirect political consequences.

States or authorities may therefore be tempted to "upgrade" a possibly parallel existing claim for damages. The question is whether the payment of damages can replace the carrying out of an investigation. From a procedural point of view, it could be argued that possible interests of third parties (such as survivors) are covered (quickly and efficiently) by the payment of damages – their complaints would then be considered inadmissible due to the lack of an existing damage.

In delicate cases, authorities may be tempted to simplify matters (for example, if a shift in the burden of proof towards the Convention State would occur anyway in proceedings before the ECtHR; *see* no. VI.4.2.4). They could admit committed failures in a blanket manner and without a closer examination. After admitting state responsibility, it could be argued that there is no longer any interest in further investigation.

4.5.1. Damages as an efficient alternative to an investigation?

a. Principle of primacy of the procedural obligation

The procedural aspect is closely related to the other obligations of the states under Art. 2 ECHR; however, it has an independent meaning. The ECtHR has repeatedly recognised that the procedural obligation under Art. 2 ECHR cannot be fulfilled with financial compensation (*see* no. III.2.4.3 and III.2.4.4)[1633].

> «This is so because, if the authorities could confine their reaction to incidents of willful police ill-treatment to the mere payment of compensation, while not doing enough in the prosecution and punishment of those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity and the general legal prohibitions

[1633] *McKerr v. The United Kingdom*, 28883/95 (2001), § 121; *Al-Skeini and others v. The United Kingdom* (GC), 55721/07 (2011), § 165.

of killing and torture and inhuman and degrading treatment, despite their fundamental importance, would be ineffective in practice.»[1634]

b. Simultaneous claims for damages

However, this does not mean (*e contrario*) that damages would be excluded or even inadmissible in the case of an impermissible use of force. Possible claims for damages or compensation can exist besides the duties to investigate.

For example, in the case of *Nikolova and Velichkova v. Bulgaria*, the relatives of the deceased were awarded compensation. Although a violation of Art. 2 ECHR can indeed lead to a claim for damages, «in cases of willful ill-treatment resulting in death the breach of Article 2 *cannot be remedied exclusively* through an award of compensation to the relatives of the victim.»[1635]

c. The special nature of non-pecuniary damage in the case of excessively long proceedings

An excessively long investigation can put a severe psychological strain on the persons involved in the proceedings. The victims or the survivors are repeatedly confronted with the facts of the case and their own fate; this can make it difficult to overcome the events.

In *Collette and Michael Hemsworth v. The United Kingdom*, *John Hemsworth's* injuries were to be assessed. During an RUC chase he had received punches to the face as a bystander. He received medical attention but his condition progressively deteriorated. Around six months after the incident, he died[1636]. The investigation had not been completed even 13 years later (which was a violation of Art. 2 ECHR; *see* no. VI.4.2.3.c with footnote 1528)[1637]. The ECtHR has recognised (independent) claims for satisfaction due to an increased burden on the relatives over a long period of time. «The applicants requested an award in respect of non-pecuniary damages. While they did not request a particular

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1634 *Nikolova and Velichkova v. Bulgaria* (GC), 7888/03 (2007), § 55.

1635 *Nikolova and Velichkova v. Bulgaria* (GC), 7888/03 (2007), § 55 (highlighted only here).

1636 *Collette and Michael Hemsworth v. The United Kingdom*, 58559/09 (2013), §§ 7 and 13 f.

1637 *Collette and Michael Hemsworth v. The United Kingdom*, 58559/09 (2013), § 58.

sum, they submitted psychiatric reports which underlined the impact on them of the death of Mr Hemsworth and which, in the case of Mrs Hemsworth, attested to the fact that the inquest delay in particular was a significant factor in the persistence of her problems of depression and anxiety.»[1638]

In the case of *McDonnell v. The United Kingdom*, the ECtHR (on the fatal heart attack of a prison inmate, which has still not been resolved after 17 years, *see* no. VI.4.2.3.c) also awarded non-pecuniary damage even without corresponding psychiatric reports. «The [...] applicant had not established any suffering and distress meriting an award of non-pecuniary damage. In particular, she had failed to provide any evidence or details in support of her claim. [...] The [...] applicant has undoubtedly suffered distress on account of the lengthy delay in the case. It awards her the full amount claimed, namely EUR 10,000, in respect of non-pecuniary damage.»[1639]

The ECtHR's victim-friendly jurisdiction on possible damages stresses the importance of a timely and not overlong investigation from an individual rights perspective. This also corresponds to the procedural institute of the requirement of acceleration.

