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PROTECTING THE RIGHT TO LIFE

POSITIVE OBLIGATIONS UNDER ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

BY

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"I certify that the attached is all my own work. I understand that I may be penalised if I use the words of others without acknowledgement."

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Abstract

The founding fathers of the European Convention on Human Rights intended to create a binding normative and institutional framework for the protection of certain of the rights enshrined in the 1948 Universal Declaration on Human Rights, i.e. the civil and political rights. Consequently the European Convention on Human Rights was to contain provisions which would prohibit any unlawful interference by states with the enjoyment of the human rights of individuals and which would, with the exception of a few articles, only place *negative obligations* upon the states. However, it soon became clear that the effective protection of human rights required more than just negative obligations and the supervisory mechanisms of the European Convention on Human Rights accepted the need for *positive obligations* for the protection of the rights enshrined in the European Convention on Human Rights.

It took until 1995 before the European Court on Human Rights was given the opportunity to judge upon the merits of an article which was generally regarded as containing only negative obligations, i.e. article 2 enshrining the right to life. The European Court on Human Rights immediately accepted the need for positive obligations for the effective and practical protection of what it referred to as the supreme value of the European Convention on Human Rights. Since 1995 it has developed an impressive body of law on the right to life and has developed a broad range of positive obligations under article 2. The positive obligations can be dealt with under three main headings, i.e. the procedural obligation, obligations in the public sphere and obligations in the private sphere. However, since positive obligations were originally not foreseen and since they may place financial and organisational burdens upon the states, the European Court on Human Rights has been careful not to place unreasonable burdens upon the states and has only introduced those positive obligations that could reasonable be inferred from article 2 and which are inherent to the effective functioning of a democratic *Rechtsstaat*.

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1. Introduction to the right to life

1.1. Introduction

Ever since the adoption of the Universal Declaration on Human Rights (hereafter UDHR),[1] the world has witnessed an explosive growth in the protection of human rights, not only on the normative level but also on the institutional level. Six major human rights treaties have been adopted within the framework of the United Nations, three regional human rights systems have been established and numerous declarations and resolutions have been issued at the international level to protect and guarantee the inherent dignity of all human beings.

It was clear from the outset that to protect and guarantee the inherent dignity of each and every human being, that person needed to be alive. The right to life can be seen as a basic right in the sense that its enjoyment is "*essential to the enjoyment of all other human rights*" and without its enjoyment the existence of all other rights would be impossible.[2] Therefore the protection of the right to life was given a prominent position in the UDHR which states clearly in article 3 that "*everyone has the right to life, liberty and security of person*".

In the decades that followed the incorporation of the right to life into the UDHR, the other major human rights documents also paid tribute to the importance of the right to life.[3] The Council of Europe was the first regional organisation to translate the non-binding principles of the UDHR into binding commitments and proclaimed in article 2 of the European Convention on Human Rights (hereafter ECHR) that "*everybody's right to life shall be protected by law*".[4] The other regional human rights systems also placed great importance upon the right to life, which is reflected by the inclusion of the right to life in their major human rights instruments, i.e. the American Convention on Human Rights (hereafter ACHR)[5] and the African Charter on Human and Peoples' Rights (hereafter ACHPR).[6] At the universal level, the International Covenant on Civil and Political Rights (hereafter ICCPR)[7] protects the inherent right to life of every human being.[8] Besides these major and binding human rights

[1] Contained in General Assembly Resolution 217A (III), 10 December 1948.
[2] Shue, H., *Basic rights, subsistence, affluence and U.S. foreign policy*, Princeton, Princeton University Press, 1996 (2nd edition), p. 19.
[3] While the texts of the international instruments refer only to males, no gender related discrimination should be inferred from the texts.
[4] Contained in European Treaty Series No. 005, adopted on 4 November 1950.
[5] Contained in O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, adopted on 22 November 1969.
[6] Contained in OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), adopted on 27 June 1981.
[7] Contained in General Assembly Resolution 2200A (XXI), 16 December 1966.
[8] See Annex I for the full text of the relevant articles and paragraphs.

instruments, many other binding and non-binding either explicitly or implicitly also aim at the protection of the right to life.

The supervisory mechanisms of all the international instruments have emphasised the importance of the right to life on numerous occasions. The Human Rights Committee, responsible for monitoring states' compliance with the ICCPR, even stated in the opening paragraphs of its General Comment 6(16) and General Comment 14(23) that the right to life is "*the supreme right*" of the ICCPR and confirmed that "*it is basic to all human rights*".[9] In a very recent judgement on article 2 the European Court on Human Rights (hereafter ECtHR) can be quoted stating that "*article 2 [of the ECHR], which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe*".[10] The African Commission on Human and Peoples' Rights said that "*the right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life*".[11] In a major case on the American continent, the *Street Children-case*, the Inter-American Court on Human Rights can be quoted saying that "*the right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning.*"[12]

1.2. Guaranteeing effective protection of the right to life

When examining the contents of the relevant provisions, one notes that all instruments do provide a non-derogable right to life, meaning that it must be guaranteed under all circumstances except in times of emergency or war.[13] However, none of the aforementioned instruments offers an absolute guarantee for the right to life. All instruments merely guarantee the prohibition of arbitrary and unlawful intervention with the right life and therefore allow limitations upon the right to life under specific circumstances. In spite of what one may expect, the original instruments do not even prohibit the death penalty. Additional protocols

[9] General Comments contained in the documents CCPR/C/21/Add.1 (1982) and CCPR/C/21/Add.4 (1984).
[10] Aktas v. Turkey, Judgement of 24 April 2003, paragraph 258.
[11] 223/98 Forum of Conscience/ Sierra Leone.
[12] Villagrán Morales and Others v. Guatemala, Judgement of 19 November 1989, I/A Court H.R. Series C63, paragraph 144.
[13] See article 15 ECHR, article 4 ICCPR & article 27 ACHR.

deal with that issue, but only the ECHR provides for additional protocols abolishing the death penalty in times of peace as well as times of war.[14]

Traditionally, the right to life under international law was regarded as the typical example of a right containing only *negative obligations* and requiring solely that the states refrained from any unlawful or arbitrary interference with the right to life of individuals. The importance of the right to life as the basis for the enjoyment of all other human rights has made a change in this perception necessary. It has become clear that states need to do more that simply refrain from unlawful or arbitrary killings of individuals, but that they need to take an active stand when the protection of the right to life is involved. It has therefore been accepted that even the adoption of *positive measures* can be required. The Human Rights Committee formally accepted the need for positive actions on several occasions in its 1982 General Comment 6 (16), and incorporated the need for positive actions in its case law.[15] The concept of positive obligations under article 4 of the ACHR entered into the Inter-American human rights system as soon as the Inter-American Court on Human Rights was confronted with contentious cases dealing with the right to life.[16] The African Commission on Human and Peoples' Rights also indicated the need for positive actions under article 4 of the ACHPR when dealing with a case against Malawi in 1994.[17] In 1995, the ECtHR was finally given the possibility to join ranks with the other supervisory mechanisms and to establish the existence of positive obligations under article 2 of the ECHR as well.[18]

One may wonder why the ECtHR, the oldest and generally referred to as the best developed supervisory mechanism, was the last one to proclaim and confirm the existence of positive obligations in the field of the protection on the right to life. The answer stems from the fact that it took until the mid-1990s before the first case on the right to life was brought before the ECtHR. The European Commission had dealt with the right to life in several decisions and the Committee of Ministers even established a violation of the right to life in a case between Cyprus and Turkey, [19] but the ECtHR had to wait until 1995 before it could deliver a judgement on the right to life. In the first case ever on article 2 the ECtHR immediately and explicitly recognised the need for governments to adopt positive steps in order to fulfil their obligations under the ECHR.

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[14] See Protocol 6 (peacetime) and Protocol 13 (war times).
[15] See e.g. Baboeram v. Suriname (146, 148-154/83).
[16] Velásquez Rodríguez v. Honduras, Judgement of 29 July 1988, I/A Court H.R. Series C4.
[17] 64/92 Krishna Achuthan on behalf of Aleke Banda, 68/92 Amnesty International on behalf of Orton and Vera Chirwa 78/92 Amnesty International on behalf of Orton and Vera Chirwa / Malawi.
[18] McCann and Others v. United Kingdom, Judgement of 27 September 1995, 21 E.H.R.R. 97.
[19] Cyprus v. Turkey, 4 E.H.R.R. 482.

1.3. Conclusion

The ECtHR might have been the last one to judge on the protection of the right to life, but it has rapidly developed a broad range of obligations under article 2. Since 1995 the ECtHR has dealt with the merits of the right to life in over 50 cases. In those cases the ECtHR imposed a broad variety of obligations on states. In a large number of cases the ECtHR not only imposed negative obligations upon states but also imposed positive obligations upon the states to effectively guarantee the right to life. Consequently, the ECtHR made the scope of article 2 much broader than states had anticipated when they drafted and ratified the ECHR.

This paper will examine the contents and scope of these positive obligations under article 2 of the ECHR. Chapter two will look into the theoretical foundations underlying the concept of positive obligations in human rights law generally and within the ECHR specifically. Chapter three will briefly examine the traditional aspects of the right to life and will look into the negative obligation of states to respect the right to life. Chapters four, five and six will each focus on specific categories of positive obligations that have been identified under article 2 of the ECHR. Finally, chapter seven will evaluate and appreciate the positive obligations that have been established under article 2 and will try to give some guidance for the future of the positive obligations under article 2.

2. Positive obligations under the European Convention on Human Rights

2.1. Introduction

Originally, the ECHR was to be the first step to guarantee within a European context the collective enforcement of certain of the rights enshrined in the UDHR.[20] It was to list the fundamental human rights and freedom to be respected within the Council of Europe and to set up an effective enforcement mechanism for the protection of the classical human rights; the civil and political rights. The drafters of the ECHR intended to protect these classical human rights by prohibiting any unlawful interference by states with the free exercise of these rights by individuals under their jurisdiction. Only in exceptional circumstances did the provisions of the ECHR explicitly demand the states to undertake certain positive obligations in addition to their negative obligations. Examples of explicit positive obligations can be found in article 6 (3), which requires states to provide legal assistance in criminal cases, [21] and in article 3 of Protocol 1 which places upon states the duty to hold regular elections.[22]

However, time has shown that negative obligations alone have proven insufficient to guarantee the effective enjoyment of the rights enshrined in the ECHR. Therefore the supervisory mechanisms of the ECHR have broadened the scope of the states' obligations. Positive obligations have been read into articles that did not contain an explicit reference to any such obligation. This chapter will examine the evolution of the positive obligations under the ECHR as a whole and will search for theoretical underpinnings of these obligations.

