

# The right to life

*A guide to the implementation  
of Article 2  
of the European Convention  
on Human Rights*

Douwe Korff



**Human rights handbooks, No. 8**



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*Douwe Korff is Professor of International Law at London Metropolitan University, London, United Kingdom. He represented the applicants in the cases of, inter alia, McCann, Caraher, Kelly and Shanaghan v. the United Kingdom.*

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## Article 2 of the European Convention on Human Rights

### Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

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

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

## Introduction

This Handbook deals with the right to life, as guaranteed by Article 2 of the European Convention on Human Rights (ECHR or “the Convention”), and with the case-law of the European Court of Human Rights (“the Court”) under that article. However, the Convention must be regarded as a whole, and the rights in the Convention do not operate in isolation. On the contrary, certain basic concepts and approaches – like the concept of “law” and the tests of “legitimate aim”, “necessity”, “proportionality”, “non-arbitrariness” and “fair balance” – run like red threads through the fabric of the Convention and the various rights in the Convention. There are also specific links between specific articles – e.g., in respect of the right to life, between Article 2 (1) and Protocols Nos. 6 and 13 as concerns the death penalty, and between Article 2 (2) and Article 15 of the Convention as concerns “deaths resulting from lawful acts of war”. Cases relating to one issue are furthermore often brought under a variety of articles – as we shall note with regard to abortion and suicide in particular – and in such instances, the Court’s approach can only be understood by reference to its rulings on all the articles involved.

Also important is the fact that the Convention usually does not impose rigid requirements on States. Rather, it sets certain minimum standards, while allowing States a certain discretion, a “margin of appreciation”, in how to meet those standards. The scope of this discretion, of this margin, depends on the nature of the right, on the nature of the issues and the importance of the

interests at stake, and on the existence or absence of a European (or wider) consensus on the matter in hand. Such a consensus can be gleaned from State practice (through a comparative study of the laws and practices of the Council of Europe member States) or from international standards set out in other treaties (such as the Oviedo Convention on Human Rights and Biomedicine), or in resolutions adopted by the Committee of Ministers or the Parliamentary Assembly of the Council of Europe, or by United Nations bodies.

In summarising the case-law of the European Court of Human Rights (and where relevant, of the European Commission on Human Rights, abolished by Protocol No. 11 to the Convention) on Article 2, reference will therefore often be made to such general issues, to other rights in the Convention, and to issues outside the Convention (such as such European or United Nations standards), as reflected in that case-law.

This handbook is aimed, in particular, at judges and other legal professionals such as prosecutors and practising lawyers. These need to understand the Convention and the case-law of the Court, in particular when the Convention is formally part of their domestic legal systems – as is the case in most of the member States of the Council of Europe. Indeed, in law, the Convention in many European countries overrides ordinary domestic law. It is therefore crucial for these legal practitioners to be aware of the

detailed requirements of the Convention. More specifically, it follows from the supremacy of the Convention that the interpretation of the Convention by the European Court of Human Rights should also be followed by the national courts in these countries. The Court's judgments are not merely advisory or relevant to the respondent State in a given case only. Rather, in Council of Europe member States in which domestic law or jurisprudence proclaims

## Article 2

The first substantive right proclaimed by the Convention is the right to life, set out in Article 2 and reproduced on p. 4.

The right to life is listed first because it is the most basic human right of all: if one could be arbitrarily deprived of one's right to life, all other rights would become illusory. The fundamental nature of the right is also clear from the fact that it is "non-derogable": it may not be denied even in "time of war or other public emergency threatening the life of the nation" – although, as discussed later, "deaths resulting from lawful acts of war" do not constitute violations of the right to life (Article 15 (2)). As the Court put it in its Grand Chamber (GC) judgment in the case of *McCann and others v. the United Kingdom*:

*Article 2 ranks as one of the most fundamental provisions in the Convention – indeed one which, in peacetime, admits of no derogation under Article 15. Together with Article 3 of the*

the supremacy of international law in general, and/or of international human rights law or the Convention in particular, the domestic courts must follow the European Court of Human Rights' interpretations of the Convention in their own jurisprudence. It is hoped that this handbook, together with the other handbooks already issued, will help them do so.

*Convention [the prohibition of torture], it also enshrines one of the basic values of the democratic societies making up the Council of Europe.<sup>1</sup>*

Because of this, the Court said, "its provisions must be strictly construed."<sup>2</sup>

The second sentence of Article 2 (1) concerns the death penalty, which will also be discussed separately, below, with reference to the Protocols Nos. 6 and 13 to the Convention, which abolish that penalty in times of peace (Protocol No. 6) or in all circumstances (Protocol No. 13) for those State Parties that have signed up to them.

1. *McCann and others v. the United Kingdom*, GC judgment of 5 September 1995, § 147, with reference to *Soering v. the United Kingdom*, judgment of 7 July 1989, para 88.
2. *McCann* GC judgment, § 147.



That question aside, Article 2 contains two fundamental elements, reflected in its two paragraphs: a general obligation to protect the right to life “by law” (§ 1), and a prohibition of deprivation of life, delimited by a list of exceptions (§ 2). This is similar to the structure of Articles 8 to 11 of the Convention. As explained in Human Rights Handbooks Nos. 1 and 2, with reference to Articles 8 and 10 respectively, the European Commission and Court of Human Rights have derived certain important concepts and tests from this structure. These are also important in the context of Article 2, although there are some differences, which mainly strengthen the right and limit the exceptions.

Specifically, Articles 8 to 11 stipulate that restrictions on the rights they guarantee must be provided for “by law”, but under Article 2 the right itself must be “protected by law”. This gives additional weight to the right: While States are not generally required to incorporate the Convention into their domestic law,<sup>3</sup> as far as the right to life is concerned, they must still at least have laws in place which, in various contexts, protect that right to an extent and in a manner that substantively reflect the Convention standards of Article 2.<sup>4</sup>

The concept of “law” must here, moreover, be interpreted in the same way as in those other articles (and in the Convention generally), that is, as requiring rules that are accessible, and reasonably

precise and foreseeable in their application.<sup>5</sup> This has implications, e.g., for the rules on the use of lethal force in law enforcement, as discussed later.

As far as the second paragraph is concerned, Article 2 allows for exceptions to the right to life only when this is “absolutely necessary” for one of the aims set out in sub-paragraphs (2) (a)-(c). Again, this denotes a stricter test than under the provisions of the Convention that allow restrictions on rights when this is simply “necessary in a democratic society” for the “legitimate aims” listed in them. As the Court put it in *McCann*:

*In this respect the use of the term “absolutely necessary” in Article 2 § 2 indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is “necessary in a democratic society” under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2.<sup>6</sup>*

Finally, the Court has held that Article 2 imposes a “positive obligation” on States to investigate deaths that may have occurred in violation of this article. This procedural requirement was first stated in the case of *McCann*, concerning killings by agents of the State, in the following terms:

3. E.g., *James and others v. the United Kingdom*, judgment of 21 February 1986, § 84; *Holy Monasteries v. Greece*, judgment of 9 December 1994, § 90.  
4. Cf. the discussion of domestic law in the *McCann* GC judgment, §§ 151-155.

5. *Sunday Times v. the United Kingdom (I)*, judgment of 29 March 1979, § 49, repeated in many cases since.  
6. *McCann* GC judgment, § 149.

*The Court confines itself to noting, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, 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.<sup>7</sup>*

7. *McCann* GC judgment, § 161.

## The nature, beginning and end of life

Article 2 protects "everyone's" right to "life". "Life" here means human life: neither the right to life of animals, nor the right to existence of "legal persons" is covered by the concept. Animals are not "persons" and hence not included in the concept of "everyone" (*toute personne*) and are therefore not protected by the Convention at all. "Legal persons" such as companies are "persons" and can invoke the Convention in certain respects, e.g. in respect of the right to property<sup>8</sup> and the right to a fair trial in the determination of their civil rights and obligations.<sup>9</sup> The right to freedom of expression can be invoked by newspaper companies and publishers etc.,<sup>10</sup> the right to freedom of association by associations,<sup>11</sup> and

the right to freedom of religion by religious associations.<sup>12</sup> But none of them have a "life" in the sense of Article 2.

The Convention does not otherwise clarify what "life" is, or when it – and therewith the protection of Article 2 of the Convention – begins or ends. Indeed, in the absence of a European (or worldwide) legal or scientific consensus on the matter, the Commission when it still existed was, and the Court still is, unwilling to set

8. E.g., *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994. Note that Article 1 of the First Protocol explicitly grants the right to the peaceful enjoyment of one's possessions to "every natural or legal person"; it is the only provision in the Convention and its additional protocols to do so.

9. E.g., *Stran Greek Refineries and Stratis Andreadis v. Greece* (see previous footnote); *Te Traktörer Aktiebolag v. Sweden*, judgment of 7 July 1989.

10. E.g., *Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991; *Sunday Times v. the United Kingdom (II)*, judgment of 26 November 1991; *Groppera Radio AG and others v. Switzerland*, judgment of 28 March 1990; *Informationsverein Lentia v. Austria*, judgment of 24 November 1993.

11. E.g., *VATAN (People's Democratic Party) v. Russia*, Appl. No. 47978/99, admissibility decision of 21 March 2002.

12. *Pastor X and the Church of Scientology v. Sweden*, Appl. No. 7805/77, admissibility decision of 5 May 1979 (reversing an earlier decision to the contrary: *Church of X v. the United Kingdom*, Appl. No. 3798/68, admissibility decision of 17 December 1968).

precise standards in these regards. As the Court put it in the case of *Vo v. France* (further discussed below, p. 13 ff.):

*... the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a “living instrument which must be interpreted in the light of present-day conditions” [...]. The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life. ...*

Having regard to the foregoing, the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention (*personne* in the French text).<sup>13</sup>

13. *Vo v. France*, judgment of 8 July 2004, §§ 82 and 85. In the judgment, the Court makes extensive reference to the Oviedo Convention on Human Rights and Biomedicine, its Additional Protocol on the Prohibition of Cloning Human Beings and its Draft additional Protocol on biomedical research (§§ 35-39), to the opinion on the ethical aspects of research involving the use of human embryo, adopted in 1998 by the EU European Group on Ethics in Science and New Technologies (§ 40), and to comparative law (§ 41), and it refers to this in the passage quoted above (see §§ 82-85). As the Court pointed out, the latter Convention and protocols notably do not define the concept of “human being” (§ 84).

Rather than imposing a uniform standard, the Commission and Court thus assessed and assess matters relating to the beginning of life only in a marginal way, on a case-by-case basis, while leaving considerable freedom to States to regulate the matters in question themselves, as long as they approach them in an appropriate way, in particular by giving appropriate weight to the various interests at stake and by carefully balancing those interests. This can be seen from the case-law of the Convention organs on induced termination of pregnancy (*abortus provocatus*; hereafter simply “abortion”), euthanasia and assisted suicide.

### A right to live? Abortion and the right to life

Applicants in cases relating to abortion have invoked not just Article 2, but also Article 8, which protects “private and family life”, Article 6, which guarantees, among other matters, “access to court” in the determination of a person’s “civil rights and obligations” and, as concerns the dissemination of information on abortion, Article 10, concerning freedom of expression. Although the discussion in this handbook will focus on the arguments relating to Article 2, it is important to note several of the other arguments as well, since they are closely inter-related, and because the Convention organs have at times made comments in cases under those other articles which relate to Article 2. Thus, in an early case, *Brüggemann and Scheuten v. Germany*, the applicant argued that she had the sole right to decide to have an abortion under Article 8 of the Convention, which guarantees the right to respect for “private life”. However, the Commission held that:

*Article 8 § 1 cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother<sup>14</sup>*

while declining to examine the issue, in that case, under Article 2. However, in later cases it did take up the issue under that article.

In the case of *X v. the United Kingdom*,<sup>15</sup> the Commission noted that Article 2 of the Convention does not mention abortion. In particular, it does not include it in the list of actions in its second paragraph, which are “not [to] be regarded as inflicted in contravention of this article”. According to the Commission, this meant that there were only three options: either Article 2 does not cover an unborn foetus at all; or it recognises a right to life of the foetus with certain implied limitations; or it grants an absolute right to life to the foetus.

The Commission expressly ruled out the latter interpretation, because it did not allow for the taking into account of any risk to the mother’s life: that “would mean that the ‘unborn life’ of the foetus would be regarded as being of a higher value than the life of the pregnant woman.”<sup>16</sup> This could not be the proper interpretation of Article 2 in respect of abortion, because not only had almost all Contracting Parties to the Convention allowed abortion when this was necessary to save the life of the mother, even by 1950, when the Convention was drafted, but in the meantime

there had been, if anything, “a tendency towards further liberalisation [of abortion].”<sup>17</sup>

Rather, in this early case, the Commission tended towards the first interpretation. It discussed the limitations on the right to life, contained in the second sentence of the first paragraph of Article 2 and in the second paragraph of that article, and found that:

*All the above limitations, by their nature, concern persons already born and cannot be applied to the foetus.*

Thus both the general usage of the term “everyone” (“*toute personne*”) in the Convention and the context in which this term is employed in Article 2 tend to support the view that it does not include the unborn.<sup>18</sup>

However, in a later case, *H. v. Norway*, the Commission went somewhat further in the direction of the second option, by “*not exclud[ing]*” that “*in certain circumstances*” the foetus may enjoy “*a certain protection under Article 2, first sentence*” notwithstanding the “*considerable divergence of views*” in the Contracting States on whether or to what extent Article 2 protects the unborn life.<sup>19</sup>

The Commission based its conclusion about this divergence specifically on the jurisprudence of the Austrian and German Constitutional Courts and the Norwegian Supreme Court on the matter. The Austrian Constitutional Court ruled in 1974 that Article 2 of

14. *Brüggegan and Scheuten v. Germany*, Appl. No. 6959/75, Commission Report of 12 July 1977.

15. *X v. the United Kingdom*, Appl. No. 8416/79, admissibility decision of 13 May 1980.

16. *X v. the United Kingdom* decision, § 19.

17. *X v. the United Kingdom* decision, § 20.

18. Appl. No. 8416/79, admissibility decision of 13 May 1980.

19. *H. v. Norway*, Appl. No. 17004/90, admissibility decision of 19 May 1992. Reference to other cases omitted.

the Convention (which applies directly in Austria) did not cover unborn life, while the German Constitutional Court held in 1975 that the word “everyone” in the phrase “everyone has a right to life” in the corresponding provision in the German Basic Law (the forerunner to the Constitution of the re-united Germany) referred to “every living human being” – and that the right thus did extend to (living) unborn human beings. The Norwegian Supreme Court was more pragmatic. As paraphrased in *H. v. Norway*, it ruled in 1979 that:

*... abortion laws must necessarily be based on a compromise between the respect for the unborn life and other essential and worthy considerations. This compromise has led the legislator to permit self-determined abortion under the circumstances defined by the [1978 Norwegian Act on Termination of Pregnancy].*

Clearly, such a reconciliation of disparate considerations gives rise to ethical problems, and clearly too, there will be some disagreement about the system embodied in the Act. The reactions to the Act show that many ... view it as an attack on central ethical principles. But it is equally relevant that others – also from an ethical point of view – regard the Act as having done away with an unacceptable legal situation.

It is not a matter for the courts to decide whether the solution to a difficult legislative problem which the legislator chose when adopting the Act on Termination of Pregnancy of 1978, is the best one. On this point, different opinions will be held among judges as

among other members of our society. The reconciliation of conflicting interests which abortion laws require is the legislator’s task and the legislator’s responsibility. The legislative power is exercised by the People through the Storting [the Norwegian Parliament]. The Storting majority which adopted the Act on Termination of Pregnancy in 1978 had its mandate from the People after an election campaign in which the abortion question was again a central issue, decided moreover not to take the initiative towards any statutory amendment. Clearly, the courts must respect the solution chosen by the legislator.

The Commission looked quite closely at the specific provisions of the 1978 Norwegian Termination of Pregnancy Act, noting that it only allowed “self-determined abortion” within the first 12 weeks of pregnancy; abortion between 12 and 18 weeks on the authority of two doctors if the pregnancy, birth or care for the child might place the mother in a difficult situation of life; and termination after the 18th week only if there were particularly serious reasons for such a step, and never if there was reason to presume that the foetus is viable. The woman in the case in question had received authorisation for a termination in the 14th week. Echoing the views of the Norwegian Supreme Court, the Commission concluded:

*As the present case shows there are different opinions as to whether such an authorisation strikes a fair balance between the legitimate need to protect the foetus and the legitimate interests of the woman in question. However, having regard to what is Stated above concerning Norwegian legislation, its*

*requirements for the termination of pregnancy as well as the specific circumstances of the present case, the Commission does not find that the respondent State has gone beyond its discretion which the Commission considers it has in this sensitive area of abortion. Accordingly, it finds that the applicant's complaint under Article 2 of the Convention is manifestly ill-founded within the meaning of Article 27 § 2 of the Convention.*

A few years later, the Commission examined a case, *Reeve v. the United Kingdom*,<sup>20</sup> in which the mother of a 2-year old child born with severe congenital defects (*spina bifida* and *hydrocephalus*) that should have been, but were not, detected by the doctors treating her during her pregnancy complained on behalf of her child that the child was prevented from pursuing an action against the health authority employing those doctors, for “wrongful life”. The mother claimed on behalf of the child (the latter being formally the applicant) that it violated the Convention, and more specifically the child’s right of “access to court” under Article 6 of the Convention, that the State disallowed a claim for damages by the child on the basis that it was allowed to be born in circumstances in which her mother would have decided to have an abortion if only she had been in possession of the full facts. However, the mother could claim damages for the loss of earnings, cost of care etc., resulting from having a handicapped child. The Commission

20. *Reeve v. the United Kingdom*, Appl. No. 24844/94, admissibility decision of 30 November 1994.

held that the restriction on “access to court” pursued the aim of upholding the right to life, and fell within the State’s margin of appreciation. It found the restriction “reasonably proportionate, given that claims lie for any wrongful act which contributes to a child’s disabilities and that insofar as the wrongful act affects the parents, action may lie for the damages which they have suffered and compensation obtained for cost of care.”<sup>21</sup>

Since in this case and all similar cases the Commission had held the application to be “manifestly ill-founded” and therefore inadmissible, the Court did not deal with the issue of abortion directly until after the Commission’s abolition in 1998.<sup>22</sup> Only in 2002, in the case of *Boso v. Italy*, did the Court at last have to adjudicate on a case directly relating to abortion. Similar to the Commission case of *H. v. Norway*, this case concerned a woman who had had an abortion, against the wishes of the potential father (in *Boso*, her husband), but in accordance with the relevant domestic law, Law No. 194 of 1978. On the issues relating to Article 2, the Court confirmed the Commission’s approach in *H. v. Norway* in the following terms:

21. *Ibid.*
22. The Court had touched on the issue indirectly in a case concerning the prohibition, in Ireland, of the dissemination of information on abortion facilities in other countries. In that case, the Court held that the Stated aim of the prohibition, the protection of the right to life of the unborn, was a “legitimate aim” for the purpose of Article 10, but it expressly refused to determine “whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2”: *Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd. and Others v. Ireland*, judgment of 29 October 1992, § 66.

*The Court considers that it is not required to determine whether the foetus may qualify for protection under the first sentence of Article 2 as interpreted above. Even supposing that, in certain circumstances, the foetus might be considered to have rights protected by Article 2 of the Convention, the Court notes that in the instant case, although the applicant did not State the number of weeks that had elapsed before the abortion or the precise grounds on which it had been carried out, it appears from the evidence that his wife's pregnancy was terminated in conformity with section 5 of Law no. 194 of 1978.*

In this connection, the Court notes that the relevant Italian legislation authorises abortion within the first twelve weeks of a pregnancy if there is a risk to the woman's physical or mental health. Beyond that point, an abortion may be carried out only where continuation of the pregnancy or childbirth would put the woman's life at risk, or where it has been established that the child will be born with a condition of such gravity as to endanger the woman's physical or mental health. It follows that an abortion may be carried out to protect the woman's health.

In the Court's opinion, such provisions strike a fair balance between, on the one hand, the need to ensure protection of the foetus and, on the other, the woman's interests. Having regard to the conditions required for the termination of pregnancy and to the particular circumstances of the case, the Court does not find that the respondent State has gone beyond its discretion in such a sensitive area (see *H. v. Norway*, No. 17004/90, Commission decision of 19 May 1992, DR 73, p. 155).<sup>23</sup>

*A right to live? Abortion and the right to life*

The Court has given its most detailed attention to the issues raised by abortion in the subsequent case of *Vo v. France*.<sup>24</sup> In this case, the applicant was a woman who had been pregnant, who intended to carry her pregnancy to term and whose unborn child was expected to be viable, or at least in good health. However, on a visit to hospital, she was mistaken for another woman with a similar name and had a coil inserted in the uterus which caused leaking of the amniotic fluid, as a result of which she had to undergo a therapeutic abortion, resulting in the death of the foetus. Mrs Vo claimed that the doctors had acted negligently and that they should have been prosecuted for unintentional homicide. However, the French Court of Cassation held that, since the criminal law has to be strictly construed, a foetus could not be the victim of unintentional homicide. The central question raised by the application was therefore whether the absence of a criminal remedy within the French legal system to punish the unintentional destruction of a foetus constituted a failure on the part of the State to protect by law the right to life within the meaning of Article 2 of the Convention.<sup>25</sup>

In answering this question, the Court summed up the Commission's case-law in *X v. the United Kingdom* and *H. v. Norway*, and its own decision in *Boso*, and concluded that:

*It follows from this recapitulation of the case-law that in the circumstances examined to date by the Convention institutions*

23. *Boso v. Italy*, Appl. No. 50490/99, decision of 5 September 2002.

24. *Vo v. France*, judgment of 8 July 2004.

25. See *Vo* judgment, § 74.



– that is, in the various laws on abortion – the unborn child is not regarded as a “person” directly protected by Article 2 of the Convention and that if the unborn do have a “right” to “life”, it is implicitly limited by the mother’s rights and interests. The Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child. That is what appears to have been contemplated by the Commission in considering that “Article 8 § 1 cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother” (see *Brüggeman and Scheuten*, cited above, § 61) and by the Court in the above-mentioned *Boso* decision. It is also clear from an examination of these cases that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a woman, a mother or a father in relation to one another or vis-à-vis an unborn child.<sup>26</sup>

Later in the judgment, the Court dealt with the question of “whether the legal protection afforded the applicant by France in respect of the loss of the unborn child she was carrying satisfied the procedural requirements inherent in Article 2 of the Convention.” The Court held that:

*The positive obligations [imposed by Article 2] require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of*

*patients’ lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable.*<sup>27</sup>

As noted, the applicant had argued that, beyond this, only a criminal remedy would have been capable of satisfying the requirements of Article 2 of the Convention. However, the Court held that in cases of unintentional killing, this was not necessarily required. In the sphere of medical negligence, civil or administrative law remedies and redress and disciplinary measures could suffice.<sup>28</sup> Such remedies had been available to the applicant. Accordingly, the Court concluded that:

*... even assuming that Article 2 was applicable in the instant case [...], there has been no violation of Article 2 of the Convention.*<sup>29</sup>

The above shows that, apart from the substance of Article 2, the Court is also concerned with the procedures that exist in a given State to ensure that the right is effectively protected: the law must not just strike a “fair balance” in the abstract, but those directly affected by the matter must have access to a process to test this. This notion of a “procedural limb” of Article 2 was first developed in cases concerning the use of force, as discussed later. Here, if it

26. *Vo* judgment, § 80.

27. *Vo* judgment, § 89, with reference to the *Powell* and *Calvelli and Ciglio* judgments discussed below, pp. 77-79.

28. See *Vo* judgment, § 90, with references to other cases.

29. *Vo* judgment, § 95.



must be noted that the Court now clearly applies this requirement more broadly, also to cases relating to abortion. In the meantime, it is clear that in the recent case-law, unborn life is given a measure of protection under the Convention, even if much is left to the discretion of the State Parties to the Convention in this respect.

### A right to die? Suicide, assisted suicide and euthanasia

As noted earlier, Article 2 of the Convention requires that everyone's "right to life" be "protected by law". Apart from the death penalty, it envisages only limited circumstances in which a person can be deprived of this right; none of these relate to suicide or euthanasia.

This raises several difficult and overlapping sets of questions. First of all: when does life – and therefore the right to protection of life by law – end? Secondly: is it acceptable to provide palliative care to a terminally ill or dying person, even if the treatment may, as a side-effect, contribute to the shortening of the patient's life? And should the patient be consulted on this? Third, may, or must, the State "protect" the right to life even of a person who does not want to live any longer, against that person's own wishes? Or do people have, under the Convention, not just a right to life, and to live – but also a right to die as and when they choose: to commit suicide? And if so, can they seek assistance from others to end their lives? And fourth: can the State allow the ending of life in order to

end suffering, even if the person concerned cannot express his or her wishes in this respect?

Perhaps surprisingly, the first, second and fourth of these sets of questions have not (yet) been put to the Commission or the Court – but the case-law on abortion, discussed above, and on the third question, discussed below, does provide some indications of the probable approach of the Court.

The first issue could arise, in particular, in a case in which the authorities in a member State of the Council of Europe had decided to switch off life-support machines at a certain moment when they deemed the person attached to the machines was no longer alive, but where this was disputed by relatives. However, as with the beginning of life, there is no European (or wider) legal or scientific consensus on when this moment is – except perhaps that death is not a moment, but a process, which suggests that it is scientifically, and thus arguably also legally, impossible to provide a clear-cut answer to the question. If the case-law on abortion is anything to go by, the Court would, because of this absence of a consensus, leave the answer to the question of when life ends – like the question of when life begins – primarily to the States.

In practice, in the member States, the issue tends to be whether life-support machines can be switched off even before a person is "clinically dead" (whenever that may be), in order not to unduly extend the dying process.<sup>30</sup> The question that arises under the Convention in such cases is whether the law in a member State which allows the switching off of the life-support machines still

adequately “protects” the right to life of the person concerned. However, even in these terms the issue has not yet come up in the case-law. In view of the case-law on demands for assisted suicide, discussed below, it is likely that the Court, if and when it is faced with this issue, will leave a wide margin of discretion to the States.