4.5.2. Recognition of mistakes and satisfaction

To our astonishment, the ECtHR seems to accept, at least in individual cases, when a state recognises an abusive use of force with a fatal outcome and subsequently awards satisfaction – without conducting an effective investigation.

In the *Akman v. Turkey* case, for example, after a shooting, house searches were carried out. The applicant cooperated with the special unit and, together with his family, complied with their demands. During the identity check of the son, an officer opened fire on him with fatal consequences. Subsequently, the regular police forces in charge and a doctor went to the spot, where the statements of the persons concerned were recorded[1640]. The ECtHR struck out the case

[1638] *Collette and Michael Hemsworth v. The United Kingdom*, 58559/09 (2013), § 79.

[1639] *McDonell v. The United Kingdom*, 19563/11 (2014), §§ 96 f.

[1640] *Akman v. Turkey*, 37453/97 (2001), § 10 ff.

> with reference to Art. 37 (para. 1 [c]) ECHR: «Having regard to the nature of the admissions contained in the declaration as well as the scope and extent of the various undertakings referred to therein, together with the amount of compensation proposed, the Court considers that it is no longer justified to continue the examination of the application.»[1641]

The judgment is not convincing. As a result, a vague acknowledgement of the violation of the Convention in connection with a corresponding payment of compensation can be used to circumvent a judicial review – and thus the procedural obligation under Art. 2 ECHR[1642]. In particular, in our opinion, the question arises as to whether an actual sanctioning of those responsible will then still take place. The purpose of the investigation – namely the identification of those responsible and the (here criminal) assessment of their conduct – may be called into question and ultimately a potential violation of the Convention may be accepted[1643].

4.6. CONCLUSION: THE IMPORTANCE OF AN EFFECTIVE INVESTIGATION

The duty to investigate takes effect in individual cases as soon as life as a legal asset is endangered by human behaviour (*see* no. III.2.4). It is thus automatically related to the positive and negative obligation under Art. 2 ECHR. In the case of a use of force, the independent content of the procedural obligation is accentuated. In the context of an investigation, public interests in a review of the lawfulness of the exercise of the state's monopoly on the use of force are indirectly included.

An effective investigation required in the case of a use of force is linked decisively to the *independence* of the investigating authority. In its assessment, the ECtHR appears to apply a strict benchmark: according to an organisational-formal perspective, *actual* administrative independence is required. Under no circumstances is an authority allowed to investigate its own conduct or its own involvement – or the conduct or involvement

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1641 *Akman v. Turkey*, 37453/97 (2001), § 30.

1642 Chevalier-Watts, Effective Investigations, p. 720.

1643 *McKerr v. The United Kingdom*, 28883/95 (2001), § 121.

of its own members. In the case of anti-terrorist operations, all specifically involved state agencies (including organisational units of law enforcement agencies) are excluded from subsequent investigative activity within the scope of Art. 2 ECHR. In other words, involvement in an operation precludes the independence of an authority in a subsequent investigation – the specific role in that operation is not relevant. Convention States have a duty to conduct the investigation with impartial investigative authorities.

Nevertheless, there is an unavoidable interface between an operation by security forces and a subsequent investigation: during an operation, the preconditions must already be created so that an effective investigation can take place with the necessary depth. In particular, this involves the comprehensive documentation and initial preservation of first evidence by the operational authorities and the subsequent provision of all relevant documents to the investigating authority.