2.2. Understanding positive obligations

The dichotomy between negative and positive obligations is closely related to the distinction that has been made in history between the different categories or generations of human rights.[23] Civil and political rights are to constitute the '*first generation*' of human rights. Economic, social and cultural rights are said to form the '*second generation*' and group rights such as the right to peace, the right to development and environmental rights are to make up the '*third generation*' of human rights. Lately however, it becomes more and more accepted

[20] Preamble paragraph 5 ECHR.
[21] Artico v. Italy, Judgement of 13 May 1980, 3 E.H.R.R. 1.
[22] Mathieu-Mohin and Clarfayt v. Belgium, Judgement of 2 March 1987, 10 E.H.R.R. 1.
[23] Forder, C.J., *Positieve verplichtingen in het kader van het Europees Verdrag tot bescherming van de Rechten van de Mens en de fundamentele vrijheden*, in «NJCM-Bulletin», Volume 17, Number 6, 1992, p. 616.

that all human rights are "*indivisible, interdependent and interrelated*".[24] However, for the discussion on the difference between negative and positive obligations, especially the characteristics of the first and second generation of human rights are used as justifications for the distinctions that are made between the respective obligations.

First generation human rights or '*classical*' human rights are assumed to constitute the core of human rights. They stem from the Enlightenment and are to be traced back to the documents deriving from the French and American Revolutions. Their compliance merely requires states to abstain from any interference in the life of the individual and thus poses only negative obligations upon the states. Second generation rights or '*socio-economic*' rights are said to be merely '*programmatic*' rights. For their realisation these rights are dependent upon an active attitude of the states, therefore placing positive obligations upon the states. For that reason, they are not to be realised immediately, but rely on '*progressive realisation*'.[25]

The division between classical and socio-economic rights has been used throughout history to identify the tension between several rights and to justify the level of protection at a certain time and place.[26] The UDHR, adopted in 1948, contains civil and political as well as economic, social and cultural rights and originally the non-binding principles of the UDHR were to be converted into binding obligations within a single document. However, the emergence of the Cold War changed the international community into a bipolar world with Western states focussing upon civil and political rights and socialist states emphasising economic and social rights.

Many arguments have been forward to stress the artificiality of the distinction between the generations of human rights. It is argued that some rights, such as the right to property, cannot easily be classified within either of the generations and that most international human rights instruments contain rights from both categories.[27] It must also be noted that the dichotomy between negative and positive obligations does not necessarily follow the dichotomy between first and second generation rights. First generation rights also require positive steps to be taken for their fulfilment, while second generation rights may require governments to abstain from interfering with the enjoyment of their rights. Some rights are

[24] Vienna Declaration and Programme of Action (1993), paragraph 5.
[25] Rosas, A. & Scheinin, M., *Categories and beneficiaries of human rights*, in R. Hanski & M. Suksi, *An introduction to the international protection of human rights*, Turku, Institute for Human Rights, 2001 (2nd edition), p. 49.
[26] Forder, C.J., *op. cit.*, note 23, p. 617.
[27] Rosas, A. & Scheinin, M., *op. cit.*, note 25 p. 52.

considered to belong to the classical human rights, such as the right to education,[28] but inevitably contain socio-economic elements and do require states to take positive measures. On the contrary, the right to strike is generally regarded as a socio-economic, second-generation right while its exercise *mainly* requires states to abstain from interfering.[29] Another argument against the division between rights containing negative and rights containing positive obligations relates to the fact that *all* rights contain negative as well as positive obligations. If one refers to obligations as duties on the side of the state, it can be stated that "*no right can…be secured by the fulfilment of only one duty or one kind of duty…it always turns out in concrete cases to involve a mixed bag of actions and omissions.*"[30] Literature has further developed this idea by stating that each human right in principle contains three different types of obligations. First, the obligation to *respect* refers to pure negative obligations and prohibits states from interfering with the enjoyment of the right. Second, the obligation to *protect* requires states to prevent interferences by enacting legislation and by providing effective remedies. Finally, states may be under the obligation to *assist* and *fulfil* the rights of individuals by establishing a better infrastructure and by providing basic needs.[31] This approach enjoys wide support at the international level and is often referred to when distinguishing and identifying human rights obligations as was done by the Committee on Economic, Social and Cultural Rights in one of its General Comments: "*The right to food like any human right imposes three levels of obligations on States parties: the obligation to respect, to protect and to fulfil.*"[32]

2.3. Acceptance of positive obligations by the European Court on Human Rights

The ECHR was originally regarded to contain first generation human rights, posing negative obligations on the states. Article 1 of the ECHR places upon the states the obligations '*to secure*' to everyone within their jurisdiction the rights and freedoms enshrined in the ECHR. However, it is left to the states themselves to decide how they fulfil this obligation. It would

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[28] The right to education is generally perceived to consist of two component, the right to freely establish schools and the right to receive education For a detailed overview of these components see General Comments 11 and 13 of the Committee on Economic, Social and Cultural Rights & Prakke, L., Reede, J.L. de, & Wissen G.J.M. van, *Pot, C.W. van der & Donner, M., Handboek van het Nederlandse staatsrecht*, Deventer, W.E.J. Tjeenk-Willink, 2001 (14e editie).

[29] Forder, C.J., *op. cit.*, note 23, p. 618.

[30] Shue, H., *Basic rights, subsistence, affluence and U.S. foreign policy*, Princeton, Princeton University Press, 1996 (2nd edition), p. 155.

[31] Eide, A., *Economic, social and cultural rights as human rights*, in A. Eide, C. Krausse & A. Rosas (eds.), *Economic, social and cultural rights: A textbook,* Dordrecht, Martinus Nijhoff Publishers, 1995, p. 35.

[32] General Comment no. 15 (1999), paragraph 15 (UN Doc. E/C.12/1999/5).

seem obvious that upon ratification states are required to ensure that their domestic legislation is in conformity with the norms enshrined in the ECHR and that '*securing the rights and freedoms to everyone*' at least places upon the states the positive obligation to change legislation violating the ECHR. In this sense the ECHR already places positive obligations upon its contracting parties from the moment of ratification.[33]

However, the ECHR only enables an individual to address the ECtHR if the legislation concerned directly affects him or her, if the individual is "*the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention*".[34] The ECtHR formulated in *Klass* that it is impossible for individuals "*to complain against a law in abstracto simply because they feel it contravenes the Convention. In principle it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention: it is necessary that the law should have been applied to his detriment*".[35] This would leave open the possibility of allowing the existence of legislation that contravenes the ECHR as long as the legislation concerned would not be applied against individuals. The ECtHR acknowledged that such an outcome would not serve the object and purpose of the ECHR and in a case dealing with legislation on homosexuality introduced the concept of a '*continuing interference*' with convention rights since "*in the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life*".[36] This wording does seem to imply that states are under a general obligation to adjust their legislation to meet the requirements of the ECHR and are thus indeed confronted with a positive obligation from the moment of ratification of the ECHR. Referring to the three levels of obligations human rights places upon states, one may well argue that the ECHR itself requires states to *respect* and *protect* convention rights.

Even though it is generally said that the ECtHR explicitly introduced the concept of positive obligations in the late 1970s, already in 1968 the ECtHR showed its sensibility to the existence of positive obligations within classical rights. In the *Belgian Linguistic-case* the ECtHR can be quoted stating that the right to education enshrined in article 2 of Protocol I may require positive steps to be taken by the states.

> "*By the terms of the first sentence of this Article (P1-2), 'no person shall be denied the right to education'. In spite of its negative formulation, this provision uses the term*

[33] Lawson, R., *Positieve verplichtingen onder het EVRM: opkomst en ondergang van de 'fair-balance'-test – deel 1*, in «NJCM-Bulletin», Volume 20, Number 5, 1995, p. 560.
[34] Article 25 ECHR.
[35] Klass v. Germany, Judgement of 6 September 1978, 2 E.H.R.R. 214, paragraph 33.
[36] Dudgeon v. United Kingdom, Judgement of 22 October 1981, 4 E.H.R.R. 149, paragraph 41.

> *'right' and speaks of a 'right to education'... It remains however to determine the content of this right and the scope of the obligation which is thereby placed upon States. The negative formulation indicates, as is confirmed by the 'preparatory work' (...), that the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level. However, it cannot be concluded from this that the State has no* ***positive obligation*** *to ensure respect for such a right as is protected by Article 2 of the Protocol (P1-2). As a 'right' does exist, it is secured, by virtue of Article 1 (art. 1) of the Convention, to everyone within the jurisdiction of a Contracting State.*"[37]

The ECtHR explicitly introduced the concept of positive obligations in *Marckx*, which dealt with the distinction Belgian law made between legitimate and illegitimate children.[38] The ECtHR stated:

> "*By proclaiming in paragraph 1 the right to respect for family life, Article 8 (art. 8-1) signifies firstly that the State cannot interfere with the exercise of that right otherwise than in accordance with the strict conditions set out in paragraph 2 (art. 8-2)... Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be* ***positive obligations*** *inherent in an effective 'respect' for family life.*"[39]

The ECtHR continued by explaining the contents of the positive obligation in this case:

> "*This means, amongst other things, that when the State determines in its domestic legal system the régime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8 (art. 8), respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 (art. 8-1) without there being any call to examine it under paragraph 2 (art. 8-2).*"

In sum, the ECtHR not only indicated the existence of positive obligation in a provision that seems to impose only the duty respect private and family life upon states, but also indicated

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[37] Belgian Linguistic-case, Judgement of 9 February 1967, 1 E.H.R.R. 241, paragraph 3, emphasis added.
[38] Marckx v. Belgium, Judgement of 13 June 1979, 2 E.H.R.R. 330.
[39] *Ibidem*, paragraph 31, emphasis added.

the contents of the positive obligation in question. The ECtHR further outlined that a failure to live up to one's positive obligations on its own constitutes a violation of article 8 (1) and that no justification under article 8 (2) can be sought.

2.4. Justifications for the introduction of positive obligations

Even though most authors agree with the result achieved in *Marckx*, it is wondered in the literature why the ECtHR introduced the notion of positive obligations in this specific case.[40] It is argued that instead of introducing the notion of positive obligations and finding a breach of article 8 (1), the ECtHR might just as well could have dealt with the issue under the limitation clause of article 8 (2).[41] It could have concluded that the mere existence of the law was to be regarded as a continuing violation of the ECHR for which no justification under article 8 (2) could be given.