The issue is closely linked to, indeed shades into, the second question: whether it is permissible to provide palliative treatment to a terminally ill or dying person, if this treatment has the side effect of hastening the patient’s death. On this issue, the Parliamentary Assembly of the Council of Europe recommends that the member States should:

*ensure that, unless the patient chooses otherwise, a terminally ill or dying person will receive adequate pain relief and palliative care, even if this treatment as a side-effect may contribute to the shortening of the individual’s life (Recommendation 1418 (1999), paragraph 9, at (a) (vii)).*

It is notable that the Court, in the case of *Pretty* discussed below, expressly referred to Recommendation 1418 (1999). In view of the apparently wide consensus on this matter, and the express recognition of freedom of choice for the individual in this recommen-

30. An example is a case before the High Court of England in August 2005, in which most of the medical experts argued in favour of withdrawal of life support from a patient, Mr. A, but relatives, backed by one doctor, argued against this. The Judge, Mr Justice Kirkwood ruled against the relatives, on the basis that: “It is in [Mr A’s] best interests that he be allowed a peaceful and dignified death. Everything should be done to support him in that, including hydration and nutrition, but it’s not in his best interests that he should continue to be subjected to painful and undignified medical processes which do nothing to improve his terminal condition.”

dation and in State practice, the Court is likely to accept that such an approach does not contravene the Convention.

The fourth issue – whether euthanasia can be in accordance with the Convention even in the absence of a clear expression of the will of the person concerned – has also not been determined by the Convention organs. Here, too, there is somewhat clearer ground, in the sense that such “mercy killings” are clearly not regarded as acceptable in Recommendation 1418 (1999), and in that there are no Council of Europe member States that allow for active termination of life (as contrasted with withdrawal of life support, as in the above case of Mr A), other than at the request of the patient.<sup>31</sup> Because of this apparent consensus, and given the emphasis which the Court places on “personal autonomy”, as discussed below, it is possible (perhaps even probable) that the Court, if confronted with this question, would feel that States that would

31. But note that the line between “passive” withdrawal of life support and “active” euthanasia is not a clear one. See, e.g., the United Kingdom case of *Re J*, mentioned in the judgment of *Pretty v. the United Kingdom*, at § 18. The question of consent is also not clear-cut. In the course of the adoption of the Dutch Euthanasia Law of 2001, the Dutch Parliament discussed whether a written declaration of a person requesting euthanasia in the case of subsequent dementia can be a ground for the termination of that person’s life when dementia later sets in, but the matter is not clearly resolved in the law. The main requirement under the law (apart from the establishment of “hopeless and unbearable suffering”) remains the free and express consent of the patient, based on detailed informing of the patient of his or her situation and prospects – which suggests that this cannot be achieved *in abstracto*, in advance. On the other hand, the law allows for euthanasia of children between the ages of 12 and 16 with the consent of the child and the parents, if the child is deemed “capable of a reasonable assessment of his [or her] interests.” (Article 2 (4) of the Euthanasia Law).

allow this may fail in their duty to protect life – but much would depend on the circumstances of the case.

The only cases in this field so far have concerned the third set of questions: whether a seriously physically ill but mentally fit person has a right to choose to die by committing suicide rather than to go on living, and whether, if so, that person can seek assistance from others in the taking of his or her life, or whether the State has the right, or the duty, to intervene to prevent this.<sup>32</sup> The Court has assessed these questions at different times, in different contexts, and by reference not just to Article 2, but also to other articles of the Convention. It has, in particular, linked its considerations under Articles 2, 3 and 8 in a way that is illustrative of its holistic approach to the rights protected in the Convention.

The 1984 case of *X v. Germany* concerned a prisoner who had gone on a hunger strike and who was forcibly fed by the authorities. X complained of this treatment, arguing that it constituted inhuman and degrading treatment, contrary to Article 3 of the Convention. However, he did not argue that, under the Convention, he had a right to choose to die by starving himself. The Commission dismissed the application in the following terms:

*In the opinion of the Commission forced feeding of a person does involve degrading elements which in certain circumstances may be regarded as prohibited by Article 3 of the Convention.*

32. A case concerning the contrary situation, *Keenan v. the United Kingdom*, in which the State was accused of not sufficiently protecting a mentally ill person from committing suicide, is discussed below, p 73 ff.

*Under the Convention the High Contracting Parties are, however, also obliged to secure to everyone the right to life as set out in Article 2. Such an obligation should in certain circumstances call for positive action on the part of the Contracting Parties, in particular an active measure to save lives when the authorities have taken the person in question into their custody. When, as in the present case, a detained person maintains a hunger strike this may inevitably lead to a conflict between an individual's right to physical integrity and the High Contracting Party's obligation under Article 2 of the Convention – a conflict which is not solved by the Convention itself. The Commission recalls that under German law this conflict has been solved in that it is possible to force-feed a detained person if this person, due to a hunger strike, would be subject to injuries of a permanent character, and the forced feeding is even obligatory if an obvious danger for the individual's life exists. The assessment of the above-mentioned conditions is left for the doctor in charge but an eventual decision to force-feed may only be carried out after judicial permission has been obtained ... The Commission is satisfied that the authorities acted solely in the best interests of the applicant when choosing between either respect for the applicant's will not to accept nourishment of any kind and thereby incur the risk that he might be subject to lasting injuries or even die, or to take action with a view to securing his survival although such action might infringe the applicant's human dignity.<sup>33</sup>*

It is notable that the applicant in this case was a prisoner, and that he did not claim a “right to die”. Prisoners are under stress by nature of their confinement, which may make them suicidal even if they would not normally be, while the State authorities are under a special duty of care towards them (as discussed later, with reference to the *Keenan case*).<sup>34</sup>

More pertinent to the general question about a “right to die” are therefore two more recent cases, *Sanles Sanles v. Spain* and *Pretty v. the United Kingdom*. The first of these concerned a man, Mr Sampedro, who had been a tetraplegic since the age of twenty-five and who, from 1993, when he was about fifty, had tried to obtain recognition from the Spanish courts of what he claimed was his right to end his life, with the help of others (including, in particular, his doctor), without interference by the State. However, he died before the proceedings in Spain had come to an end, and the relative he appointed as successor to this claim, Mrs Sanles Sanles, was held by the Spanish courts and by the European Court of Human Rights to have no standing in the matter, i.e., in the latter forum, not to be a “victim” of the alleged violation of the Convention.<sup>35</sup>

The issues raised in the *Sanles Sanles* case did at last come directly before the Court in the subsequent case of *Pretty v. the United Kingdom*.<sup>36</sup> The case was brought by a 43-year-old married

woman, Mrs Dianne Pretty, who was suffering from a degenerative and incurable illness, motor neurone disease (MND), which was at an advanced stage. Although essentially paralysed from the neck down, and incapable of decipherable speech, her intellect and capacity to make decisions were unimpaired. Frightened and distressed at the suffering and indignity she would have to endure if the disease were to run its course, but unable to commit suicide by herself, she wanted her husband to assist her in this. In the United Kingdom, committing suicide is not a criminal offence, but assisting someone else to commit suicide is (under the Suicide Act 1961). However, prosecutions can only be brought with the consent of the Director of Public Prosecutions (the DPP), a senior law officer, who can exercise discretion in the matter. Mrs Pretty therefore sought an assurance from the DPP that he would not prosecute her husband if he were to assist her to commit suicide in accordance with her wishes, but the DPP refused. The United Kingdom courts upheld the DPP’s decision not to give the undertaking, after detailed analysis of the case-law of the European Commission and Court of Human Rights. Mrs Pretty then turned to the European Court of Human Rights.

The Court admitted the case and, apart from receiving submissions from the applicant and the respondent Government, also allowed third-party interventions by the Voluntary Euthanasia Society (a United Kingdom organisation favouring voluntary euthanasia) and by the [Roman] Catholic Bishops’ Conference of England and Wales. The Court also quoted parts of paragraph 9 of Recommendation 1418 (1999) of the Parliamentary Assembly of

33. *X v. Germany*, Appl. No. 10565/83, admissibility decision of 9 May 1984.

34. See footnote 32, above.

35. *Sanles Sanles v. Spain*, admissibility decision of 20 October 2000.

36. *Pretty v. the United Kingdom*, judgment of 29 April 2002.

the Council of Europe, already mentioned, in which the Assembly recommends:

*... that the Committee of Ministers encourage the member States of the Council of Europe to respect and protect the dignity of terminally ill or dying persons in all respects:*

...

- c. *by upholding the prohibition against intentionally taking the life of terminally ill or dying persons, while:*
  - i. *recognising that the right to life, especially with regard to a terminally ill or dying person, is guaranteed by the member States, in accordance with Article 2 of the European Convention on Human Rights which States that “no one shall be deprived of his life intentionally”;*
  - ii. *recognising that a terminally ill or dying person’s wish to die never constitutes any legal claim to die at the hand of another person;*
  - iii. *recognising that a terminally ill or dying person’s wish to die cannot of itself constitute a legal justification to carry out actions intended to bring about death.<sup>37</sup>*

The Court was quite dismissive of the claim that Article 2 of the Convention should be read as granting individuals a right to

37. *Pretty* judgment, § 24. Note that a subsequent draft resolution, based on a report by Mr Dick Marty on “Assistance to patients at end of life” (PACE Doc. 104559 of February 2005), which (among other matters), sought to “prevent euthanasia from developing in a shroud of secrecy because of legal uncertainties or outdated norms”, was first heavily amended and then rejected by the Assembly, on 27 April 2005.

commit suicide. It noted, with reference to earlier case-law on various issues under Article 2, that, “in certain well-defined circumstances”, the article may impose a positive obligation on State authorities “to take preventive operational measures to protect an individual whose life is at risk”, and that this also applied to “the situation of a mentally ill prisoner who disclosed signs of being a suicide risk” (as discussed later). However, as the Court pointed out:

*The consistent emphasis in all the cases before the Court has been the obligation of the State to protect life. The Court is not persuaded that “the right to life” guaranteed in Article 2 can be interpreted as involving a negative aspect. While, for example in the context of Article 11 of the Convention, the freedom of association has been found to involve not only a right to join an association but a corresponding right not to be forced to join an association, the Court observes that the notion of a freedom implies some measure of choice as to its exercise [...]. Article 2 of the Convention is phrased in different terms. It is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection from State interference, they may be reflected in the rights guaranteed by other Articles of the Convention, or in other international human rights instruments. **Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-deter-***

*mination in the sense of conferring on an individual the entitlement to choose death rather than life.*

*The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention. It is confirmed in this view by the recent Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe [...].<sup>38</sup>*

However, the Court was careful to stress that this ruling did not mean that if a particular State does recognise such a right (as does Switzerland, for instance), that would *ipso facto* be contrary to Article 2; nor did it mean that if a State that did recognise a right to take one's own life were to be held to have acted in accordance with Article 2, that would imply that the applicant, too, should be granted that right:

*... even if circumstances prevailing in a particular country which permitted assisted suicide were found not to infringe Article 2 of the Convention, that would not assist the applicant in this case, where the very different proposition – that the United Kingdom would be in breach of its obligations under Article 2 if it did not allow assisted suicide – has not been established.<sup>39</sup>*

38. *Pretty* judgment, §§ 39-40, emphasis added, references to other cases and to other paragraphs in the judgment omitted.

39. *Pretty* judgment, § 41.

The Court did not leave it at this. In particular, it did not say (as it often does in cases in which several articles of the Convention are invoked) that “no separate issue” arose in respect of the other articles. On the contrary, the Court clearly felt that the matter should be examined under different articles, and the ultimate decision based on the interplay between them. The Court therefore went on to carefully consider the claim to a right to commit suicide in the face of terrible suffering under Article 3, which prohibits torture, inhuman or degrading treatment or punishment in absolute terms, and Article 8, which guarantees, among other things, respect for “private life”.

The applicant had claimed that the suffering to which her illness would inevitably lead was so severe as to amount to “degrading treatment” in terms of Article 3; and that the State had a positive duty to take steps to protect her from this, by allowing her to obtain assistance to commit suicide.<sup>40</sup> However, the Court held that “Article 3 must be construed in harmony with Article 2”, which (the Court recalled) “does not confer any right on an individual to require a State to permit or facilitate his or her death”.<sup>41</sup> Article 3, too, therefore did not impose on States a duty to allow actions to terminate life in cases such as hers.<sup>42</sup>

The Court took a much more positive approach to Mrs *Pretty*'s case under Article 8. In a way, this became the provision under

40. *Pretty* judgment, §§ 44-45.

41. *Pretty* judgment, § 54.

42. See *Pretty* judgment, § 55.

which the difficult and sensitive issues involved were addressed in the greatest depth and detail.

The Court reiterated, first of all, with reference to earlier case-law on a variety of different issues, that the term “private life” in Article 8 “is a broad term not susceptible to exhaustive definition”<sup>43</sup>. It then took an important new step, by recognising a new principle of “**personal autonomy**” or “self-determination”:

Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.<sup>44</sup>

Somewhat hesitantly, the Court accepted – or rather, was “not prepared to exclude” – that Mrs Pretty’s wish to “exercis[e] her choice to avoid what she considers will be an undignified and distressing end to her life” was covered by the concept of “personal autonomy”, and that the law preventing her from exercising this choice (by asking her husband for assistance, she being incapable of committing suicide unaided) thus constituted an “interference” with Mrs Pretty’s right to respect for private life as guaranteed under Article 8 § 1 of the Convention.<sup>45</sup>

43. *Pretty* judgment, § 61.

44. *Pretty* judgment, § 61.

45. *Pretty* judgment, § 67. The Court was influenced in this by the case of *Rodriguez v. the Attorney General of Canada*, [1994] 2 Law Reports of Canada 136, in which the Canadian Supreme Court held that that the prohibition on the appellant in that case receiving assistance in suicide contributed to her distress and prevented her from managing her death, and that this deprived her of autonomy and required justification under principles of fundamental justice. (see *Pretty* judgment, § 66)

Recognition of the principle of “personal autonomy” enabled the Court to address the issue at the heart of the case: whether this principle protects the right of mentally fit individuals to choose death (if needs be with the assistance of others), or whether “the principle of sanctity of life” should – or can be allowed to – override such “self-determination”. The Court held that it was “common ground [between the parties] that the restriction on assisted suicide in this case was imposed by law and in pursuit of the legitimate aim of safeguarding life and thereby protecting the rights of others.” The only issue to be determined was therefore whether the interference was “necessary in a democratic society.”<sup>46</sup> On the margin of appreciation to be accorded in making this assessment, the Court recalled that this margin “will vary in accordance with the nature of the issues and the importance of the interests at stake.”<sup>47</sup> However, the Court disagreed with the applicant that the margin had to be narrow, in line with the Court’s case-law in other cases involving intimate personal matters, such as sexual life.<sup>48</sup> Rather, the focus was on the issue of proportionality and prevention of arbitrariness:

*It does not appear to be arbitrary to the Court for the law to reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as*

46. *Pretty* judgment, § 69.

47. *Pretty* judgment, § 70.

48. *Pretty* judgment, § 71.



*to the fair and proper requirements of retribution and deterrence.*

*Nor in the circumstances is there anything disproportionate in the refusal of the DPP to give an advance undertaking that no prosecution would be brought against the applicant's husband. Strong arguments based on the rule of law could be raised against any claim by the executive to exempt individuals or classes of individuals from the operation of the law. In any event, the seriousness of the act for which immunity was claimed was such that the decision of the DPP to refuse the undertaking sought in the present case cannot be said to be arbitrary or unreasonable.*

*The Court concludes that the interference in this case may be justified as "necessary in a democratic society" for the protection of the rights of others and, accordingly, that there has been no violation of Article 8 of the Convention.<sup>49</sup>*

The crucial issue is therefore one of balance. Of particular importance is the fact that the law in the United Kingdom which makes it a criminal offence, in principle, to assist another person in committing suicide, can be applied with flexibility and restraint – or even not applied – in individual cases. That flexibility, that legal responsiveness to the specific circumstances, more than anything else, led the Court to its finding of “no violation” of Article 8. It would appear that an inflexible law – say, a law imposing a mandatory life sentence for murder in a case similar to the one at hand,

without discretion on the part of the prosecuting authorities or the courts – would have been disproportionate and thus contrary to Article 8.

After this, the Court quickly dismissed the remaining arguments of the applicant, under Article 9, which protects the right to freedom of thought, conscience and religion, and Article 14, which prohibits discrimination in the enjoyment of the Convention rights. On the former, it held that “[Mrs Pretty’s] claims do not involve a form of manifestation of a religion or belief”.<sup>50</sup> On Article 14, it ruled that:

*... there is, in the Court's view, objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide. ... The borderline between the two categories will often be a very fine one and to seek to build into the law an exemption for those judged to be incapable of committing suicide would seriously undermine the protection of life which the 1961 Act was intended to safeguard and greatly increase the risk of abuse.*

*Consequently, there has been no violation of Article 14 of the Convention in the present case.<sup>51</sup>*

A few days after the judgment, Mrs Pretty started having breathing difficulties and was moved to a hospice. There, following palliative care, she slipped into a coma and died, on 11 May 2002, twelve days after the ruling.<sup>52</sup>

49. *Pretty* judgment, §§ 76-78.

50. *Pretty* judgment, § 82.

51. *Pretty* judgment, §§ 88-89, reference to other paragraph in the judgment omitted.



52. *BBC News*, Sunday 12 May 2002.

## Use of lethal force by agents of the State

The second paragraph of Article 2 refers to “deprivation of life” – i.e. to killings. Certain actions resulting in the death of persons, it says, “shall not be regarded as inflicted in contravention of this article” – i.e. will not be regarded as violations of the right to life – provided they meet certain criteria. First of all, the actions must be aimed at one of a number of exhaustively listed aims:

- to defend a person (any person) from unlawful violence (Article 2 (2) (a));
- to effect a lawful arrest (Article 2 (2) (b));
- to prevent the escape of a person lawfully detained (*idem*);
- to quell a riot or insurrection through action lawfully taken for that purpose (Article 2 (2) (c)).

It is notable that the use of force to protect property is not included in the list. It was originally included in the drafting of the corresponding article, Article 6, of the International Covenant on Civil and Political Rights, the sister document to the Convention, but met with strong opposition and was dropped from the text. Since the Covenant and the Convention were drafted in parallel, its omission from the latter instrument, too, cannot be regarded as accidental. This suggests that lethal force cannot be legitimately used to protect property, unless life too is in jeopardy.

Both the Commission and Court have held that:

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*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” [for any of the above purposes] which may result, as an unintended outcome, in the deprivation of life.*<sup>53</sup>

However, intentional killings by the State or agents of the State, for the above-mentioned purposes, can also fall within the scope of the second paragraph,<sup>54</sup> as can so-called “disappearances” – that is, cases in which a person is arrested by agents of the State but then no longer accounted for, and likely to have been killed.<sup>55</sup>

Secondly, any such action must be “no more than absolutely necessary” to achieve the aim in question.

As already noted, this is similar to, but stricter than, the requirements set out in the “typical” Convention articles, Articles 8 to 11,

53. *McCann and Others v. the United Kingdom*, Grand Chamber judgment of 27 September 1995, § 148, quoting the Commission’s view, already expressed in the earlier case of *Stewart v. the United Kingdom*, Appl. No. 10044/82 and repeated in its report in the *McCann* case. The *McCann* is discussed in some detail below, p. 24 ff. In *Stewart*, the United Kingdom Government had argued that Article 2 only applied to intentional killings, but this view was emphatically rejected by the Commission.

54. *McCann* GC judgment, § 148.

55. The case-law relating to “disappearances” is discussed separately, later in this chapter, as is the case-law on unresolved killings and killings allegedly involving collusion between agents of the State and non-State actors. Note that Article 2 can sometimes also apply to the use of potentially lethal force in cases in which the victim in fact survived: see the case of *Matzarakis v. Greece*, discussed below, p. 26.

which stipulate that the rights protected by them may only be restricted or interfered with in accordance with “law”; for certain specified (“legitimate”) aims; and only to the extent “necessary in a democratic society” to achieve those aims. The latter requirement implies that restrictions under those articles must be “proportionate” to the legitimate aims concerned.

Article 2 is especially adamant about lawfulness in this regard: It follows from the first paragraph that the law must not just regulate interferences with the right to life, but must positively “protect” individuals from actions not justified under the second paragraph; and the sub-clauses in the second paragraph also stress the need for lawfulness or protection from unlawfulness. Furthermore, the requirement of “absolute necessity” in Article 2 means that any force used for any of the purposes mentioned in Article 2 must be “strictly proportionate” to the achievement of any of the aims set out in sub-paragraphs 2 (a), (b) and (c) of that article.<sup>56</sup>

These issues were all first addressed in detail by the Court in the case of *McCann and others v. the United Kingdom*, already mentioned.<sup>57</sup> The case concerned the shooting dead, by soldiers from a British special forces (SAS) regiment, of three IRA terrorist suspects in Gibraltar, a British colony at the southern tip of the Hibernian peninsula and a major naval base.<sup>58</sup> They three had

56. *McCann* GC judgment, § 149.

57. See above, p. 23, footnote 52. The earlier case of *Farrell v. the United Kingdom*, Appl. No. 9013/80, had been resolved by a friendly settlement, and in the case of *Stewart v. the United Kingdom*, Appl. No. 10044/82, the Commission had found no violation. Neither of these cases thus reached the Court, although *Farrell* laid the foundation for *McCann* and the other cases discussed here.

travelled to Spain with the intention of detonating a car bomb in the colony, and had parked a car next to their intended target. However, afterwards it transpired that at the time they were killed they were all unarmed, and that the car did not contain a bomb – although a bomb and a timing device was found in the terrorists’ hideout in Malaga (near Gibraltar, across the Spanish border). The Court found that the three suspects had been deliberately killed – and that the killings violated Article 2 of the Convention. It was the first time any European Government had been found guilty by the Court of the unlawful use of lethal force by law enforcement officials.

In *McCann*, the Commission and Court addressed the following issues of importance to this handbook:

- whether the relevant domestic (English) law adequately protected the right to life of the three persons killed;
- what the appropriate judicial approach is for the Court with regard to the establishing of the facts surrounding a killing, and how to assess whether these facts show a violation of the substantive requirements of Article 2, that force shall only be used where “absolutely necessary” to achieve one of the aims listed in subparagraphs (a)-(c) of Article 2 (2); and
- the additional, procedural requirements under Article 2.

58. The letters IRA stand for “Irish Republican Army”. The IRA, or more precisely the “Provisional” wing of the IRA or PIRA, seeks the re-unification of Northern Ireland with the Republic of Ireland. It has since announced an end to its armed campaign: BBC News, 28 July 2005.

These matters are addressed under the next three headings, in each case first of all with reference to the judgment in *McCann*. However, later cases have expanded on the rulings on these issues in *McCann*, and those are also noted. It will be shown that, as a result of the overall case-law in these regards, there is now a strong legal framework for the assessment of the use of lethal force by agents of the State, including in terrorist cases and cases of internal and international armed conflict.

There have also been developments in related areas, not covered by *McCann*: deaths in custody, unresolved killings and “disappearances”, and the use of force in international armed conflict. These matters are addressed separately (below, pp. 43 and 55).

### Protecting the right to life “by law”

As noted earlier, Article 2 stipulates both (i) that “everyone’s right to life shall be protected by law” and (ii) that any use of lethal force must be “**absolutely** necessary”. It follows that the law in a State Party to the Convention should protect people from being killed other than when this is “**absolutely** necessary”.

The use of lethal force by the SAS soldiers in *McCann* was judged, in the domestic proceedings, by reference to the English legal standard, according to which any force used must be “**reasonably** necessary” in the circumstances. The question thus arose of whether, in Gibraltar (and England), the law adequately protected the right to life.

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The Court felt that “the Convention standard on its face appears to be stricter than the relevant national standard”, but noted that “it has been submitted by the Government that, having regard to the manner in which the [national] standard is interpreted and applied by the national courts . . . , there is no significant difference in substance between the two concepts.”<sup>59</sup> Without endorsing the Government’s submission, the Court nonetheless concluded that,

*whatever the validity of [the Government’s] submission, the difference between the two standards is not sufficiently great that a violation of Article 2 § 1 could be found on this ground alone.*<sup>60</sup>

This finding was repeated in subsequent cases concerning killings in Northern Ireland, discussed later, to which the same domestic legal principle of “reasonable necessity” applied.<sup>61</sup>

In *McCann*, the Court refused to examine the training of the agents that killed the terrorists as part of its assessment of whether the law provided sufficient protection, arguing that that matter could best be examined in the context of its wider assessment of whether the use of force in the particular case was justified in terms of the Convention.

However, that deficiencies in the domestic legal framework on the use of lethal (or potentially lethal) force can, in themselves, amount to a violation of Article 2 was confirmed in the later case

59. *McCann* GC judgment, § 154.

60. *McCann* GC judgment, § 155.

61. See the cases of *Shanaghan*, *Hugh Jordan*, *Kelly* and *McKerr v. the United Kingdom*, discussed below, p. 48 ff.

of *Matzarakis v. Greece*.<sup>62</sup> In that case, the Court also – contrary to *McCann* – analysed the training and instructions given to law enforcement officials in this context.

The case concerned a police pursuit of a car which had driven through a red traffic light and crashed through several police barriers. The police fired many shots at the car and seriously wounded (but did not kill) the occupant, Mr Matzarakis, in what the Court found was clearly a badly co-ordinated operation:

*... the Court is struck by the chaotic way in which the firearms were actually used by the police in the circumstances. It may be recalled that an unspecified number of police officers fired volleys of shots at the applicant's car with revolvers, pistols and submachine guns. No less than sixteen gunshot impacts were counted on the car, some being horizontal or even upwards, and not downwards as one would expect if the tyres, and only the tyres, of the vehicle were being shot at by the pursuing police. Three holes and a mark had damaged the car's front windscreen and the rear plate glass was broken and had fallen in [...]. In sum, it appears from the evidence produced before the Court that large numbers of police officers took part in a largely uncontrolled chase.*<sup>63</sup>

At the time, the use of firearms in Greece was still regulated by an “obsolete and incomplete” Second World War law, which listed a wide range of situations in which a police officer could use fire-

62. *Matzarakis v. Greece*, Grand Chamber judgment of 20 December 2004.