The *adequacy* of an investigation depends heavily on the individual case. The ECtHR grants the states a certain margin of discretion – nevertheless, a kind of minimum standard has been established[1644]. The adequacy reaches a higher importance in cases of specific state responsibility towards individuals: when a person is held in custody, when potentially lethal means of coercion are used or when effective control over a certain conflict area is exercised, a shift of the burden of proof takes effect whenever the cause of death is unclear. The shifting of the burden of proof is closely related to the positive and negative obligations under Art. 2 ECHR. The decisive factor for the Court is whether state actors exercise full control over a specific situation or in exceptional situations in a specific territory (in the sense of a power of domination under Art. 1 ECHR).

To the extent that – or, in the case of *anti-terrorist operations*, as soon as – state security forces have gained the freedom of acting, the ECtHR applies a strict benchmark for the duty to investigate. A properly functioning judicial system, which guarantees judicial control and oversight of both the police and intelligence services[1645], plays a decisive – strategic – role especially in countering home-grown terrorism.

[1644] The Court accepts minor defects in the investigation to the extent that they do not falsify the overall picture; *cf.* Reid, Practitioner's Guide, 85-021.

[1645] Holmes, Counterterrorism Policy, p. 44.

It is true that it only becomes apparent *ex post* whether an investigation actually has to take place (because a use of force with reference to Art. 2 ECHR has occurred). However, in the case of operations by state security forces (and thus at least potentially life-threatening use of force), the duty to investigate has "material preliminary effects": it must already be taken into account in the planning and implementation of specific operations. Otherwise, there is a risk that an investigation cannot be adequately conducted by an independent authority at a later stage.

An investigation must take into account the *specific purposes* of the procedural obligation. Regardless of the procedural requirements of potential applicants, an investigation into the use of potentially lethal means of coercion also indirectly serves the public interest in clarifying the relevant circumstances. The establishment of transparency strengthens confidence in the functioning of the constitutional state, irrespective of the outcome of an investigation. In addition, an effective investigation lays the foundation for a (primarily internal) review and in-depth analysis of state conduct and thus for lessons learned and for future improvements (up to and including an adjustment in training for law enforcement officials). In the case of individual complaints, the specific purposes of the procedural obligation are (in our opinion indirectly) included[1646]. Under certain circumstances (or in controversial cases), this can also occur later than six months after the national courts have been exhausted. The (restricting) six-months rule does not apply absolutely to the procedural obligation under Art. 2 ECHR. The Court quite rightly makes a reference to the respective situation. The challenge is to find an appropriate and convincing solution in the context of an investigation with a balancing of the various elements – claims against the state, guaranteeing democratic standards and taking into account victims' claims as well as restoring trust in the state[1647].

Therefore, there is a similarity in the relationship between the right to an appropriate investigation and any claims for *damages*. The payment of damages is not a substitute for the conduct of an investigation. If states could "buy their way out" of an investigation, essential purposes of the procedural obligation would not be fulfilled in the case of a use of force.

[1646] Chevalier-Watts, Effective Investigations, p. 721.

[1647] Chevalier-Watts, Effective Investigations, p. 715.

In the practical implementation of the investigation, the investigating authorities are bound both by their national legal framework (in particular criminal proceedings and administrative proceedings) and by the guarantees of the ECHR. The former (of course) do not apply to the ECtHR. The Court can therefore also point out weaknesses or shortcomings in the national legal bases in its proceedings (which it has done in particular in the cases on Northern Ireland).

The Convention is violated if an effective investigation cannot be carried out due to a lack of legal basis, insufficient independence of the investigating authority or the failure to provide the affected persons with participatory rights.

5. CONCLUSION: HIGHLIGHTING OF ALL THREE OBLIGATIONS

The scope of application of the obligations under Art. 2 ECHR does not end objectively or temporally with the completion of anti-terrorist operations. Although a concrete endangerment by terrorists may come to an end, specific situations may continue beyond this stage in view of the legal assets involved: for example, when a large number of seriously injured persons need medical care.

After a certain situation has been "settled" by law enforcement officials, specific legal bases for the deployment of security forces and possible margins of discretion on the part of the authorities (which may still have existed before for operations) may no longer apply. Interventions in life as a legal asset are then only permissible to a very limited extent and under the usual strictness. Post-operationally, the Convention States have a particular duty to provide aftercare. This applies to both victims and perpetrators.