The reasons referred to in literature for the introduction of the concept of positive obligations differ. First, some authors refer to the dissenting opinion of Judge Fitzmaurice, in which he resolutely refuses to accept that *Marckx* falls within the scope of article 8, as a reason for the ECtHR to explain its majority point of view on positive obligations.[42] It is said that the ECtHR needed to clarify its choice of bringing the case under article 8 and did so by introducing the concept of positive obligations.

Second, the introduction of the positive obligations might be explained by examining the specific way in which the ECtHR has interpreted the ECHR, based on the principle of effectiveness.[43] Since the ECHR is an international treaty the general rules on interpretation of treaties as formulated by the Vienna Convention on the Law of Treaties (hereafter Vienna Convention) are applicable to interpretation of the ECHR.[44] As a general rule a treaty must be interpreted in good faith and in accordance with the ordinary meaning of its wording in their context and in the light of its object and purpose. The Vienna Convention further refers to the *travaux prépraratoire* as a supplementary means of interpretation. However, the ECtHR was quick to note that the specific character of the ECHR, being a human rights instrument with its own adjudication system, renders specific forms of interpretation necessary. In *Tyrer* the

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[40] Velde, J. van der, *Positieve verplichtingen: over het ontstaan en het karakter van positieve verplichtingen*, in «EVRM R&C», Katern 2.2, 2002, p. 3.
[41] Lawson, R., *op. cit.*, note 33, p. 563.
[42] *Ibidem*, p. 564.
[43] Merrils, J.G., *The development of international law by the European Court on Human Rights*, Manchester, Manchester University Press, 1993 (2nd edition), ch. 5 & Ovey, C. & White, R., *Jacobs and White, The European Convention on Human Rights*, Oxford, Oxford University Press, 2002 (3rd edition), p. 37.

ECtHR noted that "*the Convention is a living instrument which…must be interpreted in the light of present-day conditions.*"[45] The ECtHR explained its position again clearly in *Soering* when it said:

> "*In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (…). Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (…). In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society' (…).*"[46]

In the second case dealing with positive obligations the ECtHR explicitly referred to the specifics of this dynamic interpretation of convention rights. In *Airey* the ECtHR noted that "*the Convention must be interpreted in the light of present-day conditions ... and it is designed to safeguard the individual in a real and practical way.*"[47] The effective and practical protection of the convention rights is central in the arguments of the ECtHR. The ECtHR thus has chosen a dynamic or evolutive approach to the interpretation of the ECHR, which may result in the development of rights and obligations that were neither explicitly recognised by the drafters of the ECHR nor by the ratifying states. This renders the use of the *travaux prépraratoires* as a supplementary means of interpretation almost irrelevant. Nevertheless, the use of the dynamic interpretation is not unlimited.[48] The ECtHR may not introduce rights or obligations into the ECHR that were explicitly excluded from the scope of the ECHR or would counter the general object and purpose of the ECHR. This limitation becomes clear from the ECtHR's findings in *Johnston*:

> "*The question that arises, as regards this part of the case, is whether an effective 'respect' for the applicants' family life imposes on Ireland a positive obligation to introduce measures that would permit divorce... It is true that, on this question, Article 8 (art. 8), with its reference to the somewhat vague notion of 'respect' for family life, might appear to lend itself more readily to an evolutive interpretation than does Article 12 (art. 12). Nevertheless, the Convention must be read as a whole and the*

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[44] Golder v. United Kingdom, Judgement of 21 February 1975, 1 E.H.R.R. 524, paragraph 29.
[45] Tyrer v. United Kingdom, Judgement of 25 April 1978, 2 EHHR 1, paragraph 31.
[46] Soering v. United Kingdom, Judgement of 7 July 1989, 11 E.H.R.R. 439, paragraph 87.
[47] Airey v. Ireland, Judgement of 9 October 1979, 2 E.H.R.R. 305, paragraph 25.
[48] Ovey, C. & White, R., *op. cit.*, note 43, p. 35.

> *Court does not consider that a right to divorce, which it has found to be excluded from Article 12 (art. 12) (...), can, with consistency, be derived from Article 8 (art. 8) a provision of more general purpose and scope.*"[49]

The ECtHR reached the same conclusion in *Pretty*, dealing with a request for euthanasia under article 2. It said that "*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. (...) Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life... 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.*"[50] In sum, positive obligations can only be read into the ECHR if the ECHR itself provides a certain base for the existence of these obligations.[51]

Third, the existence of positive obligations for so called classical rights might be explained by the fact that the distinction between classical and social rights is by no means a very strict distinction.[52] This refers back to the different levels of obligations states have under all human rights. The ECtHR dealt with this issue in *Airey* where it stated that "*whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention*."[53]

Whatever the theoretical underpinnings for the existence of positive obligations under the ECHR may be, the ECtHR itself indicated that it was not unduly concerned about the theoretical background. The primary concern of the ECtHR lies in an effective guarantee of the rights enshrined in the ECHR:

> "*The Court does not have to develop a general theory of the positive obligations which may flow from the Convention, but before ruling on the arguability of the applicant*

[49] Johnston v Ireland, Judgement of 18 December 1986, 9 E.H.R.R. 203, paragraphs 56-57.
[50] Pretty v. United Kingdom, Judgement of 29 April 2002, paragraphs 39-40.
[51] Velde, J. van der, *op. cit.*, note 40, p. 4.
[52] *Ibidem,* note 40, p. 5.
[53] Airey, *op. cit.*, note 47, paragraph 26.

> *association's claim it has to give an interpretation of Article 11 (art. 11)...Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 (art. 11).*"[54]

2.5. Scope and contents of the positive obligations

Even though it might be impossible to trace the exact origins of the positive obligations found within the ECHR, the fact remains that they have largely broadened the scope of the ECHR and have posed an increasing burden on the states. Another issue surrounding the inclusion of positive obligations into the ECHR is the difficulty to determine what exactly the contents of the positive obligations under the ECHR should be. Naturally the contents of the positive obligation should be such as necessary for the effective enjoyment of the right concerned. However, the means to reach this effective enjoyment may differ.[55] Faced with the fact that the positive obligations were not expressly contained in the ECHR combined with the financial or organisational burden they might place upon states the ECtHR decided to give states a wide margin of appreciation when dealing with positive obligations. In *Airey* the ECtHR explicitly stated that "*in any event, it is not the Court's function to indicate, let alone dictate, which measures should be taken...*"[56] In *Abdulaziz* the ECtHR again proved sensitive for the delicacy of posing additional obligations upon states:

> "*The Court recalls that, although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life (...). However, especially as far as those positive obligations are concerned, the notion of 'respect' is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (...). In particular, in the area now under*

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[54] Plattform Ärzte für das Leben v. Austria, Judgement of 21 June 1988, 13 E.H.R.R. 204, paragraphs 31-32.
[55] Dijk, P. van, *'Positive obligations' implied in the European Convention on Human Rights: are the states still the 'masters' of the Convention*, in M. Castermans, F. van Hoof & J. Smith (eds.), *The role of the nation states in the 21st century*, The Hague, Kluwer Law International, 1998, p. 22.
[56] Airey, *op. cit.*, note 40, paragraph 26.

> *consideration, the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved. Moreover, the Court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory*."[57]

The ECtHR thus allowed states to adopt the means they thought needed, especially in a delicate area such as immigration policies and an area where positions between states differ significantly.

Since *Marckx* the ECtHR has accepted the existence of positive obligations under several articles of the ECHR and its Protocols, but for the development of the doctrine of positive obligations its case-law dealing with the respect for private and family life guaranteed in article 8 deserves particular attention. The structure of that article, containing the right to respect for one's private and family life in the first paragraph and the possibility for interferences with the rights under the conditions of the limitation-clause of the second paragraph, originally made the ECtHR deal with positive obligations under the first paragraph of article 8. Article 8 (1) itself contained no guidelines for assessing whether or not a state had lived up to its positive obligations. Therefore the ECtHR was forced to develop criteria which could be used to monitor states' compliance with their positive obligations. In *Rees* the ECtHR developed the so-called '*fair-balance test*'.[58] The fair-balance test had been used by the ECtHR before in cases dealing with article 1 Protocol I, an article that does not contain a specific limitation clause such as article 8 (2).[59] While referring to *Abdulaziz* the ECtHR concluded that "*in determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention (...). In striking this balance the aims mentioned in the second paragraph of Article 8 (art. 8-2) may be of a certain relevance...*"[60]

In the literature it is generally agreed that the development of the fair-balance test had not been favourable for the protection of the rights and freedom of individuals.[61] Compared to the strict requirements of the limitation clauses of the ECHR, striking a balance between the

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[57] Abdulaziz, Cabales and Balkandali v. United Kingdom, Judgement of 28 May 1985, 7 E.H.R.R. 471, paragraph 67.
[58] Rees v. United Kingdom, Judgement of 17 October 1986, 9 E.H.R.R. 56.
[59] See Sporrong and Lönnroth v. Sweden, Judgement of 23 September 1983, 5 E.H.R.R. 35.
[60] Rees, *op. cit.*, note 58, paragraph 37.

interests of the individual and the general community while leaving to the states a wide margin of appreciation leaves little room for supervision of the positive obligations by the ECtHR.[62] However, by noting that the aims of article 8 (2) "*may be of a certain relevance*" for the determination whether or nor a fair-balance had been struck, the ECtHR seemed to have made an understatement. Within several years the fair-balance test would equal the requirements of the limitation clause whenever possible.[63] The only distinction was often to be found in the fact that the "*prescribed by law*"-condition of the limitation clause could not be used for the fair-balance test, since exactly the lack of legislation was a crucial issue in many cases dealing with positive obligations.[64] From the perspective of the protection of the individual, this has been a positive development enabling the ECtHR to fully examine the positive obligations required.