63. *Matzarakis* GC judgment, § 67.

arms without being liable for the consequences. In 1991, a presidential decree somewhat restricted this, by authorising the use of firearms in the circumstances set forth in the law “only when absolutely necessary and when all less extreme methods have been exhausted”. However, no other provisions regulating the use of weapons during police actions and laying down guidelines on planning and control of police operations were contained in Greek law. In assessing this legal framework, the Court held that:

*... Article 2 does not grant a carte blanche. Unregulated and arbitrary action by State officials is incompatible with effective respect for human rights. This means that, as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force [...], and even against avoidable accident.*

*... police officers should not be left in a vacuum when exercising their duties, whether in the context of a prepared operation or a spontaneous pursuit 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 [...].*<sup>64</sup>

Greek law at the time of the incident (the WW II law and the 1991 decree) did not meet these standards:

*On its face, the ... somewhat slender legal framework would not appear sufficient to provide the level of protection “by law”*

*of the right to life that is required in present-day democratic societies in Europe.*<sup>65</sup>

What is more, it was precisely this failure to provide such a framework that had led to the uninhibited shooting in the case:

*... the degeneration of the situation, which some of the police witnesses themselves described as chaotic [...], was largely due to the fact that at that time neither the individual police officers nor the chase, seen as a collective police operation, had the benefit of the appropriate structure which should have been provided by the domestic law and practice. ... The system in place did not afford to law-enforcement officials clear guidelines and criteria governing the use of force in peacetime. It was thus unavoidable that the police officers who chased and eventually arrested the applicant enjoyed a greater autonomy of*

64. *Matzarakis* GC judgment, §§ 58-59, with reference to the *Hilda Hafsteinsdóttir v. Iceland* judgment of 8 June 2004, to the Human Rights Committee's General Comment No. 6 on Article 6 ICCPR, and to the UN "Force and Firearms Principles" (full title: United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders). *Hafsteinsdóttir* is a case under Article 5, which strongly emphasised the need for protection against arbitrary police powers of arrest. The Court's reference to that case makes clear that that same need arises under Article 2, against arbitrary police powers to use firearms. The latter two references again underline the increasing willingness of the Court to apply the Convention in line with wider international standards.

65. *Matzarakis* GC judgment, § 62. In § 61, the Court noted that, since the events in the case, and even before the judgment, Greece had put in place a new legal framework regulating the use of firearms by police officers and providing for police training, with the Stated objective of complying with the international standards for human rights and policing. The State had therefore in a way already accepted that the previous framework was deficient.

*action and were able to take unconsidered initiatives, which they would probably not have displayed had they had the benefit of proper training and instructions.*<sup>66</sup>

The Greek authorities had therefore failed to put in place an adequate legislative and administrative framework to deter the commission of offences against the person; therefore:

*... the Greek authorities had not, at the relevant time, done all that could be reasonably expected of them to afford to citizens, and in particular to those, such as the applicant, against whom potentially lethal force was used, the level of safeguards required and to avoid real and immediate risk to life which they knew was liable to arise, albeit only exceptionally, in hot-pursuit police operations [...].*<sup>67</sup>

Mr Matzarakis had therefore been the victim of a violation of Article 2 of the Convention on this ground – even though he survived.<sup>68</sup>

The judgment clarifies that (serious) deficiencies in the regulatory framework for, and the absence of "proper training and instructions"<sup>69</sup> in the use of firearms by the police can, in and by themselves, constitute violations of the duty under Article 2 of the Convention to protect the right to life "by law".

66. *Matzarakis* GC judgment, § 70, cross-reference to earlier paragraphs omitted.

67. *Matzarakis* GC judgment, § 71, with reference to the *Osman* judgment, discussed below, p. 66 and ff.

68. *Matzarakis* GC judgment, § 72. Lesser actions, which threaten a person's physical well-being rather than his or her survival, can be assessed under Article 3, which prohibits torture, inhuman or degrading treatment or punishment.

69. See § 70 (quoted earlier in the text).

## Assessing compliance with the substantive requirements of Article 2

The general evidentiary standard applied by the Court in respect of alleged violations of the Convention is “proof beyond reasonable doubt”: in principle, the applicant must prove, to this standard, that a violation occurred.<sup>70</sup> However, the Court has clarified, and to some extent relaxed, this standard, by saying that:

*such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact.*<sup>71</sup>

In practice, both the question of standard and of onus of proof are somewhat flexibly applied, depending on the circumstances of the case and the nature of the allegations made by the applicant.

In *McCann*, the applicants had asserted, primarily, that the killings of the three suspected terrorists had been premeditated. On this, the Court said that “it would need to have convincing evidence before it could conclude that there was a premeditated plan, in the sense developed by the applicants”<sup>72</sup> – which the applicants had not produced.<sup>73</sup> In other words, in respect of an allegation that a killing was deliberately in contravention of Article 2, the onus is on the applicant to prove that claim; and he must produce “convincing evidence” before such a claim can be accepted.<sup>74</sup>

70. See the *Greek Case*, Commission Report of 5 November 1969, § 30.

71. *Ireland v. the United Kingdom*, judgment of 18 January 1978, § 161.

72. *McCann* GC judgment, § 179.

73. *McCann* GC judgment, § 178.

However, on a more general assertion that a killing (whether deliberate or otherwise) is in contravention of Article 2 by virtue of a lack of due diligence on the part of the authorities, it would seem that the Court to some extent reverses the onus of proof. Thus, in the end, in *McCann*, the Court, having found that the facts suggested that there was a “lack of appropriate care in the control and organisation of the arrest operation”,<sup>75</sup> was “not persuaded” that the killings were “absolutely necessary” in the sense of Article 2 (2).<sup>76</sup> This suggests that when it has been established that a person has been killed by agents of a State, that State bears the onus to prove that its actions were “absolutely necessary” in the sense of Article 2. As Judge Bratza put it in his partly dissenting opinion in *Ağdaş*:

*the test to be applied is not whether there is a sufficient evidence to satisfy the Court that the use of force was more than absolutely necessary; rather, it is whether the evidence is such as to satisfy the Court that the use of force was no more than absolutely necessary in self-defence.*<sup>77</sup>

This approach is also in line with the case-law under Article 3, according to which, if a person suffers injuries while in a State’s

74. Note that this is not the same as an allegation that a deliberate killing was in violation of Article 2: In *McCann* (as we shall see) it was not disputed that the killings were deliberate (cf. Commission Report, § 202; Judgment, § 199).

75. Cf., e.g., *McCann* GC judgment, § 212, last sentence.

76. *McCann* GC judgment, § 213. In *Matzarakis*, the Court, having found that the law did not adequately protect the applicant’s right to life and that this in itself already amounted to a violation of Article 2, felt that it was “not necessary” to examine whether “the life-threatening conduct of the police” violated the requirement of “absolute necessity”: GC judgment, § 72.

custody, the onus is on the State to prove that the injuries were not the result of torture, inhuman or degrading treatment or punishment.<sup>78</sup>

In practice, the Court is not always fully clear, or consistent, on the issue (as Judge Bratza's opinion shows). In addition:

*In this context, the conduct of the Parties when evidence is being obtained has to be taken into account.*<sup>79</sup>

The latter point is illustrated by the case of *Kaya v. Turkey*,<sup>80</sup> in which the applicant and others, including eyewitness to the relevant events, failed to appear in person to give evidence to the delegates of the Commission who had travelled to Turkey to establish the facts; unsurprisingly, this undermined the applicant's case.<sup>81</sup> In the case of *Isayeva v. Russia*<sup>82</sup> (further discussed below, p. 34), on the other hand, the Court's assessment was hampered by the refusal of the Respondent Government to provide relevant information, and the Court clearly held this against the Government in

77. *Ağdaş v. Turkey*, judgment of 27 July 2004, partly dissenting opinion by Judge Bratza, § 6. In his opinion, Judge Bratza expressed the view that, in that case, the majority of the Court had in effect wrongly applied the first, rather than the second test. The evidentiary standards in cases of deaths in custody and of "disappearances" will be discussed in the sub-sections on those issues: they also differ from the usual standard.

78. Cf. *Tomasi v. France*, judgment of 27 August 1992, §§ 108-110, discussed in Human Rights Handbook No. 6, p. 23.

79. *Ireland v. the United Kingdom*, judgment of 18 January 1978, § 161.

80. *Kaya v. Turkey*, judgment of 19 February 1998.

81. See *Kaya* judgment, §§ 76-78.

82. *Isayeva v. Russia*, judgment of 24 February 2005.

its assessment.<sup>83</sup> The same applied in the case of *Ergi v. Turkey*,<sup>84</sup> also discussed later (p. 33).

Where there have been legal proceedings in the domestic courts prior to the case being referred to the European Court of Human Rights, the latter furthermore, in principle, relies on the findings of fact of those domestic tribunals. As the Court said in the case of *Avsar v. Turkey* (to which we will return later, p. 29):

*The Court is sensitive to the subsidiary nature of its role and must be cautious in taking on the role of a first instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case [...]. Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and as a general rule it is for those courts to assess the evidence before them [...]. Though the Court is not bound by the findings of domestic courts, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts [...].*<sup>85</sup>

However, there have been cases in which there was evidence of serious defects in the respondent State's investigation of the events,<sup>86</sup> and where it was an essential part of the applicants' alle-

83. See *Isayeva* judgment, § 182.

84. *Ergi v. Turkey*, judgment of 28 July 1998.

85. *Avsar v. Turkey*, judgment of 10 July 2002, § 283, with references (omitted from the above quotation) to the judgment in *McKerr v. the United Kingdom*, further discussed below, p. 50, and to the judgment in the case of *Klaas v. Germany* of 22 September 1993. Cf. *Matzarakis v. Greece*, judgment of 20 December 2004, § 47.



gations that these defects were such as to render the other domestic proceedings ineffective – and in which the Commission therefore itself sent a delegation to the country concerned to establish the facts. The cases of *Kaya* and *Avsar v. Turkey*, just mentioned, are two examples. A further one is *Gül v. Turkey*,<sup>87</sup> in which the domestic forensic investigation at the scene and the subsequent domestic autopsy procedures were seriously defective and had hampered any effective reconstruction of events. The Court can take similar fact-finding action – but this will always remain highly exceptional. Normally, the domestic proceedings and additional information submitted to the Court by the parties will suffice for the establishment of the facts, at least to the Court’s own satisfaction. This was also the case in *McCann*: the Court expressly refused to carry out further fact-finding of its own, even though some important issues remained unresolved.

A further question arises as to the point of view from which the actions of the State have to be justified. This has a bearing on the question of what facts need to be established.

In the domestic legal proceedings in *McCann*, and in particular at the inquest held in Gibraltar after the killings, the focus was entirely on whether the actions of the SAS soldiers who actually shot the suspected terrorists were (subjectively) justified in terms of the “reasonable necessity” test, taking into account only the

facts as known to the soldiers at the time of the killings. The Court by contrast ruled that:

*the Court must, in making its assessment [as to whether there was a violation of Article 2], subject deprivations of life to the most careful scrutiny, particular 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.*<sup>88</sup>

The Court also noted expressly that “in determining whether there has been a breach of Article 2 in the present case, [the Court] is not assessing the criminal responsibility of those directly concerned.”<sup>89</sup> As it put it later in *Avsar*:

*When there have been criminal proceedings in the domestic court concerning those same allegations [as are brought before the Court], it must be borne in mind that criminal law liability is distinct from international law responsibility under the Convention. The Court’s competence is confined to the latter. Responsibility under the Convention is based on its own provisions which are to be interpreted and applied on the basis of the objectives of the Convention and in light of the relevant principles of international law. The responsibility of a State under the Convention, arising for the acts of its organs, agents and servants, is not to be confused with the domestic legal issues*

86. See the next section on the duty of the State under Article 2 to hold investigations into killings.

87. See *Gül v. Turkey*, judgment of 14 December 2000, § 89.

88. *McCann* GC judgment, § 150, emphasis added.

89. *McCann* GC judgment, § 173.



*of individual criminal responsibility under examination in the national criminal courts. The Court is not concerned with reaching any findings as to guilt or innocence in that sense.*<sup>90</sup>

The respondent State must thus show the “absolute necessity” of any killing, not only in respect of the actions of the agents who actually carried out the killing, but in respect of “all the surrounding circumstances”, including the planning, control and organisation of the operation.<sup>91</sup>

It was this wider view of the case which, in the end, led the Court to hold that the substantive requirements of Article 2 had been violated in *McCann*. Specifically, and without going into the detailed facts here, the Court found that the authorities had taken a deliberate decision not to prevent the IRA suspects from travelling into Gibraltar – even though they could have arrested them at the border without risk to innocent lives; and that the authorities had made the SAS soldiers believe there was definitely a bomb, that the bomb could definitely be detonated by remote control, and that the suspects would definitely be armed and carry minute “buttons” on them to explode the bomb – even though these assessments were not only proven to be completely wrong afterwards, but more importantly had been no more than “working hypotheses” at the time. The latter “mad[e] the use of lethal force

90. *Avsar* judgment, § 284, emphasis added, reference omitted.

91. Cf., again, *McCann* GC judgment, § 150. The issue of planning had previously been raised in the case of *Farrell v. the United Kingdom*, Appl. No. 9013/80, but the case resulted in a friendly settlement. As a result, the Commission did not rule on the issue, and the case did not reach the Court (decision, 30 DR 96 (1982); settlement, 38 DR 44 (1984)).

almost unavoidable<sup>92</sup> – especially in the light of the soldiers’ training:

***[T]he 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 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 enforce-*

92. *McCann* GC judgment, § 210.

*ment 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.*

*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 § 2 (a) of the Convention.*

***Accordingly, the Court finds that there has been a breach of Article 2 of the Convention.***<sup>93</sup>

The above makes clear that the Convention imposes strict requirements on States involved in pre-planned anti-terrorist or similar operations: they are under a duty to take “appropriate care” in the

93. *McCann* GC judgment, §§ 211-214, cross-references to earlier paragraphs omitted, emphasis added.

planning, organisation and control of such operations, to try and safeguard the lives, not just of the people that may fall victim to the terrorists’ actions, but also, if possible, of the terrorists themselves.<sup>94</sup> If the State can reasonably organise an operation in such a way as to avoid killing terrorist or other suspects, without danger to the general population or law enforcement officials, it is under a duty to do so. What needs to be proven on the “beyond reasonable doubt” standard is simply that, in the light of the facts as known to the authorities at the time, such reasonable arrangements could have been made. If that has been established, and they were not made, a violation has occurred.

This has been confirmed in many subsequent cases involving the use of lethal (and near-lethal) force since.<sup>95</sup> Indeed, in certain circumstances, the onus of proof may shift further. Thus, in the case of *Kelly and Others v. the United Kingdom*, eight terrorists involved in an attack on a (usually unmanned) police station, and an innocent civilian, were shot dead by security forces who had been lying in wait for the terrorists and who had set up an ambush. The applicants, relatives of the deceased, claimed they were the victims of a “shoot to kill” policy.<sup>96</sup> While the Court did not accept this claim as such, it held that:

94. On non-planned, spontaneous operations, see the case of *Matzarakis*, discussed on p. 26.

95. See, e.g., the cases of *Kaya v. Turkey*, judgment of 19 February 1998, § 77, *Andronicou and Constantinou v. Cyprus*, judgment of 9 October 1997, § 171.

96. On the alleged “shoot to kill policy” in Northern Ireland, see further in the sub-section on “unresolved killings and allegations of collusion”, below.

***Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as for example in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death which occur. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.***<sup>97</sup>

Of particular interest is the extension of this approach to situations of wider (internal) armed conflict, in particular in the Kurdish area of South-Eastern Turkey and in the Chechen Republic, which is part of the Russian Federation, also and in particular in respect of civilians caught up in the events.<sup>98</sup>

The case of *Ergi v. Turkey*<sup>99</sup> concerned a situation in which a young woman, the sister of the applicant, had been shot dead in a Kurdish village. The applicant alleged that the shooting was the result of indiscriminate fire by the security forces on the village, in retaliation for the killing of a “collaborator”, i.e. someone spying for the State. The Government asserted that there had been a clash between the security forces and the armed Kurdish group, the

97. *Kelly and Others v. the United Kingdom*, judgment of 4 May 2001, § 92, emphasis added, with reference to the Turkish/Kurdish cases of *Salman v. Turkey*, Grand Chamber judgment of 27 June 2000, para 100, *Çakıcı v. Turkey*, Grand Chamber judgment of 8 July 1999, § 85, *Ertak v. Turkey*, judgment of 9 May 2000, § 32 and *Timurtaş v. Turkey*, judgment of 13 June 2000, § 82. The passage is repeated *verbatim* in § 103 of the judgment of 4 May 2001 in *Hugh Johnson v. the United Kingdom*, another case of a killing in Northern Ireland, heard on the same day as *Kelly*.

98. The application of Article 2 of the Convention in international armed conflicts is discussed separately, below, p. 55.

99. *Ergi v. Turkey*, judgment of 28 July 1998.

PKK, and that the bullet which had killed her had not originated from the military side. Although the Court could ultimately not establish whether she had been killed by a bullet fired by the security forces, it nevertheless went on to assess whether the responsibility of the State was engaged in terms of the planning and conduct of the military operation and, in this regard, took into account the absence of information provided by the Government:

*... the Court must consider whether the security forces' operation had been planned and conducted in such a way as to avoid or minimise, to the greatest extent possible, any risk to the lives of the villagers, including from the fire-power of the PKK members caught in the ambush.*

...

*The Court, having regard to the Commission's findings [...] and to its own assessment, considers that ... there had been a real risk to the lives of the civilian population through being exposed to cross-fire between the security forces and the PKK. In the light of the failure of the authorities of the respondent State to adduce direct evidence on the planning and conduct of the ambush operation, the Court, in agreement with the Commission, finds that it can reasonably be inferred that insufficient precautions had been taken to protect the lives of the civilian population.*<sup>100</sup>

The State was therefore held to have violated the substantive requirements of Article 2 in this case, even though it had not been

100. *Ergi* judgment, §§ 79-81 (original heading), emphasis added.

established that its agents had fired the lethal shot: it was sufficient that the authorities had placed the victim in danger, rather than having planned the operation in a way which would have minimised the risk to civilians.

The case of *Isayeva, Yusupova and Bazayeva v. Russia*<sup>101</sup> concerned the indiscriminate aerial bombing of a convoy of civilians trying to leave Grozny, the capital of Chechnya, in October 1999 in their cars to escape the heavy fighting which took place in the city at the time between Russian forces and Chechen rebels. They had heard that a humanitarian corridor had been established to allow civilians to escape. As a result of the bombing, two children of the first applicant were killed and the first and second applicant injured. The Court accepted that the situation in Chechnya called for exceptional measures including the employment of military aviation equipped with heavy combat weapons. It was prepared to accept in principle that if the planes were attacked by illegal armed groups, that could have justified the use of lethal force (but note the qualification in the separate case of *Isayeva v. Russia*, discussed below). However, the Government had not produced convincing evidence of such an attack. The Court therefore doubted whether Article 2 could be relied upon by the State at all, but nevertheless proceeded on the assumption that it could, and went on to assess whether the bombardment of the civilian convoy had been “absolutely necessary” in the circumstances.

101. *Isayeva, Yusupova and Bazayeva v. Russia*, judgment of 24 February 2005.

The Court concluded that the bombing did not meet this requirement. In particular, the authorities should have been aware of the announcement of a humanitarian corridor to allow civilians to leave Grozny, and of the presence of civilians in the area. Consequently, they should have been alerted to the need for extreme caution regarding the use of lethal force. However, neither the air controller directing the planes, nor the pilots involved in the attack, had been made aware of this, nor was a forward air controller put on board to evaluate the targets. These factors, as well as the duration of the air attack over a period of four hours and the power of the weapons used, led the Court to conclude that the operation had not been planned and executed with the required care for the lives of the civilian population. There had therefore been a violation of the substantive requirements of Article 2.

The case of *Isayeva v. Russia*,<sup>102</sup> just mentioned, concerned the indiscriminate bombing of the village of Katyr-Yurt. The applicant and her relatives had tried to leave the village through what they thought was a safe exit route, but an aviation bomb dropped by a Russian military plane exploded near their minivan, killing the applicant's son and three nieces. The bomb was dropped in the context of an operation against armed insurgents, whom the authorities were expecting to arrive in the village (and may even have incited to do go there). The operation had been planned in advance. However, nothing was done to warn the villagers of the possibility of the arrival of armed rebels and of the danger to

102. *Isayeva v. Russia*, judgment of 24 February 2005

which they would be exposed. The Court strongly condemned this, and the subsequent indiscriminate use of massive air power against the village:

*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. ... There is no evidence that at the planning stage of the operation any serious calculations were made about the evacuation of civilians, such as ensuring that they were informed of the attack beforehand, how long such an evacuation would take, what routes evacuees were supposed to take, what kind of precautions were in place to ensure safety, what steps were to be taken to assist the vulnerable and infirm etc.*

...

*The Court considers that using this kind of weapon [heavy free-falling high-explosion aviation bombs with a damage radius exceeding 1 000 metres] 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, as the Government submit, 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.<sup>103</sup>*

### The need to hold an ex post facto inquiry: the “procedural limb” of Article 2

Important though the ruling in *McCann* and the other cases are in terms of the substance of Article 2, that judgment has had a perhaps even more significant impact on another aspect of that article, in that it clarified that States have a duty to investigate killings by members of its security forces. This is referred to as the “procedural requirement” or the “procedural limb” of Article 2.

The procedural requirement to hold an investigation into a killing is quite distinct from the substantive requirement not to use lethal force unless absolutely necessary: there can be a violation of one without a violation of the other, either way. Thus, in *McCann*, the

103. *Isayeva* judgment, §§ 189-191, cross-references to earlier paragraphs omitted, emphasis added. On the application of Article to situation of war or declared emergency, see the section on “The use of lethal force in international armed conflict”, below.

Court found a violation of the substantive requirement, as just discussed, but as we shall see, no violation of the procedural requirement. Conversely, in the case of *Kaya v. Turkey*<sup>104</sup> (further discussed below, p. 37 ff.), the Court found no violation of the substantive requirements of Article 2, but a violation of its procedural requirements. In other cases, such as *Kılıç v. Turkey*<sup>105</sup> and *Ertak v. Turkey*,<sup>106</sup> both kinds of requirements were violated. Moreover, as we shall see in the case of *Kelly and Others v. the United Kingdom*,<sup>107</sup> the Court held that, in certain cases, it could examine alleged violations of the procedural requirements even though domestic proceedings on the substance of the issues were still pending or were not pursued.

As discussed in later sections, the duty to investigate has furthermore been extended to cases of deaths in custody, unresolved killings and allegations of collusion, and “disappearances” (as well as to cases of alleged torture, as discussed in Human Rights Handbook No. 6).

The applicants in *McCann* had submitted that Article 2 imposed a positive duty on the State to provide “an effective ex post facto procedure for establishing the facts surrounding the killing by agents of the State through an independent judicial process to which relatives must have full access”.<sup>108</sup> In this, they had referred to the *United Nations Basic Principles on the Use of Force and Fire-*

*arms by Law Enforcement Officials*,<sup>109</sup> and to the *United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*.<sup>110</sup> *Amicus curiae* briefs, submitted by the Northern Ireland Human Rights Commission (a State body) and by Amnesty International and other non-governmental human rights organisations, also drew the attention of the Court to these UN standards. The Court expressly referred to these international standards<sup>111</sup> and, in a crucial passage of the judgment, accepted the general proposition:

*[The Court] confines itself to noting, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, 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*

104. *Kaya v. Turkey*, judgment of 19 February 1998.

105. *Kılıç v. Turkey*, judgment of 28 March 2000, discussed below, p. 47 ff.

106. *Ertak v. Turkey*, judgment of 9 May 2000, discussed below, p. 52 ff.

107. *Kelly v. the United Kingdom*, judgment of 4 May 2001.

108. *McCann* GC judgment, § 157, emphasis added. Note that this procedural requirement flows from Article 2 itself, and is distinct from the separate rights to an “effective remedy” against violations of the Convention (Article 13) and from the right of access to court to bring civil proceedings (Article 6), neither of which were invoked by the applicants in *McCann* (cf judgment, § 160).

109. See p. 27, footnote 64.

110. Adopted on 24 May 1989 in UN Economic and Social Council Resolution 1989/65.

111. *McCann* GC judgment, §§ 138-140.

*when individuals have been killed as a result of the use of force by inter alia, agents of the State.*<sup>112</sup>

In *McCann*, the Court felt that it was “not necessary” to decide “what form such an investigation should take and under what conditions it should be conducted,” because whatever the specific requirements, they had been met in the inquest procedures.<sup>113</sup> However, the Court noted a number of aspects of the inquest procedures which clearly contributed to its overall finding that there had been a sufficiently effective official investigation to meet the requirements of Article 2:

- the proceedings had been public;
- the applicants (i.e. the relatives of the deceased) had been legally represented;
- a large number of witnesses (seventy-nine) had been heard; and
- the lawyers for the relatives had been able to examine and cross-examine key witnesses, including the military and police personnel involved in the planning and conduct of the operation, and to make submissions in the course of the proceedings.<sup>114</sup>

Certain shortcomings in the procedure, pointed out by the applicants and the *amici curiae*, did not, in the opinion of the Court, “substantially hamper the carrying out of a thorough, impractical and careful examination of the circumstances surrounding the

killings.”<sup>115</sup> There was therefore, in *McCann*, no violation of this requirement.