The move from the operative to the post-operative phase can be abrupt. The post-operative phase must already be considered in the planning and conduct of an operation: for example, the dispatching of rescue forces must be planned for and as well adequately integrated into an operation. Security forces must be prepared to be able to act adequately within a very short time.

In the aftermath of anti-terrorist operations, there are major public information interests. The reasons for state interests in secrecy may then no longer be valid. Restrictions

on the freedom of the media (*see* no. V.6.3) can then lose their previously given justification. Furthermore, there may additionally be (also public) interests involved in an independent and appropriate investigation.

An independent investigating authority must be designated quickly and be in a position to start its work immediately. The investigation should remain unaffected by possible after-action reviews by the agencies involved in the operation. *Debriefings* and *after-action reviews* are of great practical importance for security forces. These forms of follow-up assessments represent both an element of learning and continuous improvement by the respective organisations as well as a means of processing experiences at the individual level. However, reconstruction and follow-up activities must not prejudge the outcome of the search for truth within the framework of an independent (effective) investigation.

Favourable conditions for independent investigation need to be established already in the planning and implementation phases of operations. The positive and negative obligations are closely connected to the procedural obligation. In our opinion, only for this reason can a shift in the burden of proof be justified in the use of potentially lethal means of coercion by state security forces. The question then culminates in whether an absolute necessity can be sufficiently proven.

When examining the use of physical means of coercion by state security forces, the behaviour of the opposing side (*i.e.,* terrorist actors) is not directly assessed (as a part of a specific situation)[1648]. The investigation is focused on the conduct of the Convention States or their authorities (and their law enforcement officials) in the face of a threat. A terrorist background can indirectly be relevant, especially in the assessment of a threat (*i.e.*, an assessment of a situation) and thus of proportionality.

A terrorist-motivated opposite side will want to stage and exploit every result of its action in the media. Therefore, it is important to counter that indirectly through a proper post-operational conduct[1649]: with the quick rescue of victims, with the establishment of transparency or with a quick and adequate investigation.

[1648] Warbrick, European Response to Terrorism, p. 1002.

[1649] Sharp and true Wilkinson, Terrorism versus Democracy, p. 95: "Terrorist campaigns of propaganda and defamation must be fully countered".

VII. SUMMARY OF THESES

«Terrorism does put the State under threat; it puts at risk also the rights and freedoms guaranteed by the Convention. It provides a severe test for the idea of fundamental rights.»

Colin Warbrick
(Prevention of Terrorism)

1. The right to life under Art. 2 ECHR is a human right with different elements. The *positive* and *negative* obligations emerge for the Convention States from the wording of the norm. The *procedural* obligation developed by the ECtHR on the basis of its case law supplements the article. The fundamental rights elements are related to each other in several ways.
2. The positive obligation is fulfilled by the legislative creation and actual enforcement of a *legal and administrative framework* to protect life. This element of Art. 2 ECHR thus has an impact on the entire legal system. The required implementation traditionally comprises police action by the state through the issuing of general norms under criminal law and, in the narrower sense, enforcement by the state security forces. In addition, it anchors a state responsibility in other areas, such as the regulation of public health and safety regulations for *dangerous activities*, natural or unnatural.
3. Legislation or regulatory implementation has been the responsibility of states which attempts to control *human behaviour*: this concerns on the one hand, persons acting as representatives of the state in a narrow sense – and on the other hand, in a quite broad sense, the behaviour of persons within further state regulatory powers. This may prove to be challenging in those areas where a potential threat to human life emanates from other people's actions or from natural hazards.
4. Each of these three fundamental elements of the right to life and their interaction give rise to *obligations relevant to practice* with regard to police conduct and, in particular, to the *use of (physical) means of coercion*. These obligations are set in concrete and accentuated in specific operations by state security forces,

insofar as where there is a relationship to life as a legal asset. Knowledge of a possible interference with the right to life is sufficient for this state obligation and opens the scope of protection.