When developing case law on positive obligations, the ECtHR seemed to become less convinced of the structural differences between positive and negative obligations and of the need to consider them under different paragraphs. In *Powell* it was formulated as follows:

> "*Whether the present case be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 (art. 8-1) or in terms of an 'interference by a public authority' to be justified in accordance with paragraph 2 (art. 8-2), the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (...). Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8 (art. 8-1), 'in striking [the required] balance the aims mentioned in the second paragraph (art. 8-2) may be of a certain relevance' (..).*"[65]

In *Keegan* the ECtHR used a similar phrase that has become the standard for its jurisprudence on positive obligations under article 8. The ECtHR said that "*the boundaries between the State's positive and negative obligations under this provision do not lend themselves to*

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[61] Forder, C.J., *op. cit.*, note 23, p. 631.
[62] Lawson, R., *Positieve verplichtingen onder het EVRM: opkomst en ondergang van de 'fair-balance'-test – deel 2*, «NJCM-Bulletin», Volume 20, Number 6, 1995, p. 728.
[63] Dijk, P. van, *op. cit.*, note 55, p. 23.
[64] See also the Concurring Opinion of Judge Wildhaber in Stjerna v. Finland, Judgement of 25 November 1994, 24 E.H.R.R. 195.
[65] Powell and Rayner v. United Kingdom, Judgement of 12 February 1990, 12 E.H.R.R. 355, paragraph 41.

precise definition. The applicable principles are, none the less, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation."[66]

It may be concluded that the level of protection awarded to individuals is identical regardless whether the ECtHR deals with positive obligations under the rights in general or negative obligations under the limitation clauses. The fair-balance test can also be applied to the other convention articles that contain a limitation clause such as articles 10 and 11. The extent to which the fair-balance can be applied to articles containing an absolute right will be examined in the following chapters. However, since these articles lack the possibility of weighing interests, it is argued that the required effectiveness becomes the only relevant criteria for determining the existence of a positive obligation.[67] In any event, the wide margin of appreciation which was originally awarded when dealing with positive obligations is no longer automatically applied but has become dependent upon issues such as the diversity of the practice in states.[68] The extent of the positive obligation further depends on factors including whether "*a vital interest, protected by the Convention*" is involved (*Gaskin*), whether fundamental values or essential elements of rights are at stake (*X and Y v. The Netherlands*), how the rights involved is formulated (*Botta*), scientific advances and changing attitudes (*B. v. France*) and the burden that would be placed upon the state (*Rees).*[69]

2.6. Conclusion

Even though the ECtHR introduced the notion of positive obligation over two decades ago, it is still argued in literature that there was no need for the introduction of positive obligations into the ECHR. It is stated that many cases that were dealt with under the heading of positive obligations could have dealt with just as easily under the concept of an unjustified interference with the right concerned.[70] The fact that the European Commission and the ECtHR in several cases reached the same conclusion by using different approaches might

[66] Keegan v. Ireland, Judgement of 26 May 1994, 18 E.H.R.R. 913, paragraph 47.
[67] Dijk, P. van, *op. cit.*, note 55, p. 27.
[68] Lawson, R., *op. cit.*, note 62, p. 749.
[69] Gaskin v. United Kingdom, Judgement of 7 July 1989, 12 E.H.R.R. 36; Botta v. Italy, Judgement of 24 February 1998, 26 E.H.R.R. 241; X and Y v. The Netherlands, Judgement of 26 March 1985, 8 E.H.R.R. 235; Rees, *op. cit.*, note 58; B. v. France, Judgement of 25 March 1992, 16 E.H.R.R. 1.
[70] Lawson, R., *op. cit.*, note 62, p. 749 & Dijk, P. van, *op. cit.*, note 55, p. 25.

support this view, just as the fact that the ECtHR has not always been consistent in identifying positive obligations in cases that shared a close resemblance.[71]

Nevertheless, the concept of positive obligations is now firmly embedded in the legal order of the ECHR.[72] Within the limits of the dynamic interpretation, the ECtHR has ensured an effective protection of the rights of individuals by broadening the states' obligations and by opening the ECHR for new but needed obligations.

[71] *Ibidem,* p. 733-739, referring e.g. to the Gaskin-case.
[72] See the approach of the Grand Chamber in Christine Goodwin v. United Kingdom, Judgement of 11 July 2002.

3. Respecting the right to life under the European Convention on Human Rights

3.1. Introduction

An interesting aspect of the jurisprudence on article 2 is the fact that it dealt simultaneously with negative and positive obligations. However, before looking into the development of any positive obligation, this paper will first examine the obligations the state parties clearly had in mind when they ratified the ECHR. Article 2 of the ECHR provides:

> *"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."*

The wording of article 2 is illustrative of the basic and fundamental rights that the Council of Europe set out to protect when it adopted the ECHR in 1950. Civil and political rights were to be guaranteed within the regional context of the states that had suffered most from the atrocities of the Nazi-regimes during the Second World War and democratic values had to be protected from the threats of communism and totalitarian regimes.[73] States were not to interfere with the rights and freedoms of the individuals residing under their jurisdiction and were bound by negative obligations to guarantee the effective enjoyment of these rights and freedoms. This chapter will look into the different aspects of article 2 of the ECHR regarding the negative obligations of states.

3.2. Protecting the right to life by law

When examining the structure of article 2, one immediately notices several distinctive features of the right to life under the ECHR. Article 2 does not protect life itself, but ensures

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[73] Teitgen, P.H., *Introduction to the European Convention on Human Rights*, in R. MacDonald, F. Matscher & H. Petzold, *The European system for the protection of human rights*, Dordrecht, Kluwer Academic Publishers, 1993, p. 4 & Merrills, J.G. & Robertson, A.H., *Human rights in Europe, A study of the European Convention on Human Rights*, Manchester, Manchester University Press, 2001 (4th edition), pp. 1-5.

respect for '*the right to life*'.[74] To some authors this implies certain limitations on the obligations of the states, while others criticise such a formal approach.[75] They claim that the emphasis should be put on the object and purpose of the article and that no distinction needs to be made between life and the right to life. Another interesting feature of article 2 is the fact that it requires the right to life to be protected '*by law*'. Despite the fact that the right to life is generally seen as a traditional right containing only negative obligations, it does explicitly pose upon states the obligation to enact legislation to protect the right to life. The ECtHR has said on the issue that "*article 2 (art. 2) was not to be interpreted as requiring an identical formulation in domestic law. Its requirements were satisfied if the substance of the Convention right was protected by domestic law... The Court recalls that the Convention does not oblige Contracting Parties to incorporate its provisions into national law (...).*"[76] One may conclude from this statement that the taking of life needs to be made illegal under national law, but that the ECHR does not specify the exact contents of the legislation. However, it can be said that the ECHR does require this law to possess certain qualities. In relation to other convention rights the ECtHR has declared that a national law needs to be "*adequately accessible*" and must be "*formulated with sufficient precision to enable the citizen to regulate its conduct: he must be able…to foresee, to a degree that is reasonable is the circumstances, the consequences which a given action may entail.*"[77] The legislation must also cover acts of private as well as public parties.[78] As we shall see in the following chapters, besides the obligation to enact legislation the obligation to protect the right to life by law also requires effective enforcement of that legislation in the full sense of the word. However, it must be noted that not every action resulting in the death on an individual needs to be made illegal.

Despite the fact that the ECtHR had to wait over 40 years before it could deliver its first judgement on article 2 of the ECHR, it was not hesitant to make its first judgement a firm one. In *McCann* it started its deliberation on article 2 by stressing the importance of the right to life and its supreme value in the international hierarchy of human rights. The ECtHR stated that "*it must also be borne in mind that, as a provision (art. 2) which not only safeguards the right*

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[74] Ni Aolain, F., *The Evolving jurisprudence of the European Convention concerning the right to life*, in «Netherlands Quarterly for Human Rights», Volume 19, Number 1, 2001, p. 30.
[75] See Fawcett, J., *The application of the European Convention on Human Rights*, Oxford, Oxford University Press, 1969, p. 37 quoted in Ramcharan, B.G. (ed.), *The right to life in international law*, Dordrecht, Martinus Nijhoff Publishers, 1985, p. 4.
[76] McCann and Others, *op. cit.*, note 18, paragraphs 152-153.
[77] Sunday Times v. United Kingdom, Judgement of 26 April 1979, 2 E.H.R.R. 245.
[78] Dijk, P. van & Hoof, G.J.H. van, *Theory and Practice of the European Convention on Human Rights*, The Hague, Kluwer Law International, 1998, p. 297.

to life but sets out the circumstances when the deprivation of life may be justified, Article 2 (art. 2) ranks as one of the most fundamental provisions in the Convention... it also enshrines one of the basic values of the democratic societies making up the Council of Europe (...)."[79] And in a more recent case it went even further by saying that "*the right to life is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights.*"[80]

Notwithstanding these clear statements on the importance of the right to life, neither the ECtHR nor the European Commission have had the opportunity to determine what exactly is protected by article 2 of the ECHR, i.e. what is the meaning of '*everyone's life'*. This issue becomes particularly relevant in cases dealing with the beginning and ending of human life. The wording of article 2 does not exclude the inclusion of the unborn life from its scope. The European Commission has ruled in the 1980s that article 2 does not recognise an absolute right to life of an unborn child, but failed to identify the extent to which article 2 does protect the life of the unborn.[81] In the 1990s the European Commission further stated that it did not exclude the possibility that under certain circumstances a foetus is protected by article 2. However, while accepting that the termination of a pregnancy was allowed on certain medical and social grounds, the European Commission again did not specify its findings.[82] It stated that "*it is clear that national laws on abortion differ considerably. In these circumstances, and assuming that the Convention may be considered to have some bearing in this field, the Commission finds that in such a delicate area the Contracting States must have a certain discretion.*" The fact that under article 8 or article 3, the right to private life and the prohibition against torture, abortion might be allowed does not automatically rule out the possibility that article 2 does protect the rights of the unborn.[83] The European Commission noted on the issue that "*pregnancy and its interruption do not, as a matter of principle pertain uniquely to the sphere of private of the mother.*"[84] The rights and interests involved need to be balanced against each other.

One encounters similar delicate and difficult issues when dealing with the notion of euthanasia. Legalisation of euthanasia seems to violate the thrust of article 2, but the consent

[79] McCann and Others, *op. cit.*, note 18.
[80] Streletz, Kessler and Krenz v. Germany, Judgement of 22 March 2001, 33 E.H.R.R. 751, paragraph 94.
[81] X v. United Kingdom, Decision of 13 May 1980, 19 D.R. 244.
[82] H v. Norway, Decision of 19 May 1992, 73 D.R. 155.
[83] Dijk, P. van & Hoof, G.J.H. van, *op. cit.*, note 78, p. 301.
[84] Brüggeman v. Germany, Decision of 12 July 1977, 10 D.R. 100.

of the patient involved might be an exonerating circumstance.[85] In *Pretty* the ECtHR dealt with the question whether the risk of prosecution of a husband who would assist his wife's suicide on her request violated article 2.[86] The ECtHR found no violation of article 2. It stated that article 2 does not deal with the quality of life as such and further maintained that "*article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life... 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*."[87] However, the ECtHR did not say, that the opposite, not prosecuting the people involved or legalising euthanasia would be a violation of the ECHR. Taking into account the divergent views of the states and the delicacy of the issue, it can be assumed that states enjoy certain discretion in the way they deal with the issue of euthanasia in their legislation.