Other cases, in Continental countries where there is no inquest procedure of the kind known in the United Kingdom and Gibraltar, have focused more on alleged deficiencies in the police and forensic investigation, supervised (in those countries) by a public prosecutor or judge.

The case of *Kaya v. Turkey*<sup>116</sup> concerned the killing of the applicant’s brother, Abdülmenaf Kaya. The applicant alleged that his brother was deliberately killed by the security forces on 25 March 1993. The Government on the contrary contended that he was killed in a gun battle between members of the security forces and a group of terrorists who had engaged the security forces on the day in question. They claim that the applicant’s brother was among the assailants.<sup>117</sup>

The Court held that there was no sufficient factual and evidentiary basis to conclude, beyond reasonable doubt, that the deceased had been intentionally killed by agents of the State as alleged by applicant, and that there was therefore no violation of the substantive requirements of Article 2. However, the investigation into the killing had been seriously defective: the prosecutor investigating the case “would appear to have assumed without

112. *McCann* GC judgment, § 161, emphasis added.

113. *McCann* GC judgment, § 162.

114. *McCann* GC judgment, § 162.

115. *McCann* GC judgment, § 163. For a summary of the alleged shortcomings in the inquest procedure, see § 157.

116. *Kaya v. Turkey*, judgment of 19 February 1998.

117. For details of the different accounts, see *Kaya* judgment, §§ 9-10 and 11-15, respectively; the supporting evidence on both sides is set out in § 16-30.



question that the deceased was a terrorist who had died in a clash with the security forces” and had not questioned the soldiers involved in the incident; no tests were carried out on the deceased’s hands or clothing for gunpowder traces; the deceased’s weapon was not dusted for fingerprints; the corpse was handed over to villagers, which rendered it impossible to conduct any further analyses, including of the bullets lodged in the body; the autopsy report was perfunctory and did not even include any observations on the actual number of bullets which struck the deceased or any estimation of the distance from which the bullets were fired; etc.<sup>118</sup> There had therefore been a violation of the procedural requirements of Article 2.

More detailed requirements of the investigation have been established in subsequent cases, many (like *Kaya*) relating to the situation in South-East Turkey. They are summarised in the case of *Kelly and Others v. the United Kingdom*, already mentioned, which concerned the killing of eight IRA men and an innocent bystander in an ambush by the security services in Northern Ireland, in the following terms:<sup>119</sup>

- *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*

118. See the *Kaya* judgment, §§ 86-92.

119. *Kelly and Others v. the United Kingdom*, judgment of 4 May 2001, §§ 94-98, bullet-points and emphasis added; references in brackets to the various cases replaced by references in footnotes

*responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.*<sup>120</sup>

- *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.*<sup>121</sup> *This means not only a lack of hierarchical or institutional connection but also a practical independence.*<sup>122</sup>
- *The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances*<sup>123</sup> *and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia*

120. See, *mutatis mutandis*, *Ilhan v. Turkey*, Grand Chamber judgment of 27 June 2000, § 63

121. See e.g. *Güleç v. Turkey*, judgment of 27 July 1998, §§ 81-82; *Öğür v. Turkey*, Grand Chamber judgment of 20 May 1999, §§ 91-92.

122. See, e.g., the case of *Ergi v. Turkey*, judgment of 28 July 1998, §§ 83-84, where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident. [original comment]

123. See, e.g. *Kaya v. Turkey*, judgment of 19 February 1998, § 87.



eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.<sup>124</sup>

- Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.
- A requirement of **promptness and reasonable expedition** is implicit in this context.<sup>125</sup>
- It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.
- For the same reasons, there must be a sufficient element of **public scrutiny** of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the **next of kin of the victim must be involved**

124. See concerning autopsies, e.g. *Salman v. Turkey*, judgment of 27 June 2000, § 106; concerning witnesses e.g. *Tanrikulu v. Turkey*, Grand Chamber judgment of 8 July 1999, § 109; concerning forensic evidence e.g. *Gül v. Turkey*, judgment of 4 December 2000, § 89.

125. See *Yaşa v. Turkey*, judgment of 2 September 1998, §§ 102-104; *Cakıcı v. Turkey*, judgment of 8 July 1999, §§ 80, 87 and 106; *Tanrikulu v. Turkey*, judgment of 8 July 1999, § 109; *Mahmut Kaya v. Turkey*, judgment of 28 March 2000, §§ 106-107.

*in the procedure* to the extent necessary to safeguard his or her legitimate interests.<sup>126</sup>

Importantly, in particular in respect of other cases of internal, and indeed of international armed conflict (as further discussed later), the Court in *Kaya* noted that:

... loss of life is a tragic and frequent occurrence in view of the security situation in south-east Turkey [...]. However, **neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into 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.**<sup>127</sup>

In the *Kelly* case, the Court held that there had been a violation of these procedural requirements, inter alia because inquests in Northern Ireland could no longer apportion blame, because the relatives had been denied access to relevant documents, and because of the excessive delays, over several years, in holding the inquest into the deaths.<sup>128</sup> Another main reason was that there had been no explanation as to why no-one was to be prosecuted for the killings:

126. See *Güleç v. Turkey*, judgment of 27 July 1998, § 82, where the father of the victim was not informed of the decisions not to prosecute; *Öğür v. Turkey*, judgment of 20 May 1999, § 92, where the family of the victim had no access to the investigation and court documents; *Gül v. Turkey*, judgment of 14 December 2000, § 93.

127. *Kaya v. Turkey*, judgment of 19 February 1998, § 91, emphasis added.

*In this case, nine men were shot and killed, of whom one was unconnected with the IRA and two others at least were unarmed. It is a situation which, to borrow the words of the domestic courts, cries out for an explanation. The applicants however were not informed of why the shootings were regarded as not disclosing a criminal offence or as not meriting a prosecution of the soldiers concerned. **There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Article 2, unless that information was forthcoming in some other way.** This however is not the case.<sup>129</sup>*

The Court issued this finding of a violation of the procedural aspect of Article 2, in respect of all the applicants, even though it had held earlier in the judgment that it could not (yet) rule on the substantive issues under that article in five of the seven cases in which civil proceedings were still pending;<sup>130</sup> that one applicant (the wife of the civilian victim) had settled her civil action and could therefore no longer be regarded as a victim of the alleged

128. *Kelly* judgment, §§ 124, 128 and 134. For details, see the entire section, §§ 119-134. Note that the Court both stressed that inquests in Northern Ireland were more limited than the inquest in the *McCann* case in Gibraltar had been (in respect of which it had not found a violation of the procedural requirements of Article 2) (§ 123), and that, since *McCann*, “the Court has laid more emphasis on the importance of involving the next of kin of a deceased in the procedure and providing them with information” (§ 127, with reference to *Öğür v. Turkey*, judgment of 20 May 1999, § 92).

129. *Kelly* judgment, § 118, emphasis added.

130. *Kelly* judgment, § 105.

violation of the substantive requirements of Article 2;<sup>131</sup> and that one family, which had dropped their civil suit, was barred from pursuing the claim as to the substantive violation for failure to exhaust that remedy.<sup>132</sup>

The reason why the substantive and procedural Convention issues are so clearly separable, at least as concerns English/Northern Irish law, is that “the obligations of the State under Article 2 cannot be satisfied merely by awarding damages”<sup>133</sup> – which is the main outcome in civil proceedings, and often the only available domestic outcome in cases in which a financial settlement is offered by the State. By contrast, under the Convention, as we have seen, “[t]he investigations required under Articles 2 and 13 of the Convention must be able to lead to the identification and punishment of those responsible.”<sup>134</sup>

The question of an effective investigation of killings by agents of the State is therefore linked to two other issues under the Convention: the right to an “effective remedy” under Article 13, and the duty under Article 35 (1) to exhaust domestic remedies before an application can be lodged with the Court in Strasbourg.

The first link was explained by the Court in *Matzarakis* as follows:

*Since often, in practice, the true circumstances of the death in such cases are largely confined within the knowledge of State*

131. *Kelly* judgment, § 107.

132. *Kelly* judgment, § 110.

133. *Kelly* judgment, § 105, with reference to *Kaya v. Turkey*, § 105, and *Yaşa v. Turkey*, § 74.

134. *Kelly* judgment, § 105.

*officials or authorities, the bringing of appropriate domestic proceedings, such as a criminal prosecution, disciplinary proceedings and proceedings for the exercise of remedies available to victims and their families, will be conditioned by an adequate official investigation, which must be independent and impartial.*<sup>135</sup>

Thus, if there is no proper investigation by the authorities, the remedies nominally available to applicants may be rendered ineffective in practice, in violation of Article 13. Furthermore, if those remedies have been rendered ineffective in this way, applicants are no longer required to exhaust them before being able to submit their case to the Court in Strasbourg.<sup>136</sup>

## Deaths in custody

According to consistent case-law:

*Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to*

135. *Matzarakis* judgment, § 73.

136. See, on these linked issues, the cases of *Akdivar v. Turkey*, Grand Chamber judgment of 16 September 1996, in particular § 68 (in which the Court significantly referred to the *Velásquez Rodríguez* case of its sister court, the Inter-American Court of Human Rights, and to the Inter-American Court's Advisory Opinion of 10 August 1990 on "Exceptions to the Exhaustion of Domestic Remedies") and *Khashiyev and Akayeva v. Russia*, judgment of 24 February 2005, in particular § 117.

*provide a plausible explanation of how those injuries were caused.*<sup>137</sup>

In the case of *Salman v. Turkey*, the Court, after repeating the above, added the observation that:

*The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies. ... Indeed, the burden of proof [in such cases] may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.*<sup>138</sup>

The applicant's husband, Agit Salman, had been arrested in February 1992 in Adana, Turkey, and was taken to a police station. Less than 24 hours later he was dead. Turkish medical experts concluded that he had died from a heart attack, with bruising to the chest and a broken sternum having been caused by a resuscitation attempt, but international experts appointed by the applicant and the Commission disagreed and found that the victim's injuries were consistent with beatings. The Commission concluded that Agit Salman had been subjected to torture during interrogation, which had provoked cardiac arrest and thereby caused his death.<sup>139</sup> The Court endorsed the Commission's finding, while emphasising that in such cases the onus is on the State to prove that the victim did not die as a result of torture:

137. *Salman v. Turkey*, judgment of 27 June 2000, § 99, with reference to *Selmouni v. France*, Grand Chamber judgment of 28 July 1999, § 87.

138. *Salman* judgment, §§ 99-100.

139. *Salman* judgment, § 32. For a detailed description of the Commission's findings of fact, see §§ 8-32.

*Agit Salman was taken into custody in apparent good health and without any pre-existing injuries or active illness. No plausible explanation has been provided for the injuries to the left ankle, bruising and swelling of the left foot, the bruise to the chest and the broken sternum. The evidence does not support the Government's contention that the injuries might have been caused during the arrest, or that the broken sternum was caused by cardiac massage. ...*

*The Court finds, therefore, that the Government have not accounted for the death of Agit Salman by cardiac arrest during his detention at Adana Security Directorate and that the respondent State's responsibility for his death is engaged.*

*It follows that there has been a violation of Article 2 in that respect.<sup>140</sup>*

The procedural requirements of Article 2 are, of course, equally important in cases of deaths in custody. In the case of Salman, the

140. *Salman* judgment, §§ 102-103. Note also the importance attached by the Commission and Court to deficiencies in the arrest and custody records: see §§ 13 and 16 of the judgment and the Commission's report of 1 March 1999, §§ 271-278 (referred to in § 16 of the judgment). The Court furthermore expressly referred to the findings by the Committee for the Prevention of Torture, established under the European Convention for the Prevention of Torture, that, in 1992, "the practice of torture and other forms of severe ill-treatment of persons in police custody remains widespread in Turkey", and that, even in 1996, "resort to torture and other forms of severe ill-treatment remained a common occurrence in police establishments in Turkey" (§§ 70 and 71). It also noted the Model Autopsy Report included in the "Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions" adopted by the United Nations in 1991 (§ 73). These references again illustrates how the case-law of the Court is part of a wider framework of international instruments and -procedures, which inform each other.

Court made two observations on the issue. First of all, it said that the duty to investigate, establish the facts and ensure accountability for deaths in custody "is not confined to cases where it is apparent that the killing was caused by an agent of the State": States should always investigate when a person dies in custody.<sup>141</sup> This should involve, where appropriate (i.e. whenever this could shed light on the cause of death):

*an autopsy which provides a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings, including the cause of death.<sup>142</sup>*

It was in this respect that there had been crucial failures: there had been no proper forensic photographs of the body; no dissection or histopathological analysis of the injuries had been carried out; an "unqualified assumption" had been made in the initial forensic report that the broken sternum could have been caused by cardiac massage, without seeking any verification as to whether such massage had been applied, and the assessment of these initial findings by the (State-run) Istanbul Forensic Medical Institute compounded these shortcomings by merely confirming the diagnosis of a heart attack.<sup>143</sup>

141. *Salman* judgment, § 105. Cf. the observation by the Court in *Keenan v. the United Kingdom*, judgment of 1 April 2001, § 91, welcoming the automatic holding of an inquest in all cases of deaths in custody in the United Kingdom.

142. *Salman* judgment, § 105, with reference, *mutatis mutandis*, to the *Ergi v. Turkey* judgment of 28 July 1998, § 82, and the *Yaşa v. Turkey* judgment of 2 September 1998, § 100.

143. *Salman* judgment, § 106.

These failings caused the prosecutor initially not to prosecute, and the prosecution which was later instigated to fail. The defects in the autopsy examination thus “fundamentally undermined any attempt to determine police responsibility for Agit Salman’s death”.<sup>144</sup> They also affected the availability of an effective remedy on the part of the applicant and thus the requirement that she exhaust those remedies.

*In these circumstances, an appeal to the Court of Cassation, which would only have had the power to remit the case for reconsideration by the first-instance court, had no effective prospect of clarifying or improving the evidence available. The Court is not persuaded therefore that the appeal nominally available to the applicant in the criminal-law proceedings would have been capable of altering to any significant extent the course of the investigation that was made. That being so, the applicant must be regarded as having complied with the requirement to exhaust the relevant criminal-law remedies.*

*The Court concludes that the authorities failed to carry out an effective investigation into the circumstances surrounding Agit Salman’s death. This rendered recourse to civil remedies equally ineffective in the circumstances. It accordingly dismisses the criminal and civil limb of the Government’s preliminary objection [that the applicant had not exhausted the domestic remedies] [...] and holds that there has been a violation of Article 2 in this respect.<sup>145</sup>*

144. *Salman* judgment, § 107.

## Unresolved killings and allegations of collusion

Similar issues arise in cases of unresolved killings. These may raise the question of whether agents of the State were directly responsible for the killings, and/or the question of collusion between the killers and agents of the State. In all such cases, the procedural aspect of Article 2 is especially important.

In the case of *Kashiyev and Akayeva v. Russia*,<sup>146</sup> the applicants had fled Grozny, the capital of Chechnya, in the winter of 1999-2000, because of fighting between Russian Federation forces and Chechen fighters. Upon their return to Grozny, they discovered the bodies of a number of their relatives. The bodies showed bullet wounds and signs of beating. The applicants submitted that the area in question (the Staropromyslovskiy district of Grozny) was, at the time of the deaths, under the control of Russian Federation forces. They also adduced evidence that one of the applicants’ relatives had been seen by eyewitnesses being detained by federal forces, and that there had been widespread acts of torture and extra-judicial killings by soldiers in the area at the time. They accused the Government of both responsibility for the killings of their relatives and of having failed to investigate the killings properly.

The Government submitted that the circumstances surrounding the deaths were unclear and suggested that the applicants’ relatives could have been killed by Chechen fighters or by robbers, or alter-

145. *Salman* judgment, §§ 108-109.

146. *Kashiyev and Akayeva v. Russia*, judgment of 24 February 2005.

natively, that they had been participating in armed resistance themselves and had been killed in action.

The Court requested the Government to submit a copy of the complete criminal investigation file into the case, but only about two thirds of the file was produced, the Government arguing that the remainder of the documents were irrelevant. This weighed heavily in the Court's assessment of the case:

*Where an application contains a complaint that there has not been an effective investigation, and where, as in the instant case, a copy of the file is requested from the Government, the Court considers it incumbent on the respondent State to furnish all necessary documentation pertaining to that investigation. The question of whether certain documents are relevant or not cannot be unilaterally decided by the respondent Government. ... Accordingly, the Court finds that it can draw inferences from the Government's conduct in this respect.<sup>147</sup>*

The Court found that the criminal investigation was based on the assumption that the killings had been perpetrated by Russian military servicemen, and had indeed identified one possible suspect, and that a domestic court had awarded one of the applicants damages on the basis that at the material time the Staropromys-

147. *Kashiyeu and Akayeva* judgment, §§ 138-139. The Court did not find it necessary in this case to draw separate conclusions in respect of Article 38 of the Convention, which requires States that are party to the Convention to furnish the Court with "all necessary facilities" for the effective conduct of the Court's examination of the case. However, it noted that issues in that respect were raised. Cf. the case of *Timurtaş v. Turkey*, judgment of 13 June 2000, discussed later, under the heading "Disappearances", in which the Commission found a violation of that article.

lovskiy district of Grozny had been under the firm control of the federal forces, that only its servicemen could have conducted identity checks, and that that applicant's relatives had been killed during an identity check. The other victims were found with those relatives who, the Court said, had presumably been killed in the same circumstances. The Court found that it was established that the applicants' relatives were killed by servicemen, and that their deaths could be attributed to the State, which had not provided any explanation or justification for the killings. Liability for the applicants' relatives' deaths was therefore attributable to the respondent State. There had been a violation of the substantive requirements of Article 2.<sup>148</sup>

On the question of compliance with the procedural requirements of Article 2, the Court was equally critical of the actions, or rather inactions, of the State. There was a whole litany of failings: there was an unjustified delay of three months before a criminal investigation was opened; the investigators did not even try to establish the exact name and location of a brigade seemingly implicated in the killings, or to contact its commander, or to identify some soldiers, identified by name by witnesses as implicated in the events. The investigation failed to obtain a plan of the military operations conducted in the area although, as the Court put it, "[s]uch a plan could have constituted vital evidence in respect of the circumstances of the crimes in question". No map or plan was drawn up of the district which might show the location of the bodies and

148. See *Kashiyeu and Akayeva* judgment, § 147.

important evidence; no attempt appeared to have been made to establish a list of local residents who remained in Grozny in the winter of 1999-2000, or to identify and locate witnesses directly identified by the applicants. No autopsies were ordered or conducted; some of the bodies had not been forensically examined at all. Finally, the investigation was adjourned and resumed eight times, and transferred from one prosecutor's office to another at least four times, with no clear explanation and without the applicants being informed. The Court therefore concluded that the authorities had failed to carry out an effective criminal investigation into the circumstances surrounding the killings, in violation of the procedural requirement of Article 2.<sup>149</sup>

The Court also rejected the Government's preliminary objection that the applicants could have appealed the results of the investigation and instigated civil proceedings, but had failed to do so, and had therefore not exhausted domestic remedies. In the light of the delays and omissions described above, the Court was "not persuaded that such appeal would have been able to remedy the defects in the proceedings, even if the applicants had been properly informed of the proceedings and had been involved in it." As in the case of *Salman*, discussed earlier, the failure to carry out a proper criminal investigation "rendered recourse to the civil remedies equally ineffective in the circumstances." The Court therefore rejected the Government's objection.<sup>150</sup>

149. See *Kashiyev and Akayeva* judgment, §§ 156-166.

150. See *Kashiyev and Akayeva* judgment, §§ 165-166.

The case of *Yaşa v. Turkey*<sup>151</sup> concerned a number of attacks on the applicant, his brother and his uncle, who was killed. The applicant alleged that he and his uncle had been shot because of their involvement in the distribution of the pro-Kurdish newspaper *Özgür Gündem*, after receiving threats from police officers, and that the incidents had been part of a campaign of persecution and attacks against people engaged in the publication and distribution of that and other pro-Kurdish newspapers. They pointed to a series of attacks on the newspaper's owners, journalists and staff and vendors. The Government maintained that there was no evidence to support the applicant's contention that members of the security forces were responsible for the attacks on the applicant and his uncle. They said that the applicant had never officially complained to the relevant authorities that his attackers were agents of the State. Moreover, there was no evidence to support the applicant's allegation that a police officer had told him that it was in fact he who had been the target of his uncle's killers. The Government also denied that there had been official intimidation of persons in any way connected with the sale of newspapers.

The Commission observed that the facts at the heart of the application were not disputed. The applicant, Eşref Yaşa, was shot at and seriously injured in an attack by two men on 15 January 1993. His uncle, Haşim Yaşa, was shot and killed by a gunman on 14 June 1993. The Commission found that there was no evidence before it that proved beyond reasonable doubt that agents of the

151. *Yaşa v. Turkey*, judgment of 2 September 1998.



security forces or police were involved in the shooting of either the applicant or his uncle. However, having regard to “appeals made for protection and protests made by Mr Yaşar Kaya, [a] journalist and [the] owner of the *Özgür Gündem*, at ministerial level and to the considerable number of attacks on persons connected with that newspaper”, the Commission found that the Government had or ought to have been aware that those involved in its publication and distribution feared that they were falling victim to a concerted campaign tolerated, if not approved, by State agents.

The applicant submitted to the Court a report which had been drawn up for the Turkish Prime Minister, *inter alia*, about attacks on newspapers and newsagents (the *Susurluk* report). The Court felt that the events described in that report were “disturbing”, and that “[t]he fate of certain newspaper-publishing companies, in particular the company which published the *Özgür Gündem*, [was] particularly alarming in that regard” – but nevertheless held that

*the Susurluk report does not contain material enabling the presumed perpetrators of the attacks on the applicant and his uncle to be identified with sufficient precision. Indeed, the applicant admits as much in his memorial [...].*

*Consequently, the Court does not consider that it should depart from the Commission’s conclusions regarding this complaint. It accordingly holds that the material on the case file does not enable it to conclude beyond all reasonable doubt that*

*Mr Eşref Yaşa and his uncle were respectively attacked and killed by the security forces.*<sup>152</sup>

It followed that there had been no violation of the substantive requirements of Article 2.<sup>153</sup>

As to the investigations into the killings, the Court noted that although they had been formally opened, little evidence of progress had been produced by the Government. In the case of Haşim Yaşa, the authorities had carried out an autopsy, obtained an expert ballistics report and heard three witnesses, including the deceased’s son. But no evidence of further action or progress had been produced, despite requests from the Commission. The only explanation offered by the Government was that the investigation took place in the context of the fight against terrorism, and required complex cross-checking with other cases. The Court was:

*... prepared to take into account the fact that the prevailing climate at the time in that region of Turkey, marked by violent action by the PKK [the main Kurdish separatist group] and measures taken in reaction thereto by the authorities, may have impeded the search for conclusive evidence in the domestic criminal proceedings. Nonetheless, circumstances of that nature cannot relieve the authorities of their obligations under Article 2 to carry out an investigation, as otherwise that would exacerbate still further the climate of impunity and insecurity in the region and thus create a vicious circle [...].*

152. *Yaşa* judgment, § 96, reference to earlier paragraph omitted.

153. *Yaşa* judgment, § 97.



In addition, the authorities appeared to have excluded from the outside the possibility that State agents might have been implicated in the attacks, even though (as the Commission had noted) they knew, or should have known, that those involved in the publication and distribution of the *Özgür Gündem* believed that the attacks were part of “a concerted campaign tolerated, if not approved, by State officials”. Because of this, and because at the time of the judgment, more than five years after the events, “no concrete and credible progress has been made”, the investigations could not be considered to have been effective as required by Article 2. There was therefore a violation of the procedural requirements of Article 2 in the case.<sup>154</sup>

Similar issues were raised in the case of *Kılıç v. Turkey*,<sup>155</sup> which concerned the killing of an *Özgür Gündem* journalist, Kemal Kılıç, a month after the killing of Haşım Yaşa, in February 1993. Here, the Court found a violation of both the substantive and the procedural requirements of Article 2.

The violation of the substantive requirements arose from the fact that the victim had expressly asked for protection from the authorities, who were aware, or should have been aware, of the “real and immediate” risk posed to him from unlawful attack, but had not provided any protection although, in the opinion of the Court, “[a] wide range of preventive measures were available”.<sup>156</sup> Furthermore, the authorities were aware, or should 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.”<sup>157</sup>

There was a framework of law in place with the aim of protecting life: the Turkish Criminal Code prohibited murder; there were police and gendarmerie forces with the role of preventing and investigating crime, subject to directions by prosecutors; and there were courts applying the provisions of the criminal law in trying, convicting and sentencing offenders.<sup>158</sup> However, this framework had been undermined, in that competence for the investigation of deaths involving members of the security forces was given, in certain cases – including *Kılıç* – to administrative councils that did not provide an independent or effective procedure for investigating deaths involving members of the security forces;<sup>159</sup> there had been “a series of findings of failure by the authorities to investigate allegations of wrongdoing by the security forces, both in the context of the procedural obligations under Article 2 of the Convention and the requirement for effective remedies imposed by Article 13”;<sup>160</sup> prosecutors tended to “accept [...] at face value the reports of incidents submitted by members of the security forces

154. *Yaşa* judgment, §§ 103-107, emphasis added, references to earlier paragraphs and to the Commission Report omitted.

155. *Kılıç v. Turkey*, judgment of 28 March 2000.

156. *Kılıç* judgment, § 76. See the preceding paragraphs in the judgment for more detail of the Court’s reasoning in this regard.

157. *Kılıç* judgment, § 68, with reference to a 1993 parliamentary report and the subsequent (1998) Susurluk report.

158. *Kılıç* judgment, § 70.

159. *Kılıç* judgment, §. 72, with reference to the cases of *Güleç* and *Oğur*.