5. The *Grand Chamber's* 1995 judgment *McCann and others v. The United Kingdom* on the anti-terrorist operation of the security forces on Gibraltar is still a landmark judgment. This case settles the general interpretation of Art. 2 ECHR, including the interaction of the various fundamental rights obligations in police operations. Since then, the ECtHR has been following this interpretation for police operations as well as for the use of potentially life-threatening means by the police at a lower level of escalation.
6. However, in the judgment *Osman v. The United Kingdom*, the ECtHR drew a distinction between general risks and specific threats to human life posed by other people (third parties). In situations where there is a *real and immediate risk*, the state has a duty to protect in the sense that it must take measures to avert the threat (including, if necessary, using coercive means against the perpetrators).
7. Like the states' conduct, the ECtHR's jurisprudence reaches its limits in extraordinary situations and especially in cases of emergency. According to the judgment in *Giuliani and Gaggio v. Italy*, the conduct of the state security forces did not violate the Convention guarantees: the preparations made by the state were sufficient and the right to life of perpetrators does not exclude individual acts of self-defence even by members of the security forces. In more extreme cases, the Court has to address more delicate questions of distinction and proportionality. In the judgments in *Finogenov and others v. Russia* and in *Tagayeva and others v. Russia* it has highlighted the significance of the negative obligation in anti-terrorist operations by the state security forces. In *Finogenov and others v. Russia*, the Court's recourse to the operation as a whole was in our opinion not adequate to fully guarantee the legal protection of the right to life for the hostages. The recognised violations of pre-operational (inadequate planning and conduct) and post-operational (especially the failure to conduct an effective investigation into the rescue operation) obligations does not, in our opinion, take into account the seriousness of the actual use of the means (narcotic gas, the use of which is illegal in police operations and violates the CWC). In *Tagayeva and others v. Russia*, the

ECtHR recognises a violation of the fundamental right to life of the hostages both by the use of force as well as by the inadequate planning and conduct. In addition, the absence of preventive measures by the state forces and the subsequently inadequate investigation into the operation amount to a violation of the positive obligation.

8. According to the *Grand Chamber* in *Öneryildiz v. Turkey*, duties to protect can also apply to avert abstract dangers: this requires a known and tangible endangerment – whereas in the fields of technical safety law (regulating dangerous activities) a mere potential risk can be sufficient. Even then, however, the ability to know about the possible impact on life as a legal asset can reasonably be a deciding factor.
9. The assessment of cases under Art. 2 ECHR reflects the role and the self-understanding of the ECtHR vis-à-vis the Convention States. The ECtHR is a human rights court and not a general constitutional court as such. This is of particular importance in its assessing of the positive legal basis for the use of potentially lethal means of coercion. The Court compares the legal regulations of the Convention States with international standards and principles – *i.e.,* soft law. The ECtHR is quite strict when the legal basis for the use of coercive means in the states is lacking or completely inadequate.
10. In *general procedural terms*, the ECtHR seems to be quite "liberal to the fundamental right" when interpreting the right to life. Thus, in assessing the admissibility of individual complaints on the lawful exercise of the state's monopoly on the use of force, it also allows public interests to be taken into account in the complaint's procedure. Thus, the Court basically emphasises a connection between the procedural and the positive content of Art. 2 ECHR. This has repercussions for the interpretation of the ECHR beyond its wording – for example, with regard to the period for appeal (*six-month rule*). The reversal of the burden of proof vis-à-vis the Convention States in those situations in which they exercise particularly close control over persons or territories also appears to be consistent. However, it does not seem consistent for the ECtHR to impose higher requirements of proof in complaints in individual cases (*Issa and others v. Turkey*).