3.3. The prohibition of arbitrary intervention

The most obvious obligation to be derived from article 2 is its prohibition of arbitrary interference with a person's life. Following article 15, this obligation cannot be derogated from, except when dealing with lawful acts of war. States are under the obligation to refrain from any arbitrary killings of individuals via any of its agents. They are further under the obligation to regulate the use of lethal force by their agents. In *McCann* the ECtHR had the opportunity to examine the scope of the prohibition of arbitrary killing of individuals by state agents. The case dealt with the shooting of three IRA terrorists by British security forces in Gibraltar in order to prevent them from committing terrorist activities. The terrorists were suspected of intending to detonate a car-bomb in a crowded public area. However, this presumption proved to be wrong after the terrorists had been eliminated. The ECtHR found no violation with regard to the soldiers actually firing the bullets that killed the three terrorists, but as we shall see later did condemn by a majority of one vote the government's planning and controlling activities.

Especially in the area of individuals dying while being kept in custody and in the case of forced disappearances states' negative obligation becomes particularly relevant. Initially,

[85] Harris, D.J., O'Boyle, M. & Warbick, C., *Law of the European Convention on Human Rights*, London, Butterworth, 1995, p. 38.
[86] Pretty, *op. cit.*, note 50.

the ECtHR was hesitant to find a violation of article 2 when there was no concrete evidence of killings by the state. In its first case dealing with the issue of disappearances in Turkey, the ECtHR demanded "*concrete evidence which would lead it to conclude that ... was, beyond reasonable doubt, killed by the authorities either while in detention in the village or at some subsequent stage.*"[88] However, to prevent the abuse of power by the state and to circumvent its abilities to conceal the evidence of killings carried out by its agents, the ECtHR subsequently decided to place the burden of proof upon the state when dealing with cases of forced disappearances if the applicant had satisfied the ECtHR beyond reasonable doubt that the victim had been under the control of state agents. While referring to its jurisprudence under articles 3 and 5 the ECtHR found in *Timurtas* that "*whether the failure on the part of the authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might also raise issues under Article 2 of the Convention will depend on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody (...) In this respect the period of time which has elapsed since the person was placed in detention, although not decisive in itself, is a relevant factor to be taken into account. It must be accepted that the more time goes by without any news of the detained person, the greater the likelihood that he or she has died. The passage of time may therefore to some extent affect the weight to be attached to other elements of circumstantial evidence before it can be concluded that the person concerned is to be presumed dead. In this respect the Court considers that this situation gives rise to issues which go beyond a mere irregular detention in violation of Article 5. Such an interpretation is in keeping with the effective protection of the right to life as afforded by Article 2, which ranks as one of the most fundamental provisions in the Convention (...).*"[89]

In relation to the issue of death in custody, the ECtHR proved to be sensitive to the particularly vulnerable position of persons in custody and placed the burden of proof on the state:

> "*In assessing evidence, the Court has generally applied the standard of proof 'beyond reasonable doubt' (...). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted*

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[87] *Ibidem*, note 50, paragraphs 39-40.
[88] Kurt v. Turkey, Judgement of 25 May 1998, 27 E.H.R.R. 373.
[89] Timurtas v. Turkey, Judgement of 13 June 2000, 33 E.H.R.R. 121, paragraphs 82-83.

> *presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.*"[90]

By placing the burden of proof in cases of deaths in custody and forced disappearances on the government, the ECtHR can be said to have ensured that the safeguards or article 2 are made "*practical and effective*."[91]

3.4. Permitted exceptions

Interferences with the right to life can only be justified if they fall within the ambit of the exceptions mentioned in the first or second paragraph of the article itself. The first paragraph is a reminiscent of the times when the ECHR was drafted. It explicitly allows the execution of capital punishment for certain criminal offences. Even though the Council of Europe has banished the use of the death penalty in peace-time and even in war-time in two Protocols to the ECHR, [92] neither the death penalty itself nor extradition of a individual to a country where the death penalty is still executed violate article 2. It may however raise an issue under article 3.[93] In *Ocalan* the ECtHR outlined the current status of the death penalty in Europe.[94] While examining current state practice and developments on the normative level, the ECtHR noted that "*it cannot now be excluded, in the light of the developments that have taken place in this area, that the States have agreed through their practice to modify the second sentence in Article 2 § 1 in so far as it permits capital punishment in peacetime.*"[95] The ECtHR noted that from the wording of article 2 referring to respect of the right to life by law, certain minimum conditions for the application of the death penalty could be inferred. The ECtHR noted that to avoid any arbitrary interference with the right "*deprivation of life [must] 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*

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[90] Salman v. Turkey, Judgement of 27 June 2000, 34 E.H.R.R. 425, paragraph 100.
[91] McCann and Others, *op. cit.*, note 18, paragraph 146.
[92] For more information see Mowbray, A., *The European Convention on Human Rights: The abolition of capital punishment and recent cases*, in «Human Rights Law Review», Volume 2, Number 2, Autumn 2002, pp. 311-313.
[93] Soering, o*p. cit*., note 46.
[94] Ocalan v. Turkey, Judgement of 12 March 2002.

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 (...)."[96] Literature and jurisprudence add several other requirements to the execution of the death penalty under the ECHR. In addition to the requirements given in *Ocalan*, it is said that the requirements of article 6 relating to a fair and public hearing need to be respected; that the punishment may not be disproportionate; the imposition of the death penalty and the manner of execution may not fall under article 3;[97] the requirement of article 7 needs to be fulfilled; and finally no discrimination under article 14 is allowed.[98]

The second paragraph of article 2 allows the deprivation of life resulting from the use of force which is no more than absolutely necessary under three conditions; self-defence, cases of arrest, and when dealing with riots or insurrections. These exceptions "*are exhaustive and must be narrowly interpreted*."[99] In *McCann* the ECtHR further considered that "*this provision (art. 2-2) extends to, but is not concerned exclusively with, intentional killing... the text of Article 2 (art. 2), read as a whole, demonstrates that paragraph 2 (art. 2-2) does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to 'use force' which may result, as an unintended outcome, in the deprivation of life*."[100] Even though article 2 (1) does refer to intentional deprivation of life, it is in line with the object and purpose of article 2 to broaden the exceptions to include unintentional killings as well.[101]

A central element in the exception-clause is the reference to the absolute necessity of the use of the lethal force. On the application of article 2 (2) the ECtHR noted that "*in this respect the use of the term 'absolutely necessary' in Article 2 para. 2 (art. 2-2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is 'necessary in a democratic society' under paragraph 2 of Articles 8 to 11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2) of the*

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[95] *Ibidem*, paragraph 100.
[96] *Ibidem*, paragraph 203.
[97] Soering*, cit.*, note 46, paragraph 104.
[98] Dijk, P. van & Hoof, G.J.H. van, *op. cit.*, note 78, p. 303.
[99] Stewart v. United Kingdom, Decision of 10 July 1984, 39 D.R. 162.
[100] McCann and Others, *op. cit.*, note 18, paragraph 148.
[101] Dijk, P. van & Hoof, G.J.H. van, *op. cit.*, note 78, p. 306.

Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2 (art. 2-2-a-b-c)."[102] This indicates that the ECtHR will be prepared to strictly scrutinise the use of lethal force by state agents and refuses to leave the states a broad discretion on the issue. In *McCann* the government claimed that the shooting of the terrorists fell within the ambit of article 2 paragraph 2 (a). On the facts the ECtHR held that the actions of the soldiers did indeed fall under the exception of article 2 paragraph 2 (a). The fact that the soldiers honestly believed that the use of lethal force was absolutely necessary to safeguard innocent lives proved sufficient to meet the required strict proportionality.[103] Other circumstances that need to be taken into account when accessing the proportionality of the force are the nature of the aim pursued; the dangers to life and limb inherent in the situation and the degree of risk that the force employed would result in the loss of life and any other relevant circumstances.[104] When examining the use of lethal force in order to effect a lawful arrest, the supervisory bodies have been lenient in cases of lethal violence when dealing with suspected terrorists. In *Kelly* the European Commission accepted that the shooting of a youngster who drove through a check-point was absolutely necessary to effect a lawful arrest in the circumstances of the Northern Ireland conflict.[105] However, a climate of terrorism does not relieve a state from its obligations. In *Ogur* the ECtHR has stressed the importance of the need of proper warnings before lethal force is used to apprehend a suspect, even when dealing with terrorism. The ECtHR noted that "*such precautions are all the more necessary where, as in this instance, the operations take place in darkness and fog, on hilly ground.*" [106]

The findings of the ECtHR in *McCann* indicate that defending any person from unlawful violence within the scope of the ECHR not only includes self-defence but also the defence of the public in general. The other words used in article 2 (2) will also have an autonomous meaning.[107] This means that the phrases '*lawful arrest'*, '*lawfully detained*' and '*action lawfully taken'* do not only refer to domestic law but also to the requirements set out by the ECtHR, accessibility and foreseeability, and that the convention organs are free to determine what constitutes a '*riot*' or an '*insurrection*'.

[102] McCann and Others, *op. cit.*, note 18, paragraph 149.
[103] *Ibidem*, note 18, paragraph 200.
[104] Stewart, *op. cit.,* note 99; Diaz Ruano v. Spain, Judgement of 26 April 1994, 19 E.H.R.R. 542, paragraph 48.
[105] Kelly v. United Kingdom, Decision of 13 January 1993, 74 D.R. 139.
[106] Ogur v. Turkey, Judgement of 20 May 1999, 31 E.H.R.R. 40, paragraph 83.

3.5. Conclusion

Most of the negative obligations that the ECtHR has placed upon the states were foreseeable at the time of ratification of the ECHR. However, the fact that the convention is a living document and the presumption that its safeguards must the effective and practical have resulted in an active stance of the ECtHR when judging cases under article 2. While broadly interpreting the right to life, the ECtHR has proven to strictly scrutinise the permitted exceptions under article 2. It has interpreted the exceptions in a restrictive manner and has not given the states much discretion when examining the absolute necessity of the use of lethal force. The ECtHR has applied a strict proportionality test and has not once referred to the margin of appreciation, which it so generously does under other convention rights. One cannot but conclude that the ECtHR is rigorous in the protection of the supreme right under the ECHR.

[107] On the issue of autonomous meaning see Dijk, P. van & Hoof, G.J.H. van, *op. cit.*, note 78, p. 77.