160. *Kılıç* judgment, § 73, with reference, concerning Article 2, to the cases of *Kaya*, *Ergi*, *Yaşa*, *Çakıcı* and *Tanrıkulu*.

and attribut[e] incidents to the PKK on the basis of minimal or no evidence”;<sup>161</sup> and when this happened, the cases automatically became subject to the jurisdiction of the National Security Courts, which the Court had, in a further series of cases, found did not fulfil the requirement of independence imposed by Article 6 of the Convention.<sup>162</sup> The Court found that:

*these defects undermined the effectiveness of the protection afforded by the criminal law in the south-east region during the period relevant to this case. It considers that this permitted or fostered a lack of accountability of members of the security forces for their actions which, as the Commission Stated in its report, was not compatible with the rule of law in a democratic society respecting the fundamental rights and freedoms guaranteed under the Convention.*<sup>163</sup>

The protection of the right to life “by law” had thus, in practice, been seriously weakened, to the extent that the criminal legal framework no longer met this (substantive) requirement of Article 2. That aspect of the article had therefore been violated.

In other words, if there are defects in the investigation of a specific, single case, this will lead to a finding of a violation of the procedural aspect of Article 2. But if there is a *systemic* failure of the system to properly investigate and deal with certain killings, this means that there is a failure of the substantive requirement of

that article, too, because “the law” no longer “protects” the right to life in such cases.

If a specific case falls within the category where the system systematically fails to protect, it is of course also almost certain that the procedural requirements in that case, too, are not met. Thus, in *Kılıç*, the investigation had been too limited in scope and duration; the killing had been treated as a separatist crime, committed by an arrested member of an Islamist group, Hizbullah, although there was no direct evidence linking him with that particular crime; and there was “no indication that any steps have been taken to investigate any collusion by security forces in the incident”.<sup>164</sup> There was therefore also a separate violation of the procedural requirements of Article 2.

Indeed, as the *Kılıç* judgment already suggests, if there are allegations, not just of tolerance but of active collusion between the State and the killers, the State bears a particularly heavy duty to provide for a full, impartial and speedy investigation. This was reaffirmed in the case of *Shanaghan v. the United Kingdom*.<sup>165</sup> In that case, a Northern Irish man, Patrick Shanaghan, had been shot dead by a Loyalist (i.e. pro-British) terrorist organisation, the Ulster Freedom Fighters or UFF, in 1991. Patrick Shanaghan had been suspected by the British security forces of being a member of the Irish Republican Army or IRA.<sup>166</sup> He had been arrested numerous

161. *Kılıç* judgment, § 73.

162. *Kılıç* judgment, § 74, with reference to the case of *Incal v. Turkey*.

163. *Kılıç* judgment, § 75.

164. *Kılıç* judgment, § 82. See again the preceding paragraphs in the judgment for more detail of the Court’s reasoning in this regard.

165. *Shanaghan v. the United Kingdom*, judgment of 4 May 2001.

166. See p. 24, footnote 58.

times. His mother, the applicant in the case, claimed that he had been threatened by officers of the Royal Ulster Constabulary (RUC, as the Northern Irish police force was then called) during questioning. Information identifying Patrick Shanaghan as a suspected terrorist, including a photo-montage, had been lost, allegedly by falling off the back of an army lorry, and could have ended up in the hands of the UFF terrorists. At the time of the shooting, most of the local police had been called to a road traffic accident elsewhere, and the authorities claimed that they had difficulties in recalling them by radio. The killers escaped.

An inquest was only opened after four and a half years, but its remit was limited to establishing the immediate cause of death (i.e. a gunshot wound to the chest): it could not examine the wider background to the case or the police and security forces' actions (or inactions). An Assistant Chief Constable, acting under the supervision of the Independent Commission for Police Complaints (the ICPC), carried out an investigation into the conduct of the RUC at the scene of the shooting. As a result of this investigation, the Inspector concerned was given "advice" which was recorded in the Divisional Discipline Book. The Director of Public Prosecutions decided not to prosecute any police officers. A civil court action was started by the applicant against the Chief Constable of the RUC and the Ministry of Defence, but this case was still pending at the time of the Court's judgment.

Before the Court, the applicant alleged that the death of her son was the result of collusion by the security forces with loyalist paramilitaries and that he was the victim of a pattern of killings

whereby persons perceived as IRA members or sympathisers were targeted with the knowledge and involvement of the authorities.<sup>167</sup> The Court held that if these claims were true, "serious issues" would arise. However, for this, "[a] number of key factual issues would ... have to be resolved."<sup>168</sup> The Court was not prepared to carry out such fact-finding of its own while the British courts still had the case under review: no elements had been established which would deprive the civil courts of their ability to establish the facts and determine any misfeasance or negligence on the part of the security forces.<sup>169</sup> Nor could the Court simply rely on the material provided by the parties.<sup>170</sup>

The Court similarly refused to examine, in this case and in three other Northern Irish cases relating to the same period and dealt with by the Court in parallel, whether there had been an administrative practice of collusion between the security services and Loy-

167. NGOs such as Amnesty International, Human Rights Watch and British Irish Rights Watch, as well as the UN Special Rapporteur on the Independence of Judges and Lawyers, had expressed concern about this, in particular in connection with the murder of Patrick Finucane, a Northern Irish lawyer, another case in which collusion was alleged: see *Finucane v. the United Kingdom*, judgment of 1 July 2003. A Government report on the alleged policy had not been made public, although it apparently confirmed some of the suspicions – but the Court refused a request from the applicants to ask the Government to produce this report.

168. *Shanaghan* judgment, § 94.

169. See *Shanaghan* judgment, §§ 95-96, with reference (by contrast) to the cases of *Salman v. Turkey*, where the police officers were acquitted of torture due to the lack of evidence resulting principally from a defective autopsy procedure, and *Gül v. Turkey*, where *inter alia* the forensic investigation at the scene and autopsy procedures hampered any effective reconstruction of events.

170. *Shanaghan* judgment, § 97.

alist paramilitary groups. That “would go far beyond the scope of the present application”, it said (in all four cases).<sup>171</sup>

However, the Court also rejected the Government’s argument that the applicant had not exhausted domestic remedies because the civil case was still pending, because civil proceedings can ultimately only result in the awarding of damages and the obligations under Article 2 cannot be satisfied merely by that.<sup>172</sup> The Court could therefore effectively not (yet) make any specific findings as to whether the substantive requirements of Article 2 had been complied with, and more specifically whether the killing entailed the liability of the State.<sup>173</sup>

Instead, it focused on the procedural requirements of Article 2, and noted a series of shortcomings, summed up by the Court as follows:

171. *Shanaghan* judgment, § 98. The Court repeated the last two passages, quoted above, and this Statement about an administrative practice, verbatim in those three other Northern Irish cases: *Kelly and Others v. the United Kingdom*, judgment of 4 May 2001, §§ 101-104, *Hugh Jordan v. the United Kingdom*, judgment of 4 May 2001, §§ 111-114, *McKerr v. the United Kingdom*, judgment of 4 May 2001, §§ 117-120. The Court had held a hearing into all four cases on 4 April 2000.

172. *Shanaghan* judgment, § 99, with reference to the cases of *Kaya* and *Yaşa*.

173. This contrasts with the case of *Yaşa* in which, as we have seen, the Court held that there had been no violation of the substantive requirements of Article 2. The Court ruled likewise in the three other Northern Irish cases mentioned in footnote 158, above, except as regards one of the families in *Kelly*, which had not pursued their civil action against the State. The Court held that it was precluded from examining that family’s complaint of a substantive violation of Article 2, because they had failed to make use of the available domestic remedies in this respect. However, the Court still did consider their complaints concerning the procedural obligations under Article 2, together with the corresponding complaints in that respect of the other applicants.

- no prompt or effective investigation into the allegations of collusion in the death of Patrick Shanaghan had been shown to have been carried out;
- there had been a lack of independence of the police officers investigating the incident from the security force personnel alleged to have been implicated in collusion with the loyalist paramilitaries who carried out the shooting;
- there was also a lack of public scrutiny, and information to the victim’s family, of the reasons for the decision of the DPP not to prosecute in respect of alleged collusion;
- the scope of examination of the inquest excluded the concerns of collusion by security force personnel in the targeting and killing of Patrick Shanaghan;
- the inquest procedure did not allow for any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which might have been disclosed;
- the non-disclosure of Statements prior to the appearance of the witnesses at the inquest prejudiced the ability of the applicant to participate in the inquest;
- the inquest proceedings did not commence promptly.<sup>174</sup>

It was not for the Court to specify in detail what kind of procedures the authorities should adopt to examine killings involving alleged collusion, nor needed there be “one unified procedure” for this, satisfying all the necessary safeguards. However, in the case at

174. *Shanaghan* judgment, § 122.

hand, “the available procedures have not struck the right balance”: there had been shortcomings in transparency and effectiveness in all the various proceedings (as noted in the above bullet-points). The Court therefore rejected the Government’s claim that even if the police investigation, the inquest, the ICPC investigation and the DPP’s review did not individually meet these procedural requirements, they did so in aggregate, and held that there had been a violation of the procedural requirements of Article 2.<sup>175</sup>

### “Disappearances”

The same approach as was described above is true in cases of “disappearances”, at least as far as the more recent case-law is concerned. In the first case of this kind, *Kurt v. Turkey*,<sup>176</sup> the Court had ruled that, although the applicant’s son, Üzeyir Kurt, had last been seen some four and a half years earlier surrounded by soldiers in a security operation, there was no evidence that he had been tortured or killed; and the case was therefore assessed under Article 5 (the right to freedom from arbitrary arrest and detention) rather than Article 2.<sup>177</sup> The Court found that:

*there [had] been a particularly grave violation of the right to liberty and security of person guaranteed under Article 5 raising serious concerns about the welfare of Üzeyir Kurt.*<sup>178</sup>

175. See *Shanaghan* judgment, §§ 123-125.

176. *Kurt v. Turkey*, Grand Chamber judgment of 25 May 1998.

177. *Kurt* judgment, §§ 107-108.

178. *Kurt* judgment, § 129.

### “Disappearances”

The Court also held that Üzeyir Kurt’s mother (the applicant) had suffered prolonged anguish from knowing that her son had been detained, but with “a complete absence of official information as to his subsequent fate”. It held that she had therefore herself been the victim of a violation of the prohibition on torture, inhuman or degrading treatment or punishment, enshrined in Article 3 of the Convention.<sup>179</sup> However, in a later case, *Çakici v. Turkey*, the Court stressed that “[t]he Kurt case does not ... establish any general principle that a family member of a ‘disappeared person’ is thereby a victim of treatment contrary to Article 3.” Rather, “[w]hether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation.” In that case, it held that the applicant (the “disappeared” person’s brother) had not been so affected.<sup>180</sup>

In subsequent cases, perhaps under the influence of the development of international law in this field, the Court has shown itself more prepared to examine cases in which a person’s whereabouts are unknown following arrest and detention under Article 2, but it remains somewhat cautious about the application of Article 3 to close relatives of the “disappeared”.<sup>181</sup>

In the case of *Ertak v. Turkey*<sup>182</sup> the applicant, İsmail Ertak, claimed that his son, Mehmet Ertak, had been arrested during an

179. *Kurt* judgment, § 134.

180. *Çakici v. Turkey*, judgment of 8 July 1999, §§ 98-99.

identity check on 20 August 1992, while returning home from work with three members of his family. He gave the names of eye-witnesses who had stated that they had seen his son while he was in police custody, and who reported that Mehmet had been tortured. One detainee, a lawyer, reported that Mehmet Ertak had been brought to his cell after torture, apparently dead, and was then dragged out of the cell. He never saw him again. The authorities denied that he had been arrested and said that his name was not included in the relevant custody registers.

Delegates from the Commission interviewed witnesses for the applicant and the authorities in Turkey. At the end, they concluded that Mehmet Ertak had been arrested. They noted that the name of another person, who was indisputably arrested, was also not on the register. The authorities moreover had not produced copies of the custody registers, despite being expressly requested to do so. A statement that a witness had given to the prosecutor, about important matters relating to the detention of Mehmet Ertak, had not been included in the file provided to the Commission. The Court found, on the basis of this and other evidence that:

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181. The issue was not raised in the case of *Ertak v. Turkey*, discussed next in the text, but in the case of *Timurtaş v. Turkey*, discussed after *Ertak*, the Court again did find that the applicant (the “disappeared” person’s father) had suffered such treatment, *inter alia* because “certain members of the security forces also displayed a callous disregard for the applicant’s concerns by denying, to the applicant’s face and contrary to the truth, that his son had been taken into custody.” (*Timurtaş v. Turkey*, § 97).
182. *Ertak v. Turkey*, judgment of 9 May 2000.

*there is sufficient evidence to conclude beyond reasonable doubt that, after being arrested and taken into custody, Mehmet Ertak was subjected to severe and unacknowledged ill-treatment and died while in the custody of the security forces. This case must therefore be distinguished from the Kurt case [...], in which the Court examined the applicant’s complaints about the disappearance of her son under Article 5. In the Kurt case, although the applicant’s son had been taken into custody, there was no other evidence of the treatment to which he had been subjected thereafter or his subsequent fate.*

*Stressing that the authorities are under an obligation to account for individuals under their control, the Court observes that no explanation has been offered as to what occurred after Mehmet Ertak’s arrest.*

*Accordingly, it considers that in the circumstances of the case the Government bore responsibility for Mehmet Ertak’s death, which was caused by agents of the State after his arrest; there has therefore been a violation of Article 2 on that account.*<sup>183</sup>

The Court next examined whether the procedural requirement of Article 2 had been met, under which, as we have seen, an effective, independent investigation must take place into killings, and alleged killings, by State officials (or in any case in which a person dies while in the custody of the State). The Court ruled that this requirement also applies to cases such as *Ertak*, in which the death

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183. *Ertak* judgment, §§ 131-133.

of the victim could only be inferred.<sup>184</sup> It agreed with the Commission's finding that:

*the investigation at national level into the applicant's allegations had not been conducted by independent bodies, had not been thorough and had been carried out without the applicant being given an opportunity to take part.*<sup>185</sup>

Noting a series of defects in the investigation, the Court concluded that:

*the respondent State failed to fulfil its obligation to conduct an adequate and effective investigation into the circumstances of the applicant's son's disappearance. There has therefore been a violation of Article 2 on that account also.*<sup>186</sup>

In the case of *Timurtaş v. Turkey*,<sup>187</sup> six and a half years had passed since the applicant's son, Abdulvahap Timurtaş, had been apprehended by gendarmes and taken into detention, without information as to his subsequent whereabouts or fate. The Commission was again faced with serious obstacles to its fact-finding mission: five out of the eleven witnesses they wanted to interview, including a prosecutor, did not attend, and the Government did not produce all the evidence requested. Because of these problems, the Commission formally found a violation of Article 28 (1) (a) (now Article 38 (1) (a)) of the Convention, holding that the Government had not properly co-operated with its investigation.<sup>188</sup> This

lack of cooperation clearly also counted against the Government in the Court's judgment.<sup>189</sup> The Commission was also:

*disturbed by the number of anomalies [the custody registers] were found to contain, and it noted that it had previously had occasion to doubt the accuracy of custody registers submitted in other cases involving events in south-east Turkey. In the light of the anomalies found in the registers in the present case, the Commission concluded that these ledgers could not be relied upon to prove that Abdulvahap Timurtaş had not been taken into detention.*<sup>190</sup>

In its judgment, the Court discussed the similar, though not identical, approaches to cases of alleged "disappearances" under Articles 3, 5 and 2 of the Convention:

*The Court has previously held that where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which an issue arises under Article 3 of the Convention [...]. In the same vein, Article 5 imposes an obligation on the State to account for the whereabouts of any person taken into detention and who has thus been placed under the control of the authorities [...]. **Whether the failure on the part of the authorities to provide a plausible explanation as to a detainee's fate, in the***

184. *Ertak* judgment, § 135.

185. *Ertak* judgment, § 135.

186. *Ertak v. Turkey* judgment, § 135, with reference to paragraphs 92, 93 and 121.

187. *Timurtaş v. Turkey*, judgment of 13 June 2000.

188. *Timurtaş* judgment, § 39.

189. *Timurtaş* judgment, §§ 63-70.

190. *Timurtaş* judgment, § 44.



***absence of a body, might also raise issues under Article 2 of the Convention will depend on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody [...].***<sup>191</sup>

In the case at hand, the period since Abdulvahap Timurtaş' detention had been six and a half years; it had been established that he was taken to a place of detention by authorities for whom the State is responsible; and he had been wanted by the authorities for his alleged PKK activities.<sup>192</sup> Moreover, in the view of the Court:

*In the general context of the situation in south-east Turkey in 1993, it can by no means be excluded that an unacknowledged detention of such a person would be life-threatening.*<sup>193</sup>

The Court was therefore satisfied that Abdulvahap Timurtaş should be presumed dead following an unacknowledged detention by the security forces. Consequently, the responsibility of the respondent State for his death was engaged. Since the authorities had not provided any explanation or justification for the killing, the death was attributable to the State, and there had been a violation of the substantive requirements of Article 2.<sup>194</sup>

Particularly notable is the fact that the Court was willing, in this case, to assess the likelihood of the victim's death in the light of the

general context of the situation in South-East Turkey at the time. This brings the Court's case-law closer to the case-law of the Inter-American Court of Human Rights, to which the Court's attention had been explicitly drawn by means of an *amicus curiae* brief from the Center for Justice and International Law (CEJIL), a non-governmental human rights organisation in the Americas.<sup>195</sup>

The Court agreed with the Commission that the investigation into Abdulvahap Timurtaş' "disappearance" had been:

*dilatory, perfunctory, superficial and not constituting a serious attempt to find out what had happened to the applicant's son.*<sup>196</sup>

No enquiries were made of the gendarmes for two years, and there was no evidence to suggest that the prosecutors concerned made any attempt to inspect custody ledgers or places of detention for themselves, or asked the gendarmes to account for their actions on the day of his detention. There had therefore also been a violation of the procedural requirements of Article 2.<sup>197</sup> As the Court noted:

*The lethargy displayed by the investigating authorities poignantly bears out the importance of the prompt judicial intervention required by Article 5 §§ 3 and 4 of the Convention which, as the Court emphasised in the Kurt case, may lead to the detection and prevention of life-threatening measures in violation of the fundamental guarantees contained in Article 2 [...].*<sup>198</sup>

191. *Timurtaş* judgment, § 82, emphasis added, references to other cases omitted.

192. See *Timurtaş* judgment, § 85.

193. *Timurtaş* judgment, § 85.

194. See *Timurtaş* judgment, §§ 81-86.

195. See *Timurtaş v. Turkey* judgment, §§ 79-80.

196. *Timurtaş* judgment, § 88.

197. See *Timurtaş* judgment, §§ 89-90.

198. *Timurtaş* judgment, § 90.



## Article 2 and the use of force in international armed conflict

In the previous sub-sections, we have discussed a number of cases concerning situations of internal armed conflict – that is, of armed conflict taking place within the borders of a State Party to the Convention: Northern Ireland, South-East Turkey, Chechnya. The question arises whether, and if so how and to what extent, the Convention, and more in particular Article 2 of the Convention, applies to situations of international armed conflict.

There are two issues to be considered. First, the question of the applicability of Article 2 to such situations per se. And secondly, the question of the territorial scope of the Convention.

The first question is, up to a point, answered by the Convention itself. It says, in Article 15 (2), that, even in times of war, no derogation may be made from Article 2, “except in respect of deaths resulting from lawful acts of war”. The reference to “deaths resulting from lawful acts of war” is a straightforward reference to the norms of international humanitarian law. This means that acts resulting in loss of lives, committed during times of war, and which contravene international humanitarian law, are *ipso facto* also violations of Article 2. Conversely, killings in times of war which are in accordance with international law are not in violation of the Convention. The Convention and the standards derived from international humanitarian law are thus, in this respect, fully congruent.

*Article 2 and the use of force in international armed conflict*

This is not the place to discuss international humanitarian law in any depth. Suffice it to note that, as the International Court of Justice, has said:

*The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.<sup>199</sup>*

Although there has, as yet, been no specific case-law on this, these principles chime well with the general principles established by the European Court of Human Rights in the cases of internal armed conflict, discussed earlier. Specifically, it may be recalled that the latter Court has ruled that the use of indiscriminate weapons such as heavy free-falling high-explosion aviation bombs in a populated area, “outside wartime” and without prior evacuation of civilians, “is impossible to reconcile with the degree of

199. Advisory Opinion of the International Court of Justice of 8 July 1996 on the legality of nuclear weapons, § 78. See also the reference to the “Martens clause” in § 79.

caution expected from a law-enforcement body in a democratic society;” that, in situations of (internal) armed conflict, arrangements must be made to evacuate civilians, and especially the vulnerable and infirm, by the creation of safe escape routes, and the informing of the civilian population of these measures, whenever possible; and that when there are civilians in an area of conflict, the authorities must exercise “extreme caution” in the use of lethal force.<sup>200</sup> These principles reflect international humanitarian law as much as Convention law. One may conclude, if perhaps only tentatively, that, to the extent that the Convention does apply in situations of international armed conflict, these principles retain their force, and can be applied by the Court.

The second question remains, however, as to the territorial application of the Convention. The case-law in this respect is not yet fully settled. It hinges on the stipulation in Article 1 of the Convention that:

*The high Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I [i.e. Articles 2-18] of this Convention.*

In the cases of *Loizidou v. Turkey*<sup>201</sup> and *Cyprus v. Turkey*,<sup>202</sup> the Court held that, as a consequence of Turkey’s military intervention in northern Cyprus and the establishment of a subordinate administration there, the population had been brought within the

“jurisdiction” of Turkey, and Turkey was therefore responsible under the Convention both for its actions in northern Cyprus, and for the actions of that administration.

However, the Court qualified this approach in the case of *Banković v. 17 NATO countries*.<sup>203</sup> The case concerned the bombing by NATO aircraft of the Serbian Radio and Television station in Belgrade in 1999, which caused the death of 16 civilians and injured 16 others. The bombing took place in the context of action by NATO countries which, they claimed, was aimed at securing compliance by the Federal Republic of Yugoslavia, as it then was, with the demands of the international community relating to the treatment by the Federal Republic of Yugoslavia of Kosovo Albanians. At the time, the Federal Republic of Yugoslavia was not a party to the European Convention on Human Rights, but all the NATO countries concerned were. Here, the Court ruled that

*from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. ... The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.*<sup>204</sup>

200. See the sub-section on “Assessing compliance with the substantive requirements of Article 2”, above, p. 28.

201. *Loizidou v. Turkey (Preliminary Objections)*, judgment of 23 February 1995.

202. *Cyprus v. Turkey*, judgment of 10 May 2001.

203. Grand Chamber admissibility decision of 12 December 2001 on Appl. No. 52207/99 by *Vlastimir and Borka Banković and others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*.

Central to the “exceptional” application of the Convention in *Loizidou* and in the *Cyprus v. Turkey* case had been the fact that, in those cases:

*the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercis[e] all or some of the public powers normally to be exercised by that Government.*<sup>205</sup>

Furthermore:

*the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention,<sup>206</sup> in an essentially regional context and notably in the legal space (espace juridique) of the Contracting States. The Federal Republic of Yugoslavia clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights’ protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for*

204. *Banković*, admissibility decision, §§ 60-61. The Court felt that this view was supported by State practice and by the *travaux préparatoires*: see §§ 62-63.

205. *Banković*, admissibility decision, § 71.

206. Article 56 § 1 enables a Contracting State to declare that the Convention shall extend to all or any of the territories for whose international relations that State is responsible. [original footnote]

*the specific circumstances, would normally be covered by the Convention.*<sup>207</sup>

The Convention can thus be applied to extra-territorial actions by a State Party, if those actions take place in an area over which the State-Party assumes “effective control”, e.g. as a result of military action, in particular when the territory in question was already covered by the Convention before this “effective control” by the State Party just mentioned, i.e. if one Council of Europe member State asserts effective control over a piece of territory previously controlled by another member State. Air strikes on targets outside the Council of Europe/Convention area do not fall within this category. But the decision is ambiguous as to the applicability of the Convention in situations in which a State-Party assumes “effective control” over an area outside the *espace juridique* of the Convention: the Court says that the Convention is “essentially” regional and operates “notably” in this *espace juridique*, and notes that “so far” it has only been relied on in cases in which the territory in question would normally already be covered by the Convention. But those caveats clearly left the Court the freedom to extend the application of the Convention again if it felt there was another “exceptional basis of jurisdiction”, and if there was further “special justification in the particular circumstances” of the case.

Some recent judgments suggest that the Court is indeed willing, in special cases, to extend the territorial application of the Convention to actions by State-Parties outside the European *espace juri-*

207. *Banković*, admissibility decision, § 80.

dique. In the case of *Issa and Others v. Turkey*,<sup>208</sup> seven shepherds had been killed by the Turkish army operating over its border in Northern Iraq. Here, the Court ruled – without expressly mentioning the notion of *espace juridique* at all – that:

*According to the relevant principles of international law, a State's responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – that State in practice exercises effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration [...].*

*It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned [...].*

*Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State [...]. Accountability in such situations stems from the fact that*

*Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory [...].*<sup>209</sup>

It is notable that the Court, in the final paragraph quoted above, referred expressly, not just to some of its own case-law, but also to the Inter-American Commission case of *Coard et al. v. the United States*<sup>210</sup> and to the views adopted by the Human Rights Committee in the cases of *Lopez Burgos v. Uruguay* and *Celeberti de Casariego v. Uruguay*;<sup>211</sup> these all tend to take a broader view of the territorial scope of the relevant instruments than the Court appeared to do in *Banković*.

In *Issa*, the Court found that there was insufficient evidence to establish that the Turkish troops had been responsible for the deaths of the applicants' relatives. However, on the point of law relating to the question of “jurisdiction”, the Court clearly ruled that actions taken in the context of military excursions beyond the European *espace juridique* do entail the responsibility of the relevant State, if that State exercises “temporarily, effectively overall control” of a defined area outside that space.

209. *Issa* judgment, §§ 69-71, references to other cases omitted (but see the comment in the text and the next two footnotes relating to that comment).

210. *Coard et al. v. the United States*, Inter-American Commission of Human Rights decision of 29 September 1999.