11. In *anti-terrorist operations*, the viability of the respective legal and administrative framework and the proportionality of state action are of central importance. In our opinion, the case law corresponds to the sense of the fundamental rights norm. The criterion of *state knowledge* (or the need to know) and the principle of proportionality (not imposing an impossible or disproportionate burden) have a limiting effect. Absolute protection of life as a legal asset is impossible and therefore cannot be demanded by the Convention States.
12. Obligations on the Convention States are resulting from the case law developed under Art. 2 ECHR. These are not merely the duties to protect that apply in certain circumstances but have led to an individualisation of security claims as well as to an individualisation of corresponding measures[1650]. The regulatory framework requirements have further increased. The ECtHR requires a sufficiently precise regulation, especially on the use of firearms (*i.e.*, no laxity). In our opinion, the same standard applies to all potentially lethal means of coercion (and, due to the deterministic view of the Court, basically to all means of coercion). Conversely, this is also evident from the fact that the Court only allows recourse to *ad hoc* means in extraordinary situations (then with a probabilistic risk assessment).
13. In the implementation of the requirements arising from Art. 2 ECHR, the national legal system as a whole must be taken into account. In order to prevent the materialisation of dangers, the element of investigation becomes relevant. In particular, this involves an adequate implementation of criminal law and criminal procedure with a dual objective: it is not only the use of potentially lethal means of coercion by state security forces that must be investigated – the same applies to the circumstances and characteristics of a threat underlying a defensive measure. The primary goal of the democratic state is not the "neutralisation" of terrorists, but rather the criminal assessment of their behaviour while creating (judicial) publicity[1651].
14. Jurisprudence forces the Convention States to take a strategic position in the fight against terrorism. Violations of the right to life weigh heavily and

[1650] *C.f.* Krieger, Völkerrechtliche Fundamente, p. 134.

[1651] *C.f.* Wilkinson, Terrorism versus Democracy, p. 117.

undermine credibility in the state and its institutions. Art. 2 ECHR cannot be further curtailed or limited therefore – even in the fight against terrorism, emergency measures with reference to other fundamental rights should remain reduced to the minimum[1652]. The barriers that exist for the state may limit its operational capacity to act, but they preserve it as a democratic constitutional state – the democratic constitutional state is precisely the target of terrorist activities. Fundamental rights barriers are particularly effective in those areas where "operational blindness" or "silo thinking" can otherwise obscure the picture.

15. From an operational perspective, the fundamental rights obligations of Art. 2 ECHR already have an impact well ahead of any action. Moreover, they are closely linked to the legally established framework for the actions of security forces. The various phases of anti-terrorist operations – a simplified distinction can be made between pre-operational, operational and post-operational phases – are usually strongly linked. The actual reasons for a possible violation of fundamental rights by state security forces often lie in the preliminary stages of police operations which can be attributed to the circumstances under which the operations have been initiated.
16. Once the actions of security forces have crossed the line into a real police operation, courts judge them multidimensionally. Extending the legal focus to an operation as a whole means shifting compliance with fundamental rights obligations from the conduct of an operation within the framework of the legal bases applicable to it (especially on the use of physical coercion) to the pre-operational phase of preparation and planning. The post-operational phase is subject to not only the duty of investigation (which exists independently in this respect) but also the mitigation of damage through further, in particular rescue, measures (which, in turn, must be considered and planned in part in the pre-operational phase). The significant intensification of the state's responsibility as established in *McCann and others v. The United Kingdom* is fundamentally reflected in *Isayeva v. Russia*, in *Finogenov and others v. Russia* and especially in *Tagayeva and others v. Russia*.

[1652] *C.f.,* from a temporal perspective, Wilkinson, Changing threat, p. 39 (§ 6).