4. The obligation to investigate suspicious deaths

4.1. Introduction

Chapter two has given a brief overview of the development of positive obligations under the ECHR. The following chapters will give an in depth examination of the positive obligations that have been imposed upon states to protect "*one of the most fundamental provisions in the Convention*" which "*enshrines one of the basic values of the democratic societies making up the Council of Europe*"; article 2.[108]

In 1983 the European Commission already indicated that article 2 "*may as other Convention articles (...) indeed give rise to positive obligations on the part of the State.*"[109] When the ECtHR was given the opportunity to deal with the merits of article 2 in *McCann*, it immediately accepted the view of the European Commission and incorporated positive obligations into article 2. In line with the jurisprudence under other articles the ECtHR stressed that its "*approach to the interpretation of Article 2 (art. 2) must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.*"[110] The ECtHR thereafter continued by introducing two different positive obligations that would be needed to ensure full protection of the right to life. The ECtHR first introduced the possibility that it would examine all the circumstances surrounding the use of lethal force including the planning and control of the Gibraltar operation. However, the ECtHR commenced its examination of *McCann* by scrutinising another element of the case; the '*procedural obligation*' of article 2.

The first positive obligation the ECtHR examined under article 2 was the need to investigate suspicious deaths. The ECtHR felt obliged to examine whether an inquest procedure was an adequate mechanism for the investigation of the use of lethal force since "*a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official*

[108] McCann and Others, *op. cit.*, note 18, paragraph 147.
[109] W. v. United Kingdom, Decision of 28 February 1983, 32 D.R. 190.
[110] McCann and Others, *op. cit.*, note 18, paragraph 146.

investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State."[111] Thus article 1 was used to provide article 2 with some additional obligations.

In subsequent judgements the ECtHR continuously stressed that under article 2 "*the obligation imposed is not exclusively concerned with intentional killing resulting from the use of force by agents of the State but also extends, in the first sentence of Article 2 § 1, to imposing a positive obligation on States that the right to life be protected by law. This requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (...).*"[112] In this respect the ECtHR can be quoted saying that article 2 contains a "*primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions*."[113] One could argue that this obligation is the natural corollary of the explicit demand that the right to life should be protected by law and that the ECtHR did not introduce anything into article 2. According to this reasoning protection by law does not only mean that laws should be enacted but also that the law should be backed up by an effective enforcement mechanism, which would automatically include a duty to investigate suspicious deaths. Even though the ECtHR has said that "*this obligation is based upon the – more general – obligation under article 13*"[114], one must distinguish the procedural obligation giving individuals a right to an effective official investigation under article 2 from the right to an effective remedy given by article 13. Article 13 entitles a person to a direct means of punishing perpetrators and/ or claiming compensation from those perpetrators for a breach of article 2. However, the way in which the ECtHR has developed the obligation to investigate suspicious deaths does seem to go far beyond the explicit wording of both articles 2 and 13. This chapter will focus on the way the jurisprudence on the obligation to investigate suspicious deaths has been developed.

4.2. The scope of the investigation

In *McCann* the ECtHR did not elaborate much further on the issue of an investigation into the events in Gibraltar. It noted that "*it is not necessary in the present case for the Court to decide*

[111] *Ibidem*, note 18, paragraph 161.
[112] Cakici v. Turkey, Judgement of 8 July 1999, 31 E.H.R.R. 133, paragraph 86.
[113] Osman v. United Kingdom, Judgement of 28 October 1998, 29 E.H.R.R. 245, paragraph 115.

what form such an investigation should take and under what conditions it should be conducted, since public inquest proceedings, at which the applicants were legally represented and which involved the hearing of seventy-nine witnesses, did in fact take place."[115] Based on the fact that the inquest proceedings lasted 19 days during which a detailed review of the killings took place and the fact that the applicants were given the opportunity to fully participate in the hearings, the ECtHR concluded that in the present case the inquest procedure met the requirements of article 2.[116] However, in subsequent judgements on inquest procedures the ECtHR reached another conclusion.[117]

In a series of judgements in 2001 dealing with the use of lethal force in Northern Ireland the ECtHR established that the "*essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.*"[118] This becomes particularly relevant in cases of deaths, which are largely confined within the knowledge of the state such as death during arrests, or in custody. In line with the substantive obligations of states arising in cases of disappearances and death in custody, the ECtHR has found it necessary to introduce extra safeguards into the convention.

The second case where the ECtHR dealt with the obligation to investigate suspicious death immediately proved the additional value of this obligation for the protection of the right to life in cases where a substantial violation can not readily be found, but where the right to life nevertheless lacks effective protection. In 1998 in *Kaya* the ECtHR was confronted the death of a man who the government claimed to be a terrorist, while the applicants fiercely denied this fact.[119] On the substantive issue of the killing of the deceased the ECtHR had to conclude "*that there is an insufficient factual and evidentiary basis on which to conclude that the applicant's brother was, beyond reasonable doubt, intentionally killed by the security forces in the circumstances alleged by the applicant*."[120] Hence, no violation of article 2 on this account could be established. However, the ECtHR continued by examining whether an

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[114] Öneryildiz v. Turkey, Judgement of 18 June 2002, paragraph 90.
[115] McCann and Others, *op. cit.*, note 18, paragraph 162
[116] Inquest procedures are public hearings into the facts conducted by independent judicial officers (coroners), normally sitting with a jury and for which judicial review lies from procedural decisions by coroners and in respect of any mistaken direction given to the jury see Ovey, C. & White, R., *op. cit.*, note 43, p. 50.
[117] Hugh Jordan v. United Kingdom, Judgement of 4 May 2001, paragraphs 125-140.
[118] Kelly v. United Kingdom, Judgement of 4 May 2001, paragraph 82, see also: McKerr v. United Kingdom, Judgement of 4 May 2001, 34 E.H.R.R. 553; Hugh Jordan v. United Kingdom, *op. cit.*, note 117; Shanagan v. United Kingdom, Judgement of 4 May 2001.
[119] Kaya v. Turkey, Judgement of 19 February 1998, 28 E.H.R.R. 1.
[120] *Ibidem*, paragraph 78.

effective official investigation into the killing had been performed. The ECtHR referred to this obligation as "*the procedural obligation of the right to life inherent in article 2*" which should aim at securing "*the accountability of agents of the state for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances*."[121] While sensitive to the prevalent security situation, the ECtHR held that "*neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into 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*."[122] Therefore the ECtHR fully scrutinised the investigation that had been carried out by the authorities. Especially in our current era when '*the war against terrorism*' is waged, it is important to note that the ECtHR will not be willing to lower its demands on the procedural obligation. Claims of terrorism in Turkey and Northern Ireland have not compelled the ECtHR to lower its threshold for an effective investigation. In *Kaya* the ECtHR was particularly struck by the fact that the public prosecutor had assumed without question that the deceased was indeed a terrorist and that he had forsaken to engage in an active fact-finding mission. Witnesses were not heard, no forensic tests were deployed and the autopsy proved to be incomplete on crucial issues. The ECtHR concluded that article 2 was violated on the basis of the state's failure to meet its procedural obligation.

That same year it became clear that the procedural obligation was by no means meant to have a limited reach when the ECtHR stated in *Ergi* that "*this obligation is not confined to cases where it has been established that the killing was caused by an agent of the State.*"[123] In this particular case, the deceased had been caught in an armed clash between security forces and alleged terrorists in a Turkish village. The ECtHR was unable to establish that the bullet that killed the deceased was fired by the security forces. This could have hindered direct substantive responsibility of the defendant state for the death of Havva Ergi if the ECtHR had not found other substantive violations of article 2. Besides the substantive violation the ECtHR also concluded that the procedural obligation had been breached. Three years later the ECtHR went even further in the interstate case between Cyprus and Turkey dealing with missing or disappeared persons. It recalled that the procedural obligation under article 2

[121] *Ibidem*, paragraph 87.
[122] *Ibidem*, paragraph 91.
[123] Ergi v. Turkey, Judgement of 28 July 1998, 32 E.H.R.R. 388, paragraph 82.

requires states to engage in a effective official investigation when individuals have been killed as a result of the use of force by state agents and non-state agents and concluded that despite the lack of evidence that the missing persons had been unlawfully killed "*the procedural obligation also arises upon proof of an arguable claim that an individual, who was last seen in the custody of agents of the State, subsequently disappeared in a context which may be considered life-threatening.*"[124] The ECtHR concluded that in the present case these conditions were met and concluded that there had been a continuing violation of the procedural obligation under article 2.

The above proves that the obligation to undertake an effective official investigation has been given a prominent role by the ECtHR. The procedural obligation may be used to ensure states' liability when no substantive violation can be found. However, this subsidiary role will not be its only role under the convention. It will be used to establish a separate and independent violation of article 2. The reasoning of the ECtHR in *Hugh Jordan* supports this conclusion.[125] The ECtHR noted that it would not examine the claims of a substantive violation of article 2 since domestic procedures were still pending and "*it would be inappropriate and contrary to its subsidiary role under the Convention to attempt to establish the facts of this case by embarking on a fact finding exercise of its own by summoning witnesses. Such an exercise would duplicate the proceedings before the civil courts which are better placed and equipped as fact finding tribunals.*"[126] Only in exceptional cases will the ECtHR embark on its own fact-finding missions. However, the ECtHR continued by examining the domestic procedures and found a violation of article 2 on that account. The ECtHR condemned among others the lack of independence of the investigating police officers, the lack of public scrutiny and the lack of information to the victims family, the impossibility to compel important witnesses and the fact that the inquest proceedings did not allow any verdict which could play an effective role in securing prosecution. Thus the procedural obligation ensured liability of the state, where no substantive violation could yet be established

[124] Cyprus v. Turkey, Judgement of 10 May 2001, paragraph 132.
[125] Hugh Jordan, *op. cit.*, note 117.
[126] *Ibidem,* note 117, paragraph 108.

4.3. Limits on the procedural obligation

The ECtHR has refused to establish the form that the investigation must take as long as certain standards are met. In *Calvelli* it was noted that while the ECHR itself does not contain a right to have criminal proceedings instigated, the procedural obligation under article 2 might under certain circumstances include recourse to the criminal law.[127] The ECtHR further said on the issue of the form of the investigation that "*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.*"[128] Thus while criminal procedures may not be specifically required, especially in cases of unintentional killings, the authorities are under an automatic obligation to initiate an investigation which "*must be able to lead to the identification and punishment of those responsible*" whenever they become aware of a suspicious death.[129] The ECtHR noted that the form of the investigation may vary in different circumstances and stated that "*in the sphere of negligence a civil or disciplinary remedy may suffice*".[130] In other instances the ECtHR has ruled that civil proceedings that only aim at awarding compensation cannot satisfy the requirements of article 2.[131] However, acceptance of a settlement under domestic civil procedures may influence the liability of the state for any substantive violation.[132]

In general the ECtHR said that it "*is not for this Court to specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents"* and continued by noting that as long as the procedures provide for the necessary safeguards in an accessible manner, they might even "*take into account other legitimate interests such as national security or the protection of the material relevant to other investigations."*[133] The ECtHR seems to leave the states some leeway in the manner in which they fulfil their procedural obligation under article 2 as long as a balance is struck between the requirements of article 2 and other legitimate interests.