211. *López Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*, HR Ctee nos. 52/1979 and 56/1979.

208. *Issa and others v. Turkey*, judgment of 16 November 2004.

## The duty to protect life in other circumstances

### Duties of the State in relation to life-threatening environmental risks

There have been a number of cases relating to environmental matters allegedly directly affecting individual rights protected by the Convention, including the right to life. However, applicants in such cases have also raised other rights in this regard, and the Commission and Court have sometimes dealt with the issues under Article 2, and sometimes (also) under other articles. Indeed, in the first main case in which the right to life was expressly invoked before the organs of the Convention, *Guerra v. Italy*,<sup>212</sup> outlined below, the Commission and Court took fundamentally different views on the articles to be applied. However, subsequent cases, and in particular the case of *Öneryıldız v. Turkey*,<sup>213</sup> also further discussed below, make clear that the reasoning under some of these articles (in particular, Articles 2 and 8) is, in effect, identical.

The *Guerra* case was brought by a number of applicants who lived in Manfredonia, close to a factory which released large quantities

of toxic substances. They had been subjected to this pollution generally, because emissions from the factory were often channelled towards their homes, but in addition, there had been a serious accident in which several tonnes of dangerous gasses had escaped. Some 150 people had had to be committed to hospital on that occasion, because of acute arsenic poisoning.

The Commission admitted the case only in respect of Article 10, and held by a majority that under that article, the applicants, who lived in a high-risk area, had a right to receive “adequate information on issues concerning the protection of their environment”. Since they had not received such information, Article 10 had been violated.<sup>214</sup> However, the Court disagreed. It reiterated its observation in the *Leander* judgment that freedom to receive information under the second paragraph of that article “basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him”,<sup>215</sup> and held that:

*That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.*<sup>216</sup>

212. *Guerra and others v. Italy*, judgment of 19 February 1998. An earlier case, *López Ostra v. Spain*, judgment of 24 November 1994, concerning nuisance caused by a waste-treatment plant situated a few metres away from the applicant’s home, was argued and decided under Articles 8 and 3 of the Convention only, without reference to Article 2 in the Strasbourg proceedings (although the right to life had been invoked in the domestic proceedings).

213. *Öneryıldız v. Turkey*, Grand Chamber judgment of 30 November 2004 (the Chamber judgment reviewed by the Grand Chamber was issued on 18 June 2002).

214. *Guerra*, Commission Report of 25 June 1996. Two dissenting members of the Commission felt that the case should have been considered under Article 8.

215. *Guerra* judgment, § 53, quoting *Leander v. Sweden*, judgment of 26 March 1987, § 74.

However, applying the principle *jura novit curia*, the Court held that it had jurisdiction to examine the case under Articles 8 and 2 of the Convention as well as under Article 10. It focused on the former of these two and held that that article may impose positive obligations. Specifically, it needed to be ascertained “whether the national authorities took the necessary steps to ensure effective protection of the applicants’ right to respect for their private and family life as guaranteed by Article 8”.<sup>217</sup> Having examined the facts, it concluded that the State had not properly provided the applicants with “essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia”. There had therefore been a violation of Article 8.<sup>218</sup> The Court went on to hold that:

*Having regard to its conclusion that there has been a violation of Article 8, the Court finds it unnecessary to consider the case under Article 2 also.*<sup>219</sup>

The crucial point for the present handbook is, however, that questions of serious pollution and lack of information about pollution that may harm, or even kill, people raises issues under the Convention – even if the specific articles under which these matters may be addressed may differ from case to case. As the Court noted:

216. *Guerra* judgment, § 53.

217. *Idem*, with reference to the *López Ostra v. Spain* judgment of 9 December 1994.

218. *Guerra* judgment, § 60.

219. *Guerra* judgment, § 62.

*Of particular relevance among the various Council of Europe documents in the field under consideration in the present case is Parliamentary Assembly Resolution 1087 (1996) on the consequences of the Chernobyl disaster, which was adopted on 26 April 1996 (at the 16th Sitting). Referring not only to the risks associated with the production and use of nuclear energy in the civil sector but also to other matters, it States “public access to clear and full information [on such risks] ... must be viewed as a basic human right”.*<sup>220</sup>

That Article 2 can be engaged in such cases was confirmed by the Court in a case later in the same year, *L.C.B. v. the United Kingdom*.<sup>221</sup> The case was brought by the daughter of a man who had been in the British Air Force in the 1950s, and who had been exposed to radiation caused by nuclear tests carried out in 1957 and 1958. The daughter, who was born in 1966, was diagnosed as having leukaemia in about 1970. She had to undergo extensive treatment, and her life was seriously affected by her illness.<sup>222</sup> She considered that her father’s exposure to radiation was the probable cause of her childhood leukaemia:

220. *Guerra* judgment, § 34.

221. *L.C.B. v. the United Kingdom*, judgment of 9 June 1998. See also the case of *Önerıldız v. Turkey*, discussed next. Note however that environmental issues can still also be addressed under different articles of the Convention: cf. the case of *Taskin and others v. Turkey*, judgment of 10 November 2004, in which the Court found violations of Articles 8 and 6 of the Convention in relation to dangerous pollution caused by a gold mine, but in which it held that it was “unnecessary” to examine the case under Articles 2 and 13.

222. See *L.C.B.* judgment, §§ 12-16.

*The applicant complained ... that the respondent State's failure to warn and advise her parents or monitor her health prior to her diagnosis with leukaemia in October 1970 had given rise to a violation of Article 2 of the Convention.*<sup>223</sup>

This time (unlike in *Guerra*), the Court did assess the issue first and foremost under that article. In order to assess whether the State had taken “appropriate steps to safeguard the lives of those within its jurisdiction”, the Court addressed three distinct, but closely linked, questions in succession: first, whether the British authorities knew, or should have known, that the applicant’s father had been exposed to dangerous levels of radiation; second, whether, if this was the case, the authorities should have given specific information and advice to the applicant’s parents, and should have monitored the health of the applicant herself; and third, whether such advice and monitoring would have led to early diagnosis and more effective early treatment. The applicant’s claims were rejected on all three counts: it held that the authorities could reasonably have believed, at the time, that the applicant’s father had not been dangerously irradiated;<sup>224</sup> that it had not been estab-

223. *L.C.B.* judgment, § 36. The applicant also alleged a violation of Article 3, but this was not a major issue in the Court’s judgment: see § 28 of the judgment and footnote 228, below. In addition, the applicant submitted that service personnel had been deliberately lined up and exposed to radiation for experimental purposes, and that her father’s exposure to radiation had been unmonitored, but the Court held that it could not consider these claims because of declarations made by the United Kingdom which limited the temporal jurisdiction of the Court (§ 35; for the declarations themselves, see § 20). The applicant also claimed to have been subjected to harassment and surveillance, in breach of Article 8, but this too played no further part in the judgment.

lished that there was a causal link between the exposure of a father to radiation and leukaemia in a child subsequently conceived;<sup>225</sup> and that they could therefore not have been expected to notify her parents of these matters of their own motion, or to take any other special action in relation to her.<sup>226</sup> There had therefore not been a violation of Article 2 in respect of the applicant,<sup>227</sup> nor of Article 3,<sup>228</sup> and “no separate issue” arose under Article 8.<sup>229</sup>

In the 2004 case of *Öneryıldız v. Turkey*,<sup>230</sup> the Court separately examined the two aspects of Article 2, substance and procedure, in relation to life-threatening environmental issues, and clearly set out the general principles to be applied to each of these. In the first context, the Court stressed the importance of information to be provided to the public and affected individuals about environmental hazards. The Court gave notable emphasis to various Council of Europe conventions and recommendations in this field.

The case was brought by the head of a family that had lived in slum dwellings next to a municipal rubbish tip in Ümraniye in Istanbul.<sup>231</sup> In 1991, an expert report found that the tip contravened the relevant regulations and posed a major health risk for

224. *L.C.B.* judgment, § 37.

225. *L.C.B.* judgment, § 39.

226. *L.C.B.* judgment, § 41.

227. *L.C.B.* judgment, para 41.

228. *L.C.B.* judgment, § 43, simply cross-referring to the analysis under Article 2.

229. *L.C.B.* judgment, § 46.

230. *Öneryıldız v. Turkey*, Grand Chamber judgment of 30 November 2004 (the Chamber judgment reviewed by the Grand Chamber was issued on 18 June 2002).



the inhabitants of the valley, particularly those living in the slum areas. These dangers included a risk of contagious diseases and also, in particular, a risk of explosion of methane gas formed in the tip.<sup>232</sup> The City Council opposed requests from the local mayor seeking an injunction to close the tip and to order redress, but made moves aimed at the development of new sites conforming to modern standards, which were due to open some time in 1993.<sup>233</sup> However, on 28 April 1993 at about 11 a.m. a methane explosion occurred at the site, setting off a landslide. Refuse from the mountain of waste engulfed some ten slum dwellings situated below it, including the one belonging to the applicant. Thirty-nine people died in the accident, including the applicant's wife, his concubine and seven of his ten children.<sup>234</sup>

An investigation was carried out, which identified the officials responsible, and two mayors were prosecuted – but only for “negligence in the performance of their duties”, and not for culpable deaths. In the end, they were only fined the legally minimal sum for that offence of less than 10 euros, and even that penalty was

231. Initially, the case had been brought also by a Mr Çınar, but the latter's case had been disjoined from Mr Öneriyıldız's case (judgment, § 3). Mr Öneriyıldız, technically the sole remaining applicant, acted not only on his own behalf, but also on behalf of his three surviving sons, Hüsamettin, Ayfın and Halef Öneriyıldız, who were minors at the time, and also on behalf of his relatives and relations, killed in the accident at the centre of the case: his wife, Gülnaz Öneriyıldız, his concubine, Sıdıka Zorlu, and his children, Selahattin, İdris, Mesut, Fatma, Zeynep, Remziye and Abdülkerim Öneriyıldız (*idem*).

232. *Öneriyıldız* GC judgment, § 13.

233. *Öneriyıldız* GC judgment, § 16.

234. Cf. *Öneriyıldız* GC judgment, § 18.

suspended. The applicant and his surviving children were awarded compensation of some 2,285 euros, but this sum was never actually paid to him.<sup>235</sup>

In terms of substance, the applicant submitted that the national authorities were responsible for the deaths of his close relatives and for the destruction of his property as a result of the April 1993 methane explosion at the rubbish tip.

The Court reiterated that Article 2 lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction, adding that:

*this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites.*<sup>236</sup>

The Court went on to set out the substantive principles applicable in such cases – i.e. the principles relating to the **prevention** of death as a result of dangerous activities – in the following terms:

*The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 [...] entails above all a primary duty on the State to put in place a **legislative and administrative framework** designed to provide effective deterrence against threats to the right to life [...].*

235. See section D, §§ 19-43, of the *Öneriyıldız* GC judgment for details of the various proceedings.



*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.*

*Among these preventive measures, particular emphasis should be placed on the public's right to information, as established in the case-law of the Convention institutions. The Grand Chamber agrees with the Chamber [...] that this right, which has already been recognised under Article 8 [...], may also, in principle, be relied on for the protection of the right to life, par-*

236. *Öneryıldız* GC judgment, § 71, with reference to the cases of *L.C.B.* (discussed earlier, p. 60 ff.) and *Paul and Audrey Edwards* (discussed below, p. 70 ff.). On the question of "dangerous activities", the Court adds a reference, in brackets, to the European standards it noted earlier, i.e.: PACE Resolutions 587 (1975) on problems connected with the disposal of urban and industrial waste, and 1087 (1996) on the consequences of the Chernobyl disaster, PACE Recommendation 1225 (1993) on the management, treatment, recycling and marketing of waste, Committee of Ministers Recommendation R (96) 12 on the distribution of powers and responsibilities between central authorities and local and regional authorities with regard to the environment, the 1993 Lugano Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, the 1998 Strasbourg Convention on the Protection of the Environment through Criminal Law, the Council of the European Union's Framework Decision no. 2003/80 of 27 January 2003 and the European Commission's proposal of 13 March 2001, amended on 30 September 2002, for a directive on the protection of the environment through criminal law (see §§ 59 and 60 of the judgment).

*ticularly as this interpretation is supported by current developments in European standards [...].*

*In any event, the relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels.<sup>237</sup>*

As the last sentence in the above quotation already notes, in addition to the substantive matters, there are also important **procedural** requirements in this regard. The Court summed up these requirements as follows:

*... 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 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*

237. *Öneryıldız* GC judgment, §§ 89-90, emphasis added, references in brackets to other cases, to paragraphs in the Chamber judgment and to other paragraphs in the GC judgment omitted as indicated.

*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.*

*It should in no way be inferred from the foregoing that Article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence [...] or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence [...].*

*On the other hand, 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 [...]. The Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined.<sup>238</sup>*

Applying these principles to the case at hand, the Court found that the Turkish authorities at several levels knew or ought to have

known that there was a real and immediate risk to the life and health of people living near the rubbish tip, but had either failed to take appropriate action, or even opposed the adoption of the necessary urgent measures.<sup>239</sup> The respondent Government could not invoke against this the fact that it had been formally illegal for the applicant to live where he did, because the authorities let the applicant and his close relatives live entirely undisturbed in their house for the period in question, levied council tax on him and on the other inhabitants of the slums and provided them with public services, for which they were charged.<sup>240</sup>

Although the State enjoys a wide margin of appreciation in this respect,<sup>241</sup> the State's responsibility had been engaged in several respects: the regulatory framework had proved defective, in that the site was opened and operated despite not conforming to the relevant technical standards; and there was no coherent supervisory system. The situation was furthermore exacerbated by a general policy which proved powerless in dealing with general town-planning issues and created uncertainty as to the application of statutory measures. The State officials and authorities did not do everything within their power to protect the applicant and his

238. *Öneryıldız* GC judgment, §§ 94-96. See also the preceding paragraphs. References in brackets to other cases and to other paragraphs in the judgment omitted as indicated.

239. *Öneryıldız* GC judgment, §§ 97-103.

240. *Öneryıldız* GC judgment, §§ 105-106. In this, the Court distinguished the case from *Chapman v. the United Kingdom*, Grand Chamber judgment of 18 January 2001, in which the British authorities were not found to have remained passive in the face of the applicant's unlawful actions.

241. *Öneryıldız* GC judgment, § 107.

family from the immediate and known risks to which they were exposed. There had therefore been a violation of Article 2 of the Convention in its substantive aspect.<sup>242</sup>

On the procedural side, the criminal-law procedures in Turkey in theory appeared sufficient to protect the right to life in relation to dangerous activities.<sup>243</sup> The investigative authorities had acted “with exemplary promptness”, had been diligent, and had identified those responsible for the events.<sup>244</sup> However, the scope of the criminal proceedings had been too limited: the criminal judgment had been limited to “negligence in the performance of [the official’s] duties”, without any acknowledgment of any responsibility for failing to protect the right to life. In spite of the extremely serious consequences of the accident; the persons held responsible were ultimately sentenced to “derisory fines, which were, moreover, suspended.”<sup>245</sup>

242. *Öneryıldız* GC judgment, §§ 109-110.

243. *Öneryıldız* GC judgment, § 112.

244. *Öneryıldız* GC judgment, §§ 113-114. The Court nevertheless had doubts about the administrative bodies of investigation “whose independence has already been challenged in a number of cases before the Court” (see in particular the *Güleç v. Turkey* and *Oğur v. Turkey* judgments, referred to in § 72 of the *Kilic v. Turkey* judgment, discussed earlier). They had the power to institute criminal proceedings, but in the *Öneryıldız* case only partly endorsed the public prosecutor’s submissions “for reasons which elude the Court and which the Government have never attempted to explain”. However, the Court felt that there was “no need to dwell on those shortcomings, seeing that criminal proceedings were nonetheless instituted”. (§ 115, with reference to other cases in which the Court criticised such bodies).

245. *Öneryıldız* GC judgment, §§ 116-117.

*In short, it must be concluded in the instant case that there has been a violation of Article 2 of the Convention in its procedural aspect also, on account of the lack, in connection with a fatal accident provoked by the operation of a dangerous activity, of adequate protection “by law” safeguarding the right to life and deterring similar life-endangering conduct in future.*<sup>246</sup>

The case is a salutary warning to States with weak systems of environmental regulation, planning or control. Failure to adopt regulations on environmental matters such as rubbish tips that conform to European standards could mean that the State in question fails to protect the right to life “by law”, as required by Article 2. But merely adopting regulations in conformity with the European standards does not suffice to meet the requirements of the Convention. A failure to apply such regulations strictly in practice, a failure to provide affected populations with adequate information on the risks, and/or a failure to hold those responsible seriously to account – also, for cases of serious dereliction of duty, by means of criminal prosecutions resulting in exemplary punishment – can all lead to findings of a violation of Article 2 (or, in lesser cases, Article 8) of the Convention, and to the awarding of substantial damages against victims. In serious cases, the number of victims could furthermore be substantial. Most importantly, these principles should be applied, directly or at least effectively, by the domestic courts in States that are Party to the Convention.

246. *Öneryıldız* GC judgment, §§ 116-118.

## Protection of individuals from violence by others

There have been a number of cases in which relatives of people killed by other private persons, and people nearly killed by other private persons themselves, claimed that the State ought to have protected the victims, but failed to do so. These cases too hinged crucially on matters both of law and evidence, substance and procedure.

The case of *Osman v. the United Kingdom*<sup>247</sup> concerned the killing of two people, including the father of a schoolboy, Ahmet Osman, by a teacher who had become obsessed by the boy. The teacher, Mr Paget-Lewis, had a history of such infatuations. There had moreover been a series of increasingly serious incidents involving the teacher, who had been suspended following a psychiatric evaluation. After the killings, he was convicted of two charges of manslaughter, having pleaded guilty on grounds of diminished responsibility. He was sentenced to be detained in a secure mental hospital without limit of time.

The case concerned the question of whether the authorities could and should have done more to protect the victims. The boy and his mother claimed that the police had been informed of all the relevant facts from early on, and had promised to protect them, but had failed to do so. The police denied that they had made such a promise, and claimed that they never had enough evidence against the teacher to arrest him prior to the killings. An inquest was held, but since someone had been convicted of the killings,

247. *Osman v. the United Kingdom*, GC judgment of 28 October 1998.

this was a summary procedure only, which did not seek to establish the full facts, in particular as concerns the actions or inactions of the police.<sup>248</sup> Mrs Osman and Ahmet therefore instituted civil proceedings against the police for failing to take adequate steps to protect Ahmet and his father, but these proceedings were dismissed by the British courts, which ruled, with reference to legal precedents, that, for public interest reasons, the police was exempt from liability for negligence in the investigation and suppression of crime.<sup>249</sup>

The Commission, seeking to elucidate the facts itself, found that that the police had been made aware of the substance of the events and of the school's concerns about the teacher but that the claim that the police had promised protection to the victims' families had not been substantiated.<sup>250</sup> In essence, the Commission felt that it had not been shown that the police could or should have been aware of the seriousness of the threat posed by the teacher, and that there had therefore not been a violation of Article 2 of the Convention.<sup>251</sup> However, it held that there had been a violation of Article 6, in that the applicants had been denied access to a court in respect of the substance of their claim by the legal rule that the

248. *Osman* GC judgment, § 60.

249. *Osman* GC judgment, §§ 63-66. The Government argued that the rule exempting the police from liability ("the exclusionary rule") was not absolute, but the Court did not accept that argument (§ 152). The Court also did not accept that there were alternative routes through which the applicants could have secured compensation (§ 153).

250. Cf. *Osman* GC judgment, §§ 68, 70-71.

251. See § 111 of the *Osman* GC judgment.

police could not be sued for negligence in the performance of their official task.

The Court (in a Grand Chamber judgment) essentially confirmed the Commission's opinion. It stressed "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" and "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." The positive obligations flowing from Article 2 of the Convention should, in a policing context, be "interpreted in a way which does not impose an impossible or disproportionate burden on the authorities". The Court went on to say:

*In the opinion of the Court, where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person [...], it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The*

*Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life [...]. Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 [...]. For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.<sup>252</sup>*

In the case, the Court found that the applicants had failed to show that the authorities knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis, or had enough evidence to either charge him or have him committed to a psychiatric hospital. They could not be criticised for relying on the presumption of innocence, or for failing to use powers of arrest and detention where there was such insufficient

252. *Osman* GC judgment, §§ 115-116, cross-references to earlier paragraphs and other case omitted.

evidence. There was therefore no violation of Article 2,<sup>253</sup> or of Article 8.<sup>254</sup>

However, the absence of any judicial examination of the issues at the national level did raise issues under the Convention, which the Court, like the Commission, addressed under Article 6, rather than under the so-called “procedural aspect” or “limb” of Article 2, discussed in more detail in the previous section.<sup>255</sup> The Court accepted that the exclusionary rule served a legitimate purpose, i.e. the maintenance of the effectiveness of the police service and hence to the prevention of disorder or crime.<sup>256</sup> However, the complete exclusion of any possibility of civil action against the police – “blanket immunity” – was disproportionate to this legitimate aim:

*[The applicants] may or may not have failed to convince the domestic court that the police were negligent in the circumstances. However, they were entitled to have the police account for their actions and omissions in adversarial proceedings.*<sup>257</sup>

There had therefore been a violation of Article 6.

The Court’s reasoning under Article 6 is set out above because the issue of holding the police to account for any alleged failings in a murder investigation is closely linked to the requirement that

there must be such an investigation in the first place. The requirements of the Convention in the latter respect again (as for in cases of killings by agents of the State, etc., as discussed in the previous section) derive from Article 2 itself. They are set out concisely in the case of *Menson v. the United Kingdom*.<sup>258</sup> Michael Menson was a mentally disturbed black man, who had been attacked and set on fire by a gang of white youths in a racist attack in London in January 1997. He died in hospital two weeks later. The police initially ignored signs that he had been a victim of an attack and assumed he set fire to himself. They failed to take proper post-incident measures to secure evidence and did not take a Statement from him in hospital, although he had been able to describe the attack in detail to his relatives. The applicants – all siblings of the deceased – claimed that the investigations had been affected by racism within the London Metropolitan Police Service. They complained to the Police Complaints Authority, which, after investigating the matter, confirmed that there was independent evidence to support the applicants’ claims. The file was ultimately passed on to the Crown Prosecution Service, but a decision on whether to bring charges against individual police officers for criminal offences relating to the investigation had still not been taken by the time the Court dealt with the applicants’ complaint, in 2003.<sup>259</sup>

253. *Osman* GC judgment, §§ 121-122.

254. *Osman* GC judgment, § 128; cf. also § 129.

255. Cf. § 123 of the *Osman* GC judgment. The Court held that issues under Article 13 (the right to a remedy) were also absorbed by the issues under Article 6: see § 158.

256. *Osman* GC judgment, § 150.

257. *Osman* GC judgment, § 153.

258. *Alex Menson and others v. the United Kingdom*, Appl. No. 47916/99, admissibility decision of 6 May 2003.

259. For details, see pp. 1-9 of the decision in *Menson*. Shortly after the Court’s decision, the Crown Prosecution Service decided that there was insufficient evidence to charge any police officers, although disciplinary charges were still being considered: *BBC News*, Friday, 16 May 2003.

The applicants claimed violations of Articles 2, 6, 8, 13 and 14 of the Convention. The Court declared the case “manifestly ill-founded”, and hence inadmissible, on all counts – mainly because, in the end, the perpetrators of the crime had been convicted and severely punished.<sup>260</sup>

However, before doing so the Court clarified both the relationship between Article 6 and the procedural requirements of Article 2, and the principles under the latter article concerning the duty to investigate killings. On the first issue, the Court stressed that issues of accountability and civil (or, in other jurisdictions, administrative) liability of the police for racism affecting the quality of a murder investigation – and the availability of a remedy, i.e. of “access to court” in that respect – should be examined, if at all, under Article 6. By contrast, Article 2 is “primarily concerned with the assessment of a Contracting State’s compliance with its substantive and procedural obligations to protect the right to life”.<sup>261</sup> When there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances, “some form of effective official investigation” must take place, “capable of establishing the cause of the injuries and the identification of those responsible with a view to their punishment” – although the requirement is one of means, not results: it need not necessarily lead to the conviction of the perpetrators, as long as all reasonable steps have been taken to identify and punish them. The investiga-

tion must be prompt, and carried out of the authorities’ own motion.<sup>262</sup> All this, of course, merely repeats the requirements set out in other cases, concerning deliberate killings by agents of the State, deaths in custody, or killings in which the question of State involvement or collusion have remained unresolved.<sup>263</sup> In *Menson*, the Court clarified that these requirements also apply to killings of private individuals by other private individuals, adding that, where there has been a racially motivated attack of such a kind, it is:

*particularly important that the investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society’s condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.*<sup>264</sup>

The State also has special responsibilities to protect persons in its custody from attacks by other private individuals. These special responsibilities too arise both in respect of the substantive requirements of Article 2 and in respect of its procedural requirements. They too shade into the corresponding responsibilities on the part of the State in respect of unexplained deaths in custody, or

260. See in particular p. 14 of the *Menson* decision.

261. *Menson* decision, p. 14.

262. *Menson* decision, pp. 12-14, with references.

263. Cf. the summary of the requirements in this respect, contained in the *Kelly* judgment and quoted in the section on “the need to hold an *ex post facto* inquiry: the ‘procedural limb’ of Article 2”, above, p. 35.

264. *Menson* decision, pp. 12-14, emphasis added; references in brackets to other cases replaced by shortened references in footnotes, but with references added to the (sub)sections in this handbook where those other cases are discussed.



deaths allegedly caused by agents of the State itself, which were discussed in the previous chapter.