17. The decisive factors are the multilevel pictures, *i.e.,* both the common operational picture and the variable specific situational pictures, which are relevant in all phases of an operation. Both the respect of the situational picture and the documentation (transparency) and accountability of state action are necessary in order to be able to carry out the required assessment, investigation and evaluation after an operation has come to an end. In addition to reviewing the legality and compliance with the principle of proportionality in individual cases, this also involves examining the robustness and adequacy of the legal and administrative framework. In certain special situations, the burden of proof is shifted to the Convention States.
18. Overall, it can be observed that absolute necessity – which, according to the wording of Art. 2 (para. 2) ECHR, appears to be the key element for the negative obligation – is important in cases of increased complexity, but may not be of fundamental importance on its own. Where and to the extent that Convention States must comply with obligations to protect, balancing considerations are required. Absolute necessity (in the sense of a strict proportionality test) primarily protects life as a legal asset (especially of victims, such as hostages), but not the lives of perpetrators (such as violent kidnappers, terrorists and so on). The Court's balancing of risks in extreme cases of anti-terrorist actions, also on the part of victims, does not make sense from a dogmatic point of view. Under certain circumstances, fundamental rights guarantees do severely restrict the scope of action of state security forces. In our opinion, even existing duties to protect do not require states to turn themselves into perpetrators – on the contrary, absolute necessity then forms an absolute barrier. Rather, duties to protect provoke an intensification of protective measures in the forefront of foreseeable (potential) threats.
19. In our opinion, the ECtHR's approach has reached its limits when it comes to the further concretisation and development of the right to life under its case law. There is no broad-based general risk dogmatics as a foundation for its case law, nor is there a clear distinction between dangers and risks. There will remain a conflict between comprehensive requirement to protect life, different dangers and risks for life as a legal asset, different areas of regulation and different roles

(and also obligations) of the Convention States depending on the field of regulation. Thus, it will remain a great challenge in the future.

20. Therefore, focusing the jurisprudence more sharply could be useful. This also means partially detaching it from individual leading decisions (for example, the *McCann* case has little to do with *Osman* and hardly anything to do with *Öneryildiz*). The law of technical danger prevention and the protection of the legal asset of life against human (mis-)behaviour are difficult to combine under the positive obligation. The simplicity of cases of obvious omission may perhaps obscure the view and the scope of the article under the ECHR somewhat.

VIII. CONCLUDING REMARKS

> «What de*mocracies must strive for is a balance. That balance is easier to discover if governments and their publics realize that democracies are not fragile in the face of terrorist attack and that they can defend themselves. Rather than inflating the terrorist bogey, democracies ought to realize that experience shows that the number of terrorists is limited and can probably be contained and reduced by government policies.*»
>
> Grant Wardlaw
> (The Democratic Framework)

Terrorist groups pursue "political" goals. Terrorist actions are directed against the state and against society. A promising response to terrorist threats ultimately always has a political character. In a democratic (constitutional) state, this response can only take place within the limits of the law. The binding and legitimating force of law distinguishes the exercise of legitimate state violence from illegitimate terrorist violence.

The established jurisprudence to the ECHR provides a minimal legal framework for concrete state measures, including entire operations by the security forces. The combination of political will and legal support is the foundation for countering terrorist threats[1653].

> Terrorism is the means of extremists who are in a weak position: they lack the political power to get involved in decision-making processes, they lack the military strength to challenge the state directly and they lack the moral strength to gain a social reputation. What remains is the "propaganda of the action"[1654].
>
> Terrorist masterminds aim for state responses to exceed the legal framework, to be disproportionate in choice of means or effect, and ultimately for the state to descend on their dirty playing ground.

[1653] *Cf.* Wilkinson, Changing threat, pp. 38 f. (§§ 1 and 12).

[1654] In German "*Propaganda der Tat*"; *cf.* Mueller, Innere Sicherheit Schweiz, pp. 151 ff. (in the context of the anarchist threats at the end of the 19th century.

The different aspects of the right to life according to Art. 2 ECHR oblige states to legislate and combat terrorist activities. These provisions lay down the essential guidelines on how this fight is to be carried out in the situation of concrete threats. The use of physical means of coercion is permissible. The use of even potentially lethal means of coercion is possible in order to protect victims.

The connecting element between politically defeating terrorist threats and respecting the necessary fundamental rights framework is people's trust in the functioning of democratic state institutions. Political violence does not reward. Terrorism – and that's a fact – never succeeds[1655].

> On 10 July 2006, Shamil Basayev, the alleged mastermind of the Beslan School No. 1 attack (and other attacks), was killed by an explosion in Ingushetia. It is not established whether the cause of death was a special operations forces operation or a mishandling of explosives[1656].

[1655] *Cf.* Wilkinson, Changing threat, p. 38 (§ 3).

[1656] *Tagayeva and others v. Russia,* 26562/07 (2017), § 110.

TABLE OF JUDGMENTS