The wording of the ECtHR resembles both the margin of appreciation and the fair-balance test that the ECtHR applies in respect of other articles to determine the scope of either

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[127] Calvelli v. Italy, Judgement of 17 January 2002, paragraph 51.
[128] Kelly, *op. cit.*, note 118, paragraph 94.
[129] *Ibidem*, paragraph 105.
[130] Mastromatteo v. Italy, 24 October 2001, paragraph 90.
[131] Kaya, *op. cit.*, note 119, paragraph 105 & Öneryildiz, *op. cit.*, note 114, paragraph 92-93.
[132] Kelly, *op. cit.*, note 118, paragraph 105.
[133] *Ibidem*, paragraphs 94 & 137.

legitimate limitations or positive obligations. However, the ECtHR has made it clear that the test that needs to be applied to determine whether an interference with article 2 can be justified is a stricter and more compelling test of necessity requiring a strict proportionality compared to the tests used under other convention articles.[134] If one applies this reasoning by analogy to the scope of positive obligations under article 2, one may conclude that the ECtHR has not introduced a margin of appreciation under article 2, but merely showed its sensitivity for problems states may encounter when dealing with the investigation under article 2. In the same vein one may argue that the fair-balance test, balancing the interests of the individual and the general interests of the community, is much broader than the test the ECtHR is willing to apply under article 2.

4.4. Conditions for an effective official investigation

The conclusion that the ECtHR has not intended to introduce a margin of appreciation or a fair-balance test into article 2 is strengthened by the fact that the ECtHR itself has elaborated on the requirements of article 2 and has specified the necessary safeguards it referred to in *Kelly*. Despite the fact that it had concluded in 1999 in *Velikova* that "*the nature and degree of scrutiny which satisfies the minimum threshold of the investigation's effectiveness depends on the circumstances of the particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work. It is not possible to reduce the variety of situations, which might occur to a bare check-list of acts of investigation or other simplified criteria (...)*"[135] the ECtHR spelled out in *Kelly* what its minimum requirements for an official effective investigation were:

> "*95. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (...). This means not only a lack of hierarchical or institutional connection but also a practical independence (...).*
>
> *96. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (...) 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*

[134] McCann, *op. cit.*, note 18, paragraph 149.
[135] Velikova v. Bulgaria, Judgement of 18 May 2000, paragraph 80.

> *reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (...). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.*
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> *97. A requirement of promptness and reasonable expedition is implicit in this context (...). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.*
>
> *98. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (...).*"[136]

The ECtHR has thus construed a list of requirements that not only relate to the identity of the investigative body but also relate to the way in which the investigation itself is to be carried out. In the literature it is argued that these requirements are based upon three main principles.[137] The overarching principle is that of external scrutiny and the right of the ECtHR to examine national procedures. The second principle is that of internal investigation, needed to ensure accountability for violations of article 2. The final principle is that of internal scrutiny, mandating in the first place the states themselves to examine their own investigation process. Together these underlying principles form an essential part of the protection of article 2.

As far as the institutional requirements dealing with the identity and composition of the investigative body are concerned, the ECtHR places great importance on its independence. Hierarchical as well as practical dependence is prohibited. In *Gülec* the ECtHR condemned the hierarchical dependence of the investigating officers who were mandated to examine the use of lethal force by their superiors.[138] On the same ground the ECtHR found a violation in

[136] Kelly, *op. cit.*, note 118.
[137] Ni Aolain, F., *op. cit.*, note 74, p. 36.
[138] Gülec v. Turkey, Judgement of 27 July 1998, 28 E.H.R.R. 121, paragraph 79.

Ögur. The investigating officer was subordinate to the same chain of command as the security forces he was investigating and was therefore not independent.[139] The ECtHR does not only look at the formal hierarchical independence but condemns any linkage that might affect the independence of the investigating officers, including indirect independence such as factual co-operation on or knowledge of certain missions.[140] Even if independent mechanisms supervise the investigation, the actual officers involved still need to retain their own independence as well. This conclusion can be drawn from the ECtHR's conclusions in several cases dealing with the situation in Northern Ireland where the ECtHR noted that even though "*this investigation was supervised by the ICPC, an independent police monitoring authority, this cannot provide a sufficient safeguard where the investigation itself has been for all practical purposes conducted by police officers connected, albeit indirectly, with the operation under investigation*."[141] Practical independence must be guarded as well meaning, inter alia, that the investigative officers must carry out their own fact-finding missions and may not fully rely on the information provided by the parties involved in the case.[142] Otherwise the perpetrators or the applicants would be given the opportunity to tamper with the evidence without any scrutiny on their behaviour. As the ECtHR stated in *Kaya* that "*an independent investigating official ... should have been alert to the need to collect evidence at the scene, to make his own independent reconstruction of the events and to satisfy himself that the deceased, despite being dressed as a typical farmer, was in fact a terrorist as alleged*."[143] Finally, the ECtHR has ruled that independence must also exist between those who decide on the act of prosecution as such and those who are liable to prosecution. In a number of cases dealing with Turkey the ECtHR has concluded that the Administrative Council, whose responsibility it is to decide whether charges will be brought against members of the security forces, lacks independence and therefore inhibits an official and effective investigation to take place.[144] Several cases before the ECtHR have dealt with the use of force in divided societies in places such as Northern Ireland or Turkey. Especially in such situations the composition and independence of the investigating officers can be of crucial importance. Diversity and minority representation might be needed to ensure an effective investigation.[145]

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[139] Ogur, *op. cit.*, note 114, paragraph 91.
[140] Kelly, *op. cit.*, note 118, paragraph 114.
[141] *Ibidem*, paragraph 114 & McShane v. United Kingdom, Judgement of 28 May 2002.
[142] Ergi, *op. cit.*, note 123, paragraph 83.
[143] Kaya, *op. cit.*, note 119, paragraph 89.
[144] Ogur, *op. cit.*, note 106, paragraph 91.
[145] Ni Aolain, F., *op. cit.*, note 74, p. 37.

On the procedural level the ECtHR has indicated that the investigation itself must be capable of leading to a determination of whether the force was justified and to the identification and punishment of those responsible. Needless to say that this requirement does not demand those responsible to be caught and brought to justice in each case, since that is not something that can be realised in practise with each case. However, the investigation must in principle meet these demands. Hence as stated in *Kelly*, this is an obligation of means, not of result. An essential element of this obligation of means is the way the investigating officers have dealt with the available evidence and whether they have secured this evidence. The ECtHR explicitly referred to three types of evidence. First, the ECtHR has indicated the importance of witness testimonies. When examining the effectiveness of the investigation in this sense, the ECtHR pays attention to the fact which witnesses have been heard,[146] what these witnesses have been questioned about and when they were heard.[147] In sum the ECtHR demands that all relevant witnesses need to be questioned in order to attain the fullest testimony possible. It is therefore of the utmost importance that the investigative officers indeed have the power to compel witnesses to testify.[148] Otherwise relevant evidence might not be recovered. Second, the ECtHR refers to forensic evidence. Especially, forensic evidence that connects individuals to the force used is regarded to be essential.[149] Finally, the ECtHR has stressed the important role an autopsy can play in an effective investigation. In cases when the cause of death is not abundantly clear an autopsy is generally regarded as crucial evidence. This is particularly relevant in case dealing with deaths in custody or events were governments might be inclined to evade responsibility.[150] In *Kaya* the ECtHR even noted that "*the autopsy report provided the sole record of the nature, severity and location of the bullet wounds sustained by the deceased. The Court shares the concern of the Commission about the incompleteness of this report in certain crucial respects, in particular the absence of any observations on the actual number of bullets which struck the deceased and of any estimation of the distance from which the bullets were fired. It cannot be maintained that the perfunctory autopsy performed or the findings recorded in the report could lay the basis for any effective follow-up investigation or indeed satisfy even the minimum requirements of an investigation into a clear-cut case of lawful killing since they left too many critical questions*

[146] See e.g. Gülec, *op. cit.*, note 138, paragraph 80 & Gül v. Turkey, Judgement of 14 December 2000, 34 E.H.R.R. 719, paragraph 90.
[147] Timurtas, *op. cit.*, note 89, paragraph 89.
[148] Edwards v. United Kingdom, Judgement of 14 March 2002, paragraphs 78-79.
[149] Gül, *op. cit.,* note 146, paragraph 89 & Hugh Jordan, *op. cit.*, note 117, paragraph 119.
[150] See e.g. Salman, *op. cit.*, note 90, paragraphs 106-107 & Tanli v. Turkey, Judgement of 10 April 2001, paragraph 150.

unanswered."[151] In *Gül* it was said that "*the failure of the autopsy examination to record fully the injuries on Mehmet Gül's body hampered an assessment of the extent to which he was caught in the gunfire, and his position and distance relative to the door, which could have cast further light on the circumstances in which he was killed. The Government submitted that further examination was not necessary since the cause of death was clear. The purpose of a post mortem examination however is also to elucidate the circumstances surrounding the death, including a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings (...).*"[152] These quotations make clear that a post mortem is not only relevant in establishing the cause of death but also the circumstances surrounding the death.. The ECtHR not only sets high standards for the autopsy itself, but also requires that the post mortem is performed by fully qualified officials.[153] The scope of the investigation is of course by no means limited to the three types of evidence that the ECtHR explicitly identified. What evidence will be needed to meet the demands of an effective investigation will depend on the circumstances of the case.[154]

An effective investigation must be carried out as prompt and expeditious as possible in order to maintain public confidence in the rule of law and state officials. This requirement relates to the entire investigation and demands not only the initiation of the investigation to be as prompt and expeditious as possible but demands also that during the investigation no undue delays occur.[155] Finally, the entire length of the investigation will be carefully scrutinised by the ECtHR. The simple fact that some form of investigation has been initiated is not sufficient to prevent a violation of the procedural obligation. Promptness and expeditiousness must be regarded at all times.