The case of *Paul and Audrey Edwards v. the United Kingdom*<sup>265</sup> concerned a mentally disturbed man, Christopher Edwards (Paul and Audrey Edwards' son), who had been arrested in November 1994 for accosting women on the street. After a hearing before a magistrate, he was remanded in custody and kept in a prison cell. Later the same day, another mentally disturbed man, Richard Linford, who had a history of violence, was also remanded in custody, in the same prison. Although they were initially kept in cells of their own, they were put together in one cell later that day. In the night, Richard Linford attacked and killed Christopher Edwards.<sup>266</sup>

In April 1995, Richard Linford pleaded guilty to a charge of manslaughter and was sent to a secure mental hospital, where he has been diagnosed as suffering from paranoid schizophrenia. Because he pleaded guilty, the facts of the case were only cursorily examined at the trial. After the trial, the inquest, which had been formally opened but adjourned pending the criminal proceedings, was also closed without any detailed examination of the circumstances of the killing.<sup>267</sup>

In July 1995 a private, non-statutory inquiry was commissioned by three State agencies with statutory responsibilities towards

265. *Paul and Audrey Edwards v. the United Kingdom*, judgment of 14 March 2002.

266. See §§ 9-21 of the *Edwards* judgment for details.

267. *Edwards* judgment, §§ 22-23.

Christopher Edwards – the Prison Service, the local County Council and the local Health Authority. The inquiry's 388-page report, published three years later, in June 1988:

*... concluded that ideally Christopher Edwards and Richard Linford should not have been in prison and in practice they should not have been sharing the same cell. It found "a systemic collapse of the protective mechanisms that ought to have operated to protect this vulnerable prisoner [Edwards]". It identified a series of shortcomings, including poor record-keeping, inadequate communication and limited inter-agency cooperation, and a number of missed opportunities to prevent the death of Christopher Edwards.*<sup>268</sup>

The report was, in the opinion of the Court:

*... a meticulous document, on which the Court has had no hesitation in relying on assessing the facts and issues in this case.*<sup>269</sup>

However, the applicants were advised that, in spite of the established shortcomings, they still had no realistic prospect to sue the authorities for civil damages over the way they had dealt with their son, or over the pain and suffering he may have gone through.<sup>270</sup>

Furthermore:

*By letter of 25 November 1998, the Crown Prosecution Service maintained their previous decision that there was insufficient evidence to proceed with criminal charges [against anyone in*

268. *Edwards* judgment, § 32. For a list of the shortcomings, see § 33.

269. *Edwards* judgment, § 76.

270. *Edwards* judgment, § 34.



the Prison Service or the police]. The applicants' counsel advised on 10 December 1998 that, notwithstanding the numerous shortcomings, there was insufficient material to found a criminal charge of gross negligence against any individual or agency.<sup>271</sup>

*The applicants' complaint to the Police Complaints Authority had also been kept pending during the inquiry. In December 2000 – more than six years after the killing – it produced its own report on the case. The report upheld fifteen of the parents' complaints, criticised deficiencies in the police investigation of Christopher Edwards' death, and made a number of recommendations in relation to police practice and procedure.*<sup>272</sup>

The applicants claimed that the authorities had failed to protect their son, Christopher, from Richard Linford, in violation of the substantive requirements of Article 2; and that the investigations into his death, including the above-mentioned inquiry commissioned by the Prison Service, the local Council and the local Health Authority, had failed to meet the procedural requirements of that article.

The Court reiterated its ruling in *Osman*, discussed on p. 66 ff., that there is a violation of the substantive requirements of Article 2 if it is established: (i) that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of

271. *Edwards* judgment, § 35.

272. *Edwards* judgment, § 36.

a third party and (ii) that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.<sup>273</sup> The Court found that there had been “numerous failings in the way in which Christopher Edwards was treated from his arrest to his allocation to a shared cell”. He should have been detained either in a hospital or the health care centre of the prison.<sup>274</sup> However, the central issue in the case was that:

*his life was placed at risk by the introduction into his cell of a dangerously unstable prisoner and it is the shortcomings in that regard which are most relevant to the issues in this case.*<sup>275</sup>

The essential question was therefore:

*whether the prison authorities knew or ought to have known of his [Linford's] extreme dangerousness at the time the decision was taken to place him in the same cell as Christopher Edwards.*<sup>276</sup>

The Court held that Richard Linford's medical history and perceived dangerousness was known to the authorities, and that this knowledge

*ought to have been brought to the attention of the prison authorities, and in particular those responsible for deciding*

273. *Edwards* judgment, § 55, with reference to the *Osman* judgment, § 116.

274. *Edwards* judgment, § 63.

275. *Edwards* judgment, § 63.

276. *Edwards* judgment, § 58.

*whether to place him in the health care centre or in ordinary location with other prisoners.*<sup>277</sup>

However, it was not: there were “a series of shortcomings in the transmission of information.”<sup>278</sup> This crucially affected the screening process at the prison, which was in any case too superficial:

*the Court considers that it is self-evident that the screening process of the new arrivals in a prison should serve to identify effectively those prisoners who require for their own welfare or the welfare of other prisoners to be placed under medical supervision. The defects in the information provided to the prison admissions staff were combined in this case with the brief and cursory nature of the examination carried out by a screening health worker who was found by the inquiry to be inadequately trained and acting in the absence of a doctor to whom recourse could be had in case of difficulty or doubt.*<sup>279</sup>

Consequently, the Court considered that:

*on the information available to the authorities, Richard Linford should not have been placed in Christopher Edwards’s cell in the first place.*

*The Court concludes that the failure of the agencies involved in this case (medical profession, police, prosecution and court) to pass information about Richard Linford on to the prison authorities and the inadequate nature of the screening process*

*on Richard Linford’s arrival in prison disclose a breach of the State’s obligation to protect the life of Christopher Edwards.*

*There has therefore been a breach of Article 2 of the Convention in this regard.*<sup>280</sup>

On the other aspect of Article 2, the Court found, first of all, that:

*a procedural obligation arose to investigate the circumstances of the death of Christopher Edwards. He was a prisoner under the care and responsibility of the authorities when he died from acts of violence of another prisoner and in this situation it is irrelevant whether State agents were involved by acts or omissions in the events leading to his death. The State was under an obligation to initiate and carry out an investigation which fulfilled the [various requirements concerning such an investigation, adduced in the earlier case-law]. Civil proceedings, assuming that such were available to the applicants [...] which lie at the initiative of the victim’s relatives would not satisfy the State’s obligation in this regard.*<sup>281</sup>

No full inquest had been held in this case and the criminal proceedings in which Richard Linford was convicted had not involved a trial at which witnesses were examined, as he pleaded guilty to manslaughter and was subject to a hospital order. In these respects the procedural requirements had therefore not been complied with. The question was whether the non-statutory inquiry had remedied this. The Court therefore assessed whether the

277. *Edwards judgment*, § 61.

278. *Edwards judgment*, § 61.

279. *Edwards judgment*, § 62.

280. *Edwards judgment*, §§ 63-64.

281. *Edwards judgment*, § 74.

inquiry met the various requirements: independence, promptness and expedition, capacity to establish the facts, and accessibility to the public and the relatives. It felt that the inquiry had met most of these (if with some caveats), there had been two serious defects: the inquiry had no power to compel witnesses, and it had been held in private, with even Christopher Edwards' parents only able to attend three days of the inquiry when they themselves were giving evidence, and limited in their participation:

*They were not represented and were unable to put any questions to the witnesses, whether through their own counsel or, for example, through the inquiry panel. 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.*<sup>282</sup>

Because of these two defects, the inquiry had failed to satisfy the procedural requirements of Article 2. There had therefore been a violation in that regard, too.<sup>283</sup>

## Prevention of suicide by prisoners

In an earlier section, we discussed a series of cases concerning people who wished to die and were mentally fit to decide on the

issue, but who were prevented from committing (assisted) suicide by the law in their country. The question there was whether, and if so when, the State has the right to interfere with such a wish.

These cases must be distinguished from cases in which people died by their own hands, who were vulnerable and not in a position where they could sensibly make up their own mind. In those, the reverse question arises: whether, and if so when, the State has a duty to prevent individuals from committing suicide. The question arises in particular in cases in which the individual is in the custody of the State, either as a prisoner or as a patient.

The case of *Keenan v. the United Kingdom*<sup>284</sup> concerned a young man, Mark Keenan, with a history of mental illness, who had been sentenced to imprisonment for a serious assault. In prison, he displayed a series of symptoms of his illness, including a threat of self-harm. After some time in the prison hospital wing, then in an ordinary cell, he assaulted two members of the prison staff after a change in medication which he said made him mentally unwell. For the assault, he was placed in a punishment cell, where he hanged himself. Asphyxiation by hanging was confirmed as the cause of death at an inquest, but that procedure did not seek to establish the wider causes of death, or apportion blame.

His mother claimed that the prison authorities had been negligent in respect of his care, but was advised that she could not sue the authorities because English law did not allow an appropriate action. She complained to the Commission, and then to the

282. *Edwards* judgment, § 84.

283. *Edwards* judgment, § 87.

284. *Keenan v. the United Kingdom*, judgment of 3 April 2001.

Court, alleging violations of Articles 2 (right to life), 3 (prohibition of torture, inhuman or degrading treatment or punishment) and 13 (right to an effective remedy against violations of substantive Convention rights).

The Court reiterated the principles discussed in the previous sections: that States must not just put in place effective criminal-law provisions, and back this up by effective law-enforcement machinery, but must also take reasonable preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. In *Keenan*, the Court had to consider to what extent these principles apply where the risk to a person derives from self-harm.<sup>285</sup> It held, again with reference to earlier-established principles, that it is incumbent on the State to account for any injuries or death suffered in custody, although it also had to be acknowledged that the authorities were subject to restraints, e.g., in order to respect the rights and freedoms of the individual in question. Even so:

*There are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing on personal autonomy. Whether any more stringent measures are necessary in respect of a prisoner and whether it is reasonable to apply them will depend on the circumstances of the case.*

*In the light of the above, the Court has examined whether the authorities knew or ought to have known that Mark Keenan*

*posed a real and immediate risk of suicide and, if so, whether they did all that could reasonably have been expected of them to prevent that risk.*<sup>286</sup>

The Court found that “on the whole, the authorities responded in a reasonable way to Mark Keenan’s conduct, placing him in hospital care and under watch when he evinced suicidal tendencies.”<sup>287</sup> There was, therefore, no violation of the substantive requirements of Article 2 in this case.<sup>288</sup>

However, the case also raised issues regarding the standard of care with which Mark Keenan was treated in the days before his death which fell to be examined under Article 3 of the Convention.<sup>289</sup> Notably, the Court found that Mark Keenan’s treatment had not met the standards of treatment required under that article:

*The lack of effective monitoring of Mark Keenan’s condition and the lack of informed psychiatric input into his assessment and treatment disclose significant defects in the medical care provided to a mentally ill person known to be a suicide risk. The belated imposition on him in those circumstances of a serious disciplinary punishment – seven days’ segregation in the punishment block and an additional twenty-eight days to his sentence imposed two weeks after the event and only nine days*

286. *Keenan* judgment, §§ 90-93, with reference to the cases of *Salman v. Turkey*, discussed in the sub-section on “deaths in custody” and *Osman v. Turkey*, discussed on p. 66 ff. (detailed references omitted).

287. *Keenan* judgment, § 99.

288. *Keenan* judgment, § 102; see also § 99. On the procedural issues, see later in the text, with reference to Article 13.

289. *Keenan* judgment, § 101.

285. *Keenan* judgment, §§ 89-90.

*before his expected date of release – which may well have threatened his physical and moral resistance, is not compatible with the standard of treatment required in respect of a mentally ill person. It must be regarded as constituting inhuman and degrading treatment and punishment within the meaning of Article 3 of the Convention.*<sup>290</sup>

This again shows how single or closely related issues can often not be simply addressed under one Convention article, but rather, how the forms of protection offered by various articles overlap and interrelate. The same is true of the procedural issues raised by the case, which the Court addressed mainly under Article 13 rather than Article 2 (although referring back to that article in one respect, as we shall see). The Court observed that:

*two issues arise under Article 13 of the Convention: whether Mark Keenan himself had available to him a remedy in respect of the punishment inflicted on him and whether, after his suicide, the applicant, either on her own behalf [as Mark's mother] or as the representative of her son's estate, had a remedy available to her.*<sup>291</sup>

On the first issue, the Court noted that Mark Keenan killed himself a day after having substantial additional punishment bestowed upon him, and noted that there were no remedies available to him that could be effective before the punishments were carried out. The Court held that the State should have put such

procedural safeguards in place to protect the prisoner, taking into account his mental State. The absence of those violated Article 13.<sup>292</sup>

On the question of the availability of an effective remedy for Mark's mother, the Court noted first of all that it was:

*common ground that the inquest, however useful a forum for establishing the facts surrounding Mark Keenan's death, did not provide a remedy for determining the liability of the authorities for any alleged ill-treatment or for providing compensation.*<sup>293</sup>

The Court found that the civil remedies available to the applicant were extremely limited and that no adequate damages would have been recoverable through them. Moreover, no legal aid would have been available to pursue them.<sup>294</sup> Both issues – the possibility to obtain compensation for non-pecuniary damage, and a remedy capable of establishing where responsibility for her son's death lay – were crucial. Their absence constituted a further breach of Article 13.<sup>295</sup>

## Protection against medical malpractice

In several cases, applicants have argued that deaths resulting from medical malpractice and negligence should entail the responsibility of the State in various ways. They claimed that the State has a duty to provide for a full investigation of the relevant facts and

290. *Keenan* judgment, § 116.

291. *Keenan* judgment, § 125.

292. *Keenan* judgment, § 127.

293. *Keenan* judgment, § 128.

294. See the *Keenan* judgment, § 129, for details.

295. See the *Keenan* judgment, §§ 130-133.

issues (including allegations of falsification of medical records and of conspiracies between members of the medical professions to cover up their mistakes), and that in serious cases the State has a duty to punish those responsible. The cases are complicated, however, by the fact that the applicants invoked a range of articles and did not pursue all of the available remedies, or settled civil cases.

In the case of *Erikson v. Italy*,<sup>296</sup> an elderly lady, the applicant's mother, had died of an intestinal occlusion which had not been diagnosed at a local public hospital where she had been x-rayed. The report on the x-ray had not been signed. Criminal investigations failed to identify the doctor who had failed to note the occlusion. The applicant complained that his mother's right to life was violated on account of the failure of the Italian authorities to exercise their best efforts to identify those responsible for her death. The Court held that:

*the positive obligations a State has to protect life under Article 2 of the Convention include the requirement for hospitals to have regulations for the protection of their patients' lives and also the obligation to establish an effective judicial system for establishing the cause of a death which occurs in hospital and any liability on the part of the medical practitioners concerned [...].*<sup>297</sup>

The requirements as to the protection of the right to life "by law", discussed earlier, therefore also apply to cases of alleged medical malpractice.

296. *Erikson v. Italy*, admissibility decision of 26 October 1999 on Appl. No. 37900/97.

297. *Erikson* decision, p. 7, reference omitted.

The same applies to the procedural requirements of Article 2:

*... even in cases like the present one, in which the deprivation of life was not the result of the use of lethal force by agents of the State but where agents of the State potentially bear responsibility for loss of life, the events in question should be subject to an effective investigation or scrutiny which enables the facts to become known to the public and in particular to the relatives of any victims [...].*<sup>298</sup>

However, in the case, the Court found that there had been a sufficient criminal investigation.<sup>299</sup> Moreover, the Court held it against the applicant that he had not initiated a separate civil action against the hospital:

*In civil proceedings, the applicant would have enjoyed the possibility of seeking and adducing further evidence and his scope of action would not have been limited as in criminal proceedings.*<sup>300</sup>

The Court therefore held that there had not been any failure by the respondent State to comply with the positive obligations, and in particular with the procedural requirements, imposed by

298. *Erikson* decision, p. 7, with references (omitted from the quote) to the cases of *Kaya, Ergi* and *Yaşa v. Turkey*, discussed earlier. Note that the hospital in question was a public hospital and that the doctors were therefore public officials and thus, according to the Court, "agents of the State". However, as we shall see, the Court has since applied the same requirements to deaths allegedly resulting from medical negligence on the part of private doctors or institutions.

299. *Erikson* decision, pp. 7-8.

300. *Erikson* decision, p. 8.

Article 2 of the Convention. It rejected the case as “manifestly ill-founded”.<sup>301</sup>

In the case of *Powell v. the United Kingdom*,<sup>302</sup> a 10-year old boy, Robert Powell, the applicants’ son, died of Addison’s disease, a rare condition arising from adrenal insufficiency, which is potentially fatal if untreated, but which is susceptible to treatment if diagnosed in time. Although early on, a test for the disease had been recommended by a hospital paediatrician, none had been ordered to be carried out by the various general practitioners involved in the boys’ treatment. The applicants alleged that medical records had been falsified to cover this up. They were deeply affected by the difficulties they faced in trying to find out what happened, and developed serious and lasting psychological problems as a result.<sup>303</sup>

Separate from disciplinary proceedings (from which the applicants withdrew in the appeal stage because they felt the proceedings were not fair) and a police investigation, the applicants also commenced civil proceedings against the relevant Health Authority. In the end, the Authority admitted liability for having failed to diagnose Robert’s disease, and paid the applicants £80 000 in damages and £20 000 in costs. However, the other part of the claim, concerning the alleged conspiracy to cover up the failure to diagnose, was struck out by the judge mainly on the ground that,

301. *Erikson* decision, p. 8.

302. *Powell v. the United Kingdom*, admissibility decision of 4 May 2000 on Appl. No. 45305/99.

303. *Powell* decision, p. 9.

under English law, doctors have no duty of candour to the parents of a deceased child about the circumstances surrounding the death.<sup>304</sup>

In the proceedings under the Convention, the applicants complained mainly about the falsification of the medical records and the alleged cover-up. They submitted first of all that:

*Falsification of official records by an agent of the State whose negligence resulted in the death of a child amounts to a breach of the procedural obligations inherent in Article 2 and the positive obligations inherent in Articles 8 and 10.*<sup>305</sup>

However, the Court disagreed:

*The Court stresses that its examination of the applicants’ complaint [under Article 2] must necessarily be limited to the events leading to the death of their son, to the exclusion of their allegations that, following his death, the doctors responsible for his care and treatment fabricated his medical records to exonerate them of any blame. In the Court’s opinion, that latter issue falls to be determined from the angle of their complaint under Article 6 that they were unable to secure a ruling on the doctor’s post-death responsibility. However, the alleged post-death offences committed by the doctors did not alter the course of events which led to the death of the applicants’ son.*<sup>306</sup>

304. *Powell* decision, p. 10.

305. *Powell* decision, p. 16.

306. *Powell* decision, p. 18.

The applicants' complaints under Articles 2, 8 and 10, and their separate complaints under Articles 6 and 13, were fatally undermined by the fact that they withdrew from the appeal hearing in the disciplinary proceedings and settled their civil case:

*[W]here 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 in respect of the circumstances surrounding the treatment administered to the deceased person or with regard to the investigation carried out into his or her death.<sup>307</sup>*

The applicants could therefore no longer claim to be (indirect) "victims" within the meaning of Article 34 of the Convention of the alleged violation of the (procedural aspect of) Article 2 of the Convention. For the same reasons, the Court held that, "[e]ven assuming that Article 8 § 1 of the Convention is applicable to the facts at issue and can be considered to denote a positive obligation on the authorities to make a full, frank and complete disclosure of the medical records of a deceased child to the latter's parents", the applicants could also no longer claim to be victims in relation to Article 8 of the Convention.<sup>308</sup> The same applied as concerns Article 10.<sup>309</sup>

On the issue of "access to court" under Article 6 of the Convention, the applicants claimed, with reference to the *Osman* judg-

307. *Powell* decision, p. 19.

308. *Powell* decision, pp. 20-21.

309. *Powell* decision, p. 21.

ment discussed earlier (p. 66 ff.), that they should have been able to sue the authorities separately (i.e. separate from the action for negligence for the death of their son) for compensation on account of the damage they personally suffered as a result of the alleged cover-up by the doctors. As noted earlier, the domestic courts had not allowed such an action, mainly because they held that the doctors did not owe a duty of candour towards the applicants over the death of their son. The applicants argued that if domestic law did not provide for such a remedy, it ought to, and that Article 6 required this.

The Court distinguished the case from *Osman*, which concerned a blanket rule, exempting the police from civil liability. In the case of *Powell*, by contrast, the normal English legal conditions for civil liability, proximity and foreseeability, applied. The judges had refused compensation because, in their view, those conditions had not been met with regard to the effects of the alleged cover-up on the boy's parents. There was therefore, in the latter case, no violation of the right of "access to court".<sup>310</sup> The same applied effectively to the applicants' claim under Article 13, that they had been denied an "effective remedy" against the alleged other violations.<sup>311</sup>

The cases of *Erikson* and *Powell* show the importance, for potential applicants, of vigorously pursuing all available remedies, even if they do not believe those proceedings are fair or of sufficient

310. *Powell* decision, p. 24.

311. *Powell* decision, p. 25.



scope, or will afford them justice. The Court in Strasbourg will not find a violation of either the procedural requirements of Article 2, or the requirements of Articles 6 and 13, unless it is clear that the remedies in question were incapable of addressing the factual and legal issues in question. In order for that to become clear, those remedies must in all but exceptional cases be pursued first.

In *Calvelli and Ciglio v. Italy*,<sup>312</sup> the Court again confirmed that the positive obligations under Article 2 require States “to make regulations compelling hospitals to adopt appropriate measures for the protection of their patients’ lives” and to have in place “an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession ... can be determined and those responsible made accountable”; and it stressed that both types of obligations apply to both the public- and the private health sector.<sup>313</sup>

The case concerned the death of a baby shortly after birth. The mother was a level-A diabetic and had a past history of difficult confinements, yet the hospital doctor in charge had not made appropriate arrangements, such as an external examination of the mother to assess whether the foetus was too large for a natural birth, and was not present at the time of birth. The delay in bringing him to the delivery room had significantly reduced the newborn’s chances of survival.

312. *Calvelli and Ciglio v. Italy*, Grand Chamber judgment of 17 January 2002.

313. *Calvelli and Ciglio* GC judgment, § 48.

The applicants, the baby’s parents, had obtained compensation for damages arising out of the doctor’s negligence, but believed the doctor in question should have been prosecuted. Criminal proceedings had in fact been instigated, but had had to be abandoned after several years, during which there had been a series of procedural shortcomings and delays, as a result of which the case became time-barred. The applicants alleged that this violated Article 2 of the Convention.<sup>314</sup>

The Court noted the shortcomings in the criminal proceedings, but found that in the case at hand, the civil avenues would have offered the applicants sufficient redress, if they had not settled the case. If they had pursued their civil action, this could have led to an order against the doctor for the payment of damages and possibly to the publication of the judgment in the press. Furthermore, a judgment in the civil court could also have led to disciplinary action against the doctor. The Court therefore found it unnecessary to examine, in the special circumstances of the case, whether the fact that a time-bar prevented the doctor being prosecuted for the alleged offence was compatible with Article 2. There had therefore been no violation of Article 2.<sup>315</sup>

### Extradition, expulsion and deportation

There is, under the Convention, no right not to be extradited, expelled or deported from a country of which one is not a national

314. The applicants also invoked Article 6, but only as concerns the length of the proceedings, which is not of relevance here.

315. See the *Calvelli and Ciglio* GC judgment, §§ 55-57.

as such. However, the Convention can be applied to situations in which an applicant will, or may, suffer adverse consequences in respect of certain Convention rights<sup>316</sup> as a consequence of an intended removal from a State that is Party to the Convention to a State that is not Party to the Convention, even though those consequences would only materialise in the latter State, i.e. outside the jurisdiction of the extraditing State Party to the Convention and indeed outside the *espace juridique* of the Convention as such.<sup>317</sup> This was first established in the case of *Soering v. the United Kingdom*.<sup>318</sup> The case concerned the intended extradition of a German national, Jens Soering, from the United Kingdom to the United States of America to face charges of murder in the Commonwealth of Virginia. If convicted, the applicant could be sentenced to death in that jurisdiction. Through its Embassy in Washington DC, the United Kingdom sought certain assurances from the United States in regard of that penalty in the following terms:

*Because the death penalty has been abolished in Great Britain, the Embassy has been instructed to seek an assurance, in accordance with the terms of ... the Extradition Treaty, that, in the event of Mr Soering being surrendered and being convicted of the crimes for which he has been indicted ..., the death penalty, if imposed, will not be carried out.*

316. Questions relating to extradition, etc., in death penalty cases are briefly discussed in the next section, p. 91 ff.

317. Cf. the earlier discussion of the territorial applicability of the Convention, p. 55.

318. *Soering v. the United Kingdom*, judgment of 26 June 1989.

*Should it not be possible on constitutional grounds for the United States Government to give such an assurance, the United Kingdom authorities ask that the United States Government undertake to recommend to the appropriate authorities that the death penalty should not be imposed or, if imposed, should not be executed.*<sup>319</sup>

In response to this request, the United States transmitted to the United Kingdom authorities an affidavit sworn by Mr James Updike, the Attorney for Bedford County, Virginia – who was in charge of prosecuting the case – to the effect that if Mr Soering was sentenced to death, he (Mr Updike) would make a representation in the name of the United Kingdom to the judge at the time of sentencing “*that it was the wish of the United Kingdom that the death penalty should not be imposed or carried out.*” However, Mr Updike was not willing to provide any further assurances and intended to seek the death penalty in Mr Soering’s case because the evidence, in his determination, supported such action.<sup>320</sup>

At the time, Protocol No. 6 to the Convention, which abolishes the death penalty in peace time for those States that sign up to it, had not yet been ratified by the United Kingdom. The Court could therefore not assess the case in respect of that protocol. As noted in the chapter on the death penalty, below, the Court was also not willing to rule, in that case, that the death penalty is by its very nature inhuman and degrading. However, the applicant alleged

319. *Soering* judgment, § 15.

320. *Soering* judgment, § 20.

that the conditions to which he would be exposed if sentenced to death in Virginia – known as “the death row phenomenon” – were inhuman and degrading, and therefore violated Article 3 of the Convention. In response to this argument, the Court summed up the principles governing the applicability of the Convention to extradition cases in which it is alleged that the intended extradition will result in treatment contrary to Article 3 in the receiving country, in the following terms:

*In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.<sup>321</sup>*

321. *Soering* judgment, § 90. See §§ 85-90 for the full reasoning.

Since, in the Court’s view, the conditions on “death row” in Virginia violated the standards of Article 3, the United Kingdom could therefore not extradite Mr Soering to that jurisdiction if there was a real risk that he would be placed in those conditions.

These considerations relating to Article 3 are relevant here because the Court extends these same principles to cases in which it is alleged that an intended extradition will result in a violation of the right to life. Specifically, it may be recalled that in *McCann* the Court used similar language about the importance of Article 2 as is used in the above quote in respect of Article 3. Indeed, the Court expressly puts these two provisions on the same high level:

*as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 ranks as one of the most fundamental provisions in the Convention – indeed one which, in peacetime, admits of no derogation under Article 15. Together with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe [...].<sup>322</sup>*

A person may therefore also not be extradited or expelled to a country if there are “substantial grounds” for believing that he or she would face a “real risk” of being subjected to treatment contrary to Article 2 – i.e., if the person would face a “real risk” of death in the receiving country, contrary to that article. In specific

322. *McCann* GC judgment, § 147, expressly referring to § 88 of the *Soering* judgment, in which the Court stressed these same matters in respect of Article 3.

cases, the issues under Articles 2 and 3 often overlap, and the Court tends to either subsume its assessment of the issues under Article 2 under its assessment of the issues under Article 3, or to decide that “no separate issues” arise in respect of Article 2.

The case of *Ahmed v. Austria*<sup>323</sup> concerned a Somali man, Mr Ahmed, who had been granted refugee status in Austria because, as a member of a faction fighting in the Somalian conflict, he was at risk of being persecuted and killed by other factions if returned to his home country. However, after being convicted of a criminal offence, the authorities wanted to return him to Somalia under an Austrian law allowing for such an expulsion in cases of serious offences. The authorities invoked Article 33 of the *Geneva Convention of 28 July 1951 relating to the Status of Refugees*, which provides:

1. *No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*
2. *The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*

323. *Ahmed v. Austria*, judgment of 27 November 1996.

Although in the domestic proceedings, the applicant had specifically argued that his expulsion would endanger his life,<sup>324</sup> and although he reiterated that claim before the Court,<sup>325</sup> before the latter he did not invoke Article 2, relying instead on Article 3 of the Convention, and the Court too addressed the case under the latter article. The Court reiterated that while States generally have the right to control the entry, residence and expulsion of aliens, Article 3 prohibits them from expelling a person to another country if there are “substantial grounds” for believing that the person would run a “real risk” of inhuman or degrading treatment in the receiving country. It pointed out that Article 3 prohibits torture or inhuman or degrading treatment or punishment in absolute terms, irrespective of the victim’s conduct, and added:

*The above principle is equally valid when issues under Article 3 arise in expulsion cases. Accordingly, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Article 33 of the 1951 Convention relating to the Status of Refugees [...].*<sup>326</sup>

Reiterating earlier case-law to the effect that, in assessing the risk posed to an applicant, “the material point in time must be that of the Court’s consideration of the case Court”,<sup>327</sup> the Court accepted the Commission’s finding that “[t]here was no indication that the

324. See, e.g., *Ahmed* judgment, § 21.

325. *Ahmed* judgment, § 35, last sentence.

326. *Ahmed* judgment, § 41.

327. *Ahmed* judgment, § 43.

dangers to which the applicant would have been exposed in 1992 [when he had been granted asylum] had ceased to exist or that any public authority would be able to protect him.<sup>328</sup> Expelling the applicant would therefore entail a violation of Article 3.<sup>329</sup>

The judgment is of interest here for several reasons. First of all, as already noted, the reasoning applied in the judgment under Article 3 applies equally under Article 2.<sup>330</sup> Under the latter article, too, “*the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration*” in a State’s decision on whether or not to extradite or expel that person (or, one may add, on whether to participate in so-called “rendition”). If there is a real danger that the person will be killed in the receiving country, in ways or circumstances which would violate Article 2 of the Convention if the killing occurred in a State Party to the Convention, the person may not be extradited or expelled (or “rendered”). Secondly, the case makes clear that this also applies if the threat to life comes from non-State parties in the receiving country, against whom the public authorities in that country would not, or could not, protect the potential victim. And thirdly, the case confirms previous case-law to the effect that, if a

328. *Ahmed* judgment, § 44.

329. *Ahmed* judgment, § 47.

330. Cf. the case of *Said v. the Netherlands*, judgment of 5 July 2005, in which the applicant invoked both articles, where the Court ruled that “it was more appropriate to deal globally with the complaint under Article 2 when examining the related complaint under Article 3” (§ 37), and where it held that, once it had found that expulsion would contravene the latter article, “no separate issue” arose under the former (§ 56).

case is brought to the Court in Strasbourg after a person has been expelled, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion, but if the applicant has not yet been expelled, the material time for assessing the risk in a given case is the time when the Court is asked to judge the case.

The above also applies in respect of threats resulting from lack of medical treatment in the receiving country, as is clear from the case of *D v. the United Kingdom*.<sup>331</sup> The case concerned a young man from St Kitts (an island in the Caribbean) who had been arrested upon arrival in the United Kingdom, carrying drugs. While serving a prison sentence in the United Kingdom, he was diagnosed with AIDS. He received treatment which alleviated his condition and protected him from opportunistic infections. Upon completion of his sentence, the British authorities wanted to send D back to St Kitts. He was originally held in immigration detention after his release from prison, in preparation for his expulsion, but was released on bail after the Commission’s report on the case and allowed to reside in special sheltered accommodation for AIDS patients provided by a charitable organisation working with homeless persons. Accommodation, food and services were provided free of charge to the applicant, and he was also provided with emotional support and assistance of a trained volunteer pro-

331. *D v. the United Kingdom*, judgment of 21 April 1997.

vided by the Terrence Higgins Trust, the leading HIV/AIDS charity in the United Kingdom.

The applicant pointed out, and the Commission and Court accepted, that in St Kitts he would be homeless and without any form of moral, social or family support in the final stages of his deadly illness, deprived of his medical treatment and exposed to infections; this would further limit his life expectancy and cause him severe pain and mental suffering.<sup>332</sup>

The Court held that it should give itself flexibility to address the application of Article 3 in different contexts:

*... It is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State.*<sup>333</sup>

After carefully reviewing the special facts of the case and in particular the applicant's State of health at the time of this review, the Court concluded, in respect of Article 3:

332. *D v. the United Kingdom* judgment, § 45.

333. *D. v. the United Kingdom* judgment, § 49.

*Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3, his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment. ...*<sup>334</sup>

In the “very exceptional circumstances” of the case, and given the “compelling humanitarian considerations” at stake, removal of D to St Kitts would be a violation of Article 3.<sup>335</sup>

The Court again linked the applicant's claim under Article 2 to the issues under Article 3: the two were “indissociable”, and it was therefore not necessary to examine D's complaint under Article 2.<sup>336</sup>

Finally, it should be noted that interim measures are of particular importance in the context of cases of threatened removal of persons from the jurisdiction of a State-Party to the Convention to a third country. Thus, in the case of *Mamatkulov and Askarov v. Turkey*,<sup>337</sup> the respondent Government had failed to comply with a request from the Court not to extradite the applicants to Uzbekistan in view of the widespread use of torture in that country.<sup>338</sup> It claimed that its duties under its extradition treaty with Uzbekistan overruled its obligations under the Convention. How-

334. *D. v. the United Kingdom* judgment, § 53, emphasis added.

335. *D. v. the United Kingdom* judgment, § 54.

336. *D. v. the United Kingdom* judgment, § 59.

337. *Mamatkulov and Askarov v. Turkey*, Grand Chamber judgment of 4 February 2005. Note that the Chamber judgment in this case of 6 February 2003 is referred to as *Mamatkulov and Abdurasolovic*.

338. See the *Mamatkulov and Askarov* judgment, §§ 24-27.

ever, this was dismissed by the Court because the extradition had “irreversibly reduced” the level of protection which the Court could afford.<sup>339</sup>

The Court went on to consider whether the actions of the Turkish Government had violated its obligation under Article 34 of the Convention “not to hinder in any way the effective exercise of [the right of the Court to receive and adjudicate on individual applications]”. Contrary to the position prior to Protocol No. 11, the Court ruled that:

*A failure by a Contracting State to comply with interim measures [indicated by the Court] is to be regarded as preventing the Court from effectively examining the applicant’s complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34 of the Convention.*<sup>340</sup>

339. *Mamatkulov and Askarov* judgment, § 108.

## The death penalty

### Article 2 and Protocols Nos. 6 and 13: abolition of the death penalty

As noted in the section on the text of Article 2, the second sentence in the first paragraph of that article refers to the death penalty. It stipulates that:

Turkey had therefore violated Article 34 in the case at hand.<sup>341</sup> Notably, the Court also held that this was a violation of the applicants’ rights rather than a purely procedural issue, and that “just satisfaction” therefore had to be awarded for it.<sup>342</sup>

340. *Mamatkulov and Askarov* judgment, § 128. For the position prior to the entry into force of Protocol No. 11, see, e.g., *Cruz Varas and others v. Sweden*, judgment of 20 March 1991, and the admissibility decision of 13 March 2001 in *Conka and others v. Belgium*. In adopting the new approach, the Court referred to general principles of international law, the Vienna Convention on the Law of Treaties, and the views expressed since then on the subject by other international bodies including the International Court of Justice, the Human Rights Committee established under the International Covenant on Civil and Political Rights, the Inter-American Commission and Court of Human Rights and the UN Committee Against Torture, and to the fact that while previously the right to individual application had been optional, “individuals now enjoy at the international level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention.”

341. *Mamatkulov and Askarov* judgment, § 129.

342. *Mamatkulov and Askarov* judgment, § 134.

*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.*

For the States that are party to them (i.e. almost all of the States Party to the Convention),<sup>343</sup> this stipulation has been replaced by

343. See below, p. 87, footnote 349 and p. 88, footnote 350.

the provisions in Protocols Nos. 6 and 13 to the Convention, which abolish the death penalty in times of peace and in all circumstances, respectively.<sup>344</sup> Before considering those, it is important, however, to examine the case-law of the Court on this stipulation as such, and on how the adoption of these protocols has influenced this case-law.

It is clear from the text of the second sentence that the drafters of the Convention did not regard the existence or use of the death penalty as a violation of the right to life or of other requirements of the Convention *per se*. At the time, in the early 1950s, many States still retained the penalty on their statute books, even if its use was already in decline. In the 1989 case of *Soering v. the United Kingdom*, discussed in some detail in the last section of the previous chapter, the Court still rejected a suggestion by Amnesty International that the evolving standards in western Europe regarding the existence and use of the death penalty required that the death penalty should, by then, be considered as an inhuman and degrading punishment within the meaning of Article 3, even if this was not thought to be the case at the time of the drafting of the Convention.<sup>345</sup> In rejecting this argument, the Court took into account, specifically, the fact that by then Protocol No. 6 (dis-

cussed below) had already been adopted (although it had at the time not yet been signed or ratified by the United Kingdom). According to the Court, this showed:

*that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions, notwithstanding the special character of the Convention [...], Article 3 cannot be interpreted as generally prohibiting the death penalty.*<sup>346</sup>

The issue was only revisited some twenty years later, in the case of *Öcalan v. Turkey*.<sup>347</sup> In that case, the leader of the Kurdish Workers' Party or PKK, Mr Abdullah Öcalan, had been taken by Turkish agents from Kenya to Turkey. He was tried in a State Security Court and initially sentenced to death, but the sentence was later commuted to life imprisonment. Mr Öcalan claimed, *inter alia*, that the death penalty was by its nature inhuman and degrading.<sup>348</sup>

In its ruling on this point, the Grand Chamber quoted the Chamber at length, and added its own observations, as follows:

344. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, ETS 114, of 28 April 1983, in force since 1 March 1985; 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, ETS 187, of 3 May 2002, in force since 1 July 2003.

345. *Soering* judgment, § 101.

346. *Soering* judgment, §§ 102-103.

347. *Öcalan v. Turkey*, Grand Chamber judgment of 12 May 2005; see also the Chamber judgment of 12 March 2003.

348. The applicant also claimed that any recourse to the death penalty – i.e. not just the actual implementation of that sentence but also its very imposition – would violate both Articles 2 and 3 of the Convention. The Court rejected this claim: see §§ 154-155.



*The Grand Chamber agrees with the following conclusions of the Chamber on this point [...]:*

*“... the legal position as regards the death penalty has undergone a considerable evolution since the Soering case was decided. The de facto abolition noted in that case in respect of twenty-two Contracting States in 1989 has developed into a de jure abolition in forty-three of the forty-four Contracting States and a moratorium in the remaining State which has not yet abolished the penalty, namely Russia. This almost complete abandonment of the death penalty in times of peace in Europe is reflected in the fact that all the Contracting States have signed Protocol No. 6 and forty-one States have ratified it, that is to say, all except Turkey, Armenia and Russia.<sup>349</sup> It is further reflected in the policy of the Council of Europe which requires that new member States undertake to abolish capital punishment as a condition of their admission into the organisation. As a result of these developments the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment.*

*... Such a marked development could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 § 1,*

349. Original footnote: “As at the date of the Chamber’s judgment of 12 March 2003, Protocol No. 6 has now been ratified by forty-four member States of the Council of Europe (including Turkey) and signed by two others, Monaco and Russia [...]” [As noted elsewhere, Monaco has since ratified Protocol No. 6; only Russia has not yet done so. For the current State of signatures and ratifications of Council of Europe treaties, consult <http://conventions.coe.int/>.]

*particularly when regard is had to the fact that all Contracting States have now signed Protocol No. 6 and that it has been ratified by forty-one States. It may be questioned whether it is necessary to await ratification of Protocol No 6 by the three remaining States before concluding that the death penalty exception in Article 2 has been significantly modified. **Against such a consistent background, it can be said that capital punishment in peacetime has come to be regarded as an unacceptable ... form of punishment which is no longer permissible under Article 2.**”*

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

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

*tion of the death penalty as inhuman and degrading treatment contrary to Article 3 of the Convention, since no derogation may be made from that provision, even in times of war. However, the Grand Chamber agrees with the Chamber that it is not necessary for the Court to reach any firm conclusion on these points since ... it would be contrary to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial.<sup>350</sup>*

The above shows the importance of the adoption, and near-universal ratification, of Protocol No. 6 to the Convention, which abolishes the death penalty in times of peace, and of the adoption and widespread (but not yet universal) ratification of Protocol No. 13. The main provision in Protocol No. 6, Article 1, is clear and unambiguous. It reads:

#### *Article 1 – Abolition of the death penalty*

*The death penalty shall be abolished. No one shall be condemned to such penalty or executed.*

350. *Öcalan* Grand Chamber judgment, §§ 163-165, quoting §§ 189-196 of the Chamber judgment, emphasis added, references omitted. On the fair trial issue, see the text, below p. 89. Since the Chamber judgment, quoted here, more States have ratified Protocol No. 13, so that there are now 8 States that have signed but not yet ratified the instrument. Only Azerbaijan and Russia have still neither signed nor ratified it (October 2006). For a full list of signatures and ratifications of Council of Europe treaties, see <http://conventions.coe.int/>.

Subject to its one limitation, discussed below, the absolute nature of the provision – which, for States that are Party to the Protocol, is regarded as an additional article to the Convention as a whole (Article 6 of Protocol No. 6) – is reinforced by the stipulations in Articles 3 and 4 of the Protocol that no derogations may be made from this article under Article 15 of the Convention, and that no reservations may be made in respect of it.

Article 1 of Protocol No. 6 does not affect the application of the rest of Article 2 of the Convention, other than the second sentence of the first paragraph of the latter article.<sup>351</sup> Extra-judicial killings contrary to Article 2 (2), as extensively discussed in the earlier chapters of this handbook, remain prohibited under that article. The new article prohibits *judicial* executions. The one limitation – to which, however, the stipulations in Articles 3 and 4 of the Protocol also apply – is contained in Article 2 of the Protocol, which reads:

#### *Article 2 – Death penalty in time of war*

*A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.*

351. Cf. the Commentary on Articles 1 and 6 of Protocol No. 6 in the Explanatory Memorandum to the Protocol.

The term “law”, used in Article 2 of the Protocol, must of course be given its usual meaning under the Convention, that is, as requiring rules that are accessible, and reasonably precise and foreseeable in their application. If anything, in view of the fundamental importance of the right to life, these requirements must be strictly applied.

Furthermore, as noted in the earlier quote from the Commentary in the Explanatory Memorandum to Protocol No. 6, the second sentence of paragraph 1 of Article 2 of the Convention remains applicable for those States which retain the death penalty for acts committed in time of war or of imminent threat of war, in particular as regards the requirement that the sentence must be pronounced by a “court” – that is, by an independent and impartial tribunal established by law, meeting the requirements of Article 6 of the Convention. In its case-law on that article, discussed in Human Rights Handbook No. 3, the Court has set a large number of strict standards in this regard and these must therefore be met by any “court” – including any military tribunal – that might impose the death sentence in time of war. It is notable that the Protocol stipulates, in Article 3, that:

*No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.*

This means, among other things, that States that are Party to the Protocol may not derogate from their obligations under Article 6 in respect of proceedings in times of war or imminent war that could result in the death penalty. Any State Parties to the Protocol

that do retain the death penalty in times of war or imminent war must therefore ensure that the relevant courts and procedures do not depart from the minimum fair trial requirements under Article 6 of the Convention. Rather, the Court stressed in *Öcalan* that:

*... It also follows from the requirement in Article 2 § 1 that the deprivation of life be pursuant to the “execution of a sentence of a court”, that the “court” which imposes the penalty be an independent and impartial tribunal within the meaning of the Court’s case-law [...] and that the most rigorous standards of fairness are observed in the criminal proceedings both at first instance and on appeal. Since the execution of the death penalty is irreversible, it can only be through the application of such standards that an arbitrary and unlawful taking of life can be avoided [...]. Lastly, the requirement in Article 2 § 1 that the penalty be “provided by law” means not only that there must exist a basis for the penalty in domestic law but that the requirement of the quality of the law be fully respected, namely that the legal basis be “accessible” and “foreseeable” as those terms are understood in the case-law of the Court [...].*

*... It follows from the above construction of Article 2 that the implementation of the death penalty in respect of a person who has not had a fair trial would not be permissible.<sup>352</sup>*

There has so far been no case-law on any of the provisions of Protocol No. 6. In particular, the phrase “in time of war or of imminent threat of war” has not yet been clarified. However, in

accordance with general international law, and more specifically with international humanitarian law, it should be read as referring to actual or imminent *international* armed conflict. For States that are Party to the Protocol, Article 2 of the Protocol therefore does *not* allow for the retention of the death penalty in respect of non-international (internal) armed conflicts. It can also not be invoked in the so-called “war on terror” or “on terrorism”: those phrases are political terms, they do not denote an internationally recognised condition such as war or armed conflict (although of course, if a State uses armed force in this context, it may become involved in “war” in the recognised sense).

In spite of the references in the Commentary to laws “present or future” which may make provision for the death penalty in respect of acts committed in time of war or of imminent threat of war,

352. *Öcalan* Grand Chamber judgment, § 166, quoting §§ 201-204 of the Chamber judgment, references omitted. The *Öcalan* judgment of course did not specifically deal with Protocol No. 13, since Turkey had not (and still has not) ratified it, but the matters addressed here concern the meaning of the second sentence of Article 2 (1) and therefore apply equally under the Protocol No. 13. Note that the references omitted from the quotation included references to ECOSOC Resolution 1984/50 of 25 May 1984 concerning safeguards guaranteeing protection of the rights of those facing the death penalty, to the “views” of the Human Rights Committee in a series of death penalty cases (including *Reid v. Jamaica*, *Daniel Mbenge v. Zaïre*, and *Wright v. Jamaica*) in which the Committee stressed the need for strict compliance with fair trial requirements in such cases, and to cases from the Inter-American Court of Human Rights (including its Advisory Opinion on “The right to information on consular assistance in the framework of the guarantee of due process of law” and its *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* judgment of 21 June 2002), taking the same position. This again shows the Court’s attempt to align its case-law with wider international legal standards. On the ECOSOC standards, see also its Resolutions 1989/64 of 24 May 1989 and 1996/15 of 23 July 1996.

States may not be entirely free to re-introduce the death penalty for situations to which that penalty does not apply already. This is because Article 6 of the Convention’s sister-document, the *International Covenant on Civil and Political Rights*, strongly suggests that the death penalty should be progressively abolished, and that its re-introduction or expansion in any area would thus be contrary to the letter and spirit of that treaty.<sup>353</sup> If that is so, States that are Party to Protocol No. 6 (but not to Protocol No. 13, discussed below) as well as to the ICCPR – that is, all State Parties to the Convention – are barred from introducing or re-introducing the death penalty for times of war or imminent war if their current law does not envisage this penalty at such times, or from extending its scope, because of the stipulation in Article 53 of the Convention that:

*Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.*

Under Protocol No. 13, States can agree to abolish the death penalty “in all circumstances”, i.e. both in times of peace and in times of war. The text of Protocol No. 13 is identical to the text of Protocol No. 6, except for the omission of Article 2 of the latter, just discussed. None of the interpretation questions in respect of

353. See the Human Rights Committee’s General Comment No. 6 on Article 6 of the Covenant of 30 April 1982, § 6.

that article, just noted, therefore arise: as is made clear in the very title of the instrument, for the States that have ratified Protocol No. 13, there really are no circumstances in which they can retain or (re-)introduce the death penalty, other than by denouncing the Convention.

### The death penalty and extradition

We already noted in the earlier sub-section on “extradition, expulsion and deportation” that in the 1989 case of *Soering*, the Court held that, because of the clear meaning of the second sentence of the first paragraph of Article 2, it could not rule that extradition to a country where the applicant might face the death penalty was *ipso facto* a violation of that article (although it did hold, in that case, that the “death row phenomenon” associated with that penalty in the US State of Virginia constituted inhuman and degrading treatment, thus barring the extradition on another basis). However, as we have seen in the previous sub-section, following the adoption of Protocol No. 6 to the Convention and its ratification by almost all member States of the Council of Europe, capital punishment in peacetime now *is* as such contrary to Article 2, and the use of the death penalty in any circumstances, including war, may soon also become automatically contrary to Article 3, irrespective of the attending conditions.

This means that the principle applicable to extraditions that may expose individuals to treatment contrary to Articles 2 or 3 in a non-State-Party to the Convention now also applies to extradi-

tions that may expose an individual to the death penalty in peacetime. If there are “substantial grounds” for believing that there is a “real risk” that a person to be extradited to a non-State Party will be charged, in that country, with a capital offence and, if convicted, will be sentenced to death and executed, the extraditing State will have to seek, and obtain, clear and binding assurances from the receiving State that the person will not be so sentenced, or at least that, if so sentenced, the penalty will not be carried out. Vague assurances to the effect that the prosecuting authorities will let it be known to the court that will try the person that the extraditing State would prefer that the death sentence not be imposed or carried out (such as were offered by the Virginian prosecuting authorities in *Soering*), are manifestly not enough.

Extraditing the person without such clear assurances will be in violation of the Convention. Furthermore, individuals must now have the right to assert the right not to be extradited in such circumstances before the domestic courts under Article 13 of the Convention which grants everyone the right to an effective remedy before those courts against an alleged violation, or threatened violation, of his or her substantive rights under the Convention.

What is more, if the person to be extradited appeals to the Court in Strasbourg and the Court indicates that, as an interim measure, the extraditing State should not hand the person over, the State in question will be in violation of Article 34 if it does not comply with this demand.

Of course, handing over a person to a non-State Party where he or she may face the death penalty, without going through a formal procedure in the extraditing State (as in so-called “extraordinary renditions”) is *a fortiori* against Articles 2 and 13 – and against Article 5, which prohibits arbitrary arrest and detention (including kidnapping for such abusive purposes).

It is now indeed common good practice for member States of the Council of Europe to seek such assurances, and not to extradite a person unless such assurances are obtained; and for persons under threat of extradition or expulsion to a country where they may face the death penalty to be able to challenge the intended extradition or expulsion in the domestic courts.

In theory, the fact that Protocol No. 13 has not yet been signed and ratified by all member States of the Council of Europe leaves some minor gaps in this system of protection against the death penalty. The one State that has not yet ratified Protocol No. 6 and that has neither signed nor ratified Protocol No. 13, Russia, could argue that it is still in the same legal position under the Convention as the United Kingdom was at the time of *Soering* – and that it can therefore extradite persons to States that retain the death penalty in peacetime as long as the attending circumstances don’t violate

Article 3. In practice, this is highly unlikely, since Russia itself has implemented a moratorium on executions.

Russia and the 12 States that are Party to Protocol No. 6 but not to Protocol No. 13 could argue that since they can (and presumably do) retain the death penalty in time of war, they can also extradite a person within their jurisdiction to a State that is at war and retains the death penalty in that context. However, given the extremely strict conditions imposed on any extraditions that might still be allowed as not contrary to Article 3 *per se* – such as the requirements of fully independent and impartial courts and procedures that fully conform to all the requirements of Article 6, as well as the requirements flowing from Article 3, which prohibit situations akin to the “death row phenomenon” – it will be extremely difficult to effect such an extradition or expulsion in a manner that will be compatible with the Convention. Hardly any State that retains the death penalty will meet those requirements. Many will certainly not meet those requirements in any special wartime fora and procedures, usually involving military tribunals or commissions, that may impose the death penalty. In others, the physical or psychological conditions attending such proceedings will contravene the standards of Article 3.



**Directorate General of Human Rights  
Council of Europe  
F-67075 Strasbourg Cedex**

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These human rights handbooks are intended as a very practical guide to how particular articles of the European Convention on Human Rights have been applied and interpreted by the European Court of Human Rights in Strasbourg. They were written with legal practitioners, and especially judges, in mind, but are accessible also to other interested readers.