The last requirement the ECtHR enumerated in *Kelly* is the need for public scrutiny and involvement of the next of kin of the victim during the investigation. These will strengthen public confidence in the rule of law and will ensure accountability. The ECtHR recognised that public scrutiny will not benefit all cases and noted that it will therefore vary from case to case and that the requirements of article 2 will be met as long as accountability in theory and practice is guaranteed.[156] In the case line concerning shootings in Northern Ireland

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[151] Kaya, *op. cit.*, note 119, paragraph 89.
[152] Gül, *op. cit.*, note 146, paragraph 89.
[153] See e.g. Tanli, *op. cit.*, note 150, paragraph 150 & Tanrikulu v. Turkey, Judgement of 8 July 1999, 30 E.H.R.R. 950, paragraph 106 & Demiray v. Turkey, 21 November 2000, paragraph 51.
[154] See e.g. Tanrikulu, *op. cit.*, note 153, paragraph 103 where reference is being made to photographs and sketch maps.
[155] Yasa v. Turkey, Judgement of 2 September 1998, 28 E.H.R.R. 408, paragraph 104 & Tanrikulu, *op. cit.*, mote 153, paragraph 109.
[156] Edwards, *op. cit.*, note 148, paragraph 83.

the ECtHR strongly condemned the role of the DPP "*an independent legal officer charged to decide whether to bring prosecution in respect of any possible criminal offences carries out by a police officer*" who "*is not required to give reasons for any decision not to prosecute.*"[157] The ECtHR concluded that this was not conductive to public confidence while it also denied the next of kin access to relevant information and prevented them from challenging the legal decision. Especially in a case that "*cries out for an explanation*" this could not be regarded compatible with the requirements of article 2 "*unless the information was forthcoming in another way.*"[158] While condemning the lack of involvement in the present cases the ECtHR acknowledged that shortcomings in the involvement in certain stages of the investigation might be rectified in subsequent stages of the investigation. Involvement of the next of kin refers to physical presence at hearings[159] as well as to access to the case file.[160]

The list of requirements for an effective official investigation as given by the ECtHR in *Kelly* is not exhaustive. It will depend on the circumstances of each individual case whether an investigation will meet the procedural obligation and will be regarded as an effective investigation, which will be thorough and rigorous enough to satisfy the ECtHR.

4.5. Conclusion

The procedural obligation of article 2 has been proven to be an effective mechanism for the protection of the right to life. States cannot only be held responsible for substantive violations of the right to life, but also for any failures in the procedural obligation. An additional source of responsibility has been added to article 2. Securing the implementation of domestic law and guaranteeing accountability for deaths occurring under the responsibility of the state, the main purposes of an effective official investigation, serve to ensure the rule of law and at the same time function as a deterrent for future violations of the right to life by preventing impunity. Because of these backward and forward looking effects of an effective official investigation some authors even argue that the procedural obligation constitutes the core element of protection life by law.[161]

The ECtHR itself acknowledged the importance of an effective investigation in *McCann*. Since 1995, it has developed an impressive body of rules on how this procedural

[157] Kelly, *op. cit.*, note 118, paragraph 116, see also Shanagan, Hugh Jordan & McKerr.
[158] Kelly, *op. cit.*, note 118, paragraph 118.
[159] Edwards, *op. cit.*, note 148, paragraph 84.
[160] Ogur, *op. cit.*, note 106, paragraph 92.
[161] Ni Aolain, F., *op. cit.*, note 74, p. 48.

investigation needs to be fulfilled. The ECtHR has ruled that the obligation comes into being not only when the killings were the result of the use of lethal force by state agents but also whenever the authorities become aware of a suspicious death. The ECtHR has further distinguished several criteria that must be met for an investigation to be effective. These criteria relate to institutional matters as well as procedural matters and serve to ensure that the official effective investigation is sufficiently rigorous, thorough and objective.[162] The ECtHR has been willing to scrutinise each element with great care in order to ensure practical and effective protection of the right to life.

[162] See e.g. Gülec, *op. cit.*, note 118, paragraph 82.

5. Positive obligations in the public sphere

5.1. Introduction

Before examining the procedural obligation in *McCann* the ECtHR had already indicated that it would not be prepared to only superficially examine allegations under article 2. The ECtHR firmly stated that "*in keeping with the importance of this provision (art. 2) in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also* ***all the surrounding circumstances*** *including such matters as the planning and control of the actions under examination.*"[163] One can deduce from this paragraph that states can not only be held responsible for the actual act of killings by state agents, but that states' responsibility will be examined along the much broader lines of the planning and control of the relevant actions. This induces obligations that reach far beyond enacting legislation and controlling the use of force. It demands governments to take an active stand whenever the use of lethal force is concerned. The reference to the role of the right in a democratic society stresses that the ECtHR puts great importance on the principle of equality in its approach to article 2 thereby giving protection to the lives of all individuals, whether terrorists or not.[164]

In subsequent cases the ECtHR went even further in the protection of the right to life and placed even more far-reaching obligation upon the states. While referring to its jurisprudence under article 8 the ECtHR noted in *LCB* that besides refraining from intentional killings by state agents, article 2 required states "*also to take appropriate steps to safeguard the lives of those within its jurisdiction*".[165] While these rulings dealt with positive obligations taken in the public sphere, we shall see in chapter six that the ECtHR did not hesitate to create positive obligations in the private sphere as well.[166] However, this chapter will focus upon the positive obligations the ECtHR has created in respect of risks created by public authorities and those that lay within the public sphere.

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[163] McCann and Others, *op. cit.*, note 18, paragraph 150, emphasis added.
[164] Ni Aolain, F., *op. cit.*, note 74p. 29.
[165] LCB v. United Kingdom, Judgement of 9 June 1998, 27 E.H.R.R. 212, paragraph 36.

5.2. The planning and control of security forces' operations

In *McCann* the ECtHR showed its willingness to examine allegations concerning the arbitrary taking of life in the broadest possible context. The ECtHR not only scrutinised the actions of the soldiers involved in the shootings, but also carefully examined all circumstances leading up to the use of lethal force including the planning and control of the entire operation. An interesting aspect in this approach is the fact that a shortcoming in either the actions of the soldiers or in the planning and control would constitute a separate breach of article 2. Thus after concluding that actual shooting did not constitute a breach of article 2 due to the honest, but mistaken, belief of the soldiers that the use of lethal force was absolutely necessary under the given circumstances, the ECtHR nevertheless was able to find a breach of article 2 because of flaws in the planning and control of the operation. At the beginning of its deliberation the ECtHR showed its sensitivity towards the difficult situation governments find themselves in when fighting terrorism. The ECtHR noted that it would "*bear in mind that the information that the United Kingdom authorities received that there would be a terrorist attack in Gibraltar presented them with a fundamental dilemma. On the one hand, they were required to have regard to their duty to protect the lives of the people in Gibraltar including their own military personnel and, on the other, to have minimum resort to the use of lethal force against those suspected of posing this threat in the light of the obligations flowing from both domestic and international law.*"[167] While taking into account the nature of previous IRA attacks, the fact that the authorities had had ample opportunity to plan their reaction and the fact that the policies had to be based incomplete information, the ECtHR would "*carefully scrutinise ... not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.*"[168] The ECtHR noted that in order to meet the strict proportionality test of article 2 (2) it would need to examine whether "*the anti-terrorist operation as a whole was controlled and organised in a manner which respected the requirements of Article 2 (art. 2) and whether the information and instructions given to the soldiers which, in effect, rendered inevitable the use of lethal force, took adequately into*

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[166] Osman, *op. cit.*, note 113, paragraph 115.
[167] McCann and Others, *op. cit.*, note 18, paragraph 192.
[168] *Ibidem*, paragraphs 193-194 & see Gül, *op. cit.*, note 146, paragraph 84 for a simular wording.

consideration the right to life of the three suspects."[169] The ECtHR questioned why the authorities had not prevented the suspects from entering Gibraltar thereby excluding any risks of terrorist attacks by the suspects. The ECtHR noted that even though at the time the authorities might have lacked sufficient evidence to warrant their detention and trial this should have been outweighed by the danger to the population in not preventing the entry of the suspects. The ECtHR further criticised the way in which crucial assumptions that turned out to be erroneous were made. Finally, the fact that the soldiers were trained to kill was strongly condemned. Therefore the ECtHR concluded that "*having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) (art. 2-2-a) of the Convention.*"[170]

Interestingly, the ECtHR reached its decision that article 2 had been violated by a small majority. The nine dissenting judges, including the president of the ECtHR and several senior judges, criticised the majority's findings for using the benefit of hindsight. Especially since "*the accusation of a breach by a State of its obligation under Article 2 (art 2) of the Convention to protect the right to life is of the utmost seriousness*" the dissenting judges were unable to determine that the use of force had been more than absolutely necessary.[171] In the literature is it wondered how significant this dissenting opinion is since it included the visions of the most senior members of the ECtHR.[172] On the other hand one may claim, that even though the dissenting judges did not find a violation in the present case, they were nevertheless also prepared to fully scrutinise the planning and control of the operation. While the end result differed, the existence of positive obligations in the field of planning and control of security forces' operations was accepted by the entire ECtHR.

Two years after *McCann* the ECtHR affirmed its willingness to examine all circumstances leading up to the use of lethal force including the planning and control of the

[169] McCann and Others, *op. cit.*, note 18, paragraph 201.
[170] *Ibidem*, paragraph 213.
[171] Joint Dissenting Opinion on McCann and Others, *op. cit.*, note 18, paragraph 25.
[172] Mowbray, A., *Cases and materials on the European Convention on Human Rights*, London, Butterworths, 2001, p. 54.

actions under examination. Again however, the ECtHR was highly divided on the verdict.[173] In *Andonicou* the ECtHR was confronted with the shooting of a couple by special forces, MMAD officers, who were trained to kill. The MMAD officers were engaged in a rescue operation to end the hostage taking of a young woman by her fiancé, who was armed with several weapons. After the hostage taker had opened fire upon the MMAD officers, they killed him and lethally wounded the young woman. The ECtHR had to "*evaluate whether in the circumstances the planning and control of the rescue operation including the decision to deploy the MMAD officers showed that the authorities had taken appropriate care to ensure that any risk to the lives of the couple had been minimised and that they were not negligent in their choice of action. It does not therefore consider it appropriate to discuss with the benefit of hindsight the merits of alternative tactics …, or to substitute its own views for those of the authorities confronted with a dilemma unprecedented in the respondent State and the need to take decisive action to break the deadlock.*"[174] By doing so the ECtHR widened its scope of investigation positive obligations from a situation dealing with terrorist activities to other operations of security forces. The ECtHR noted that the events of the day indicated that the authorities never lost sight of the fact that the situation had its origins in a lover's quarrel and tried to bring an end to the incident through persuasion and dialogue right up to the last possible moment. Even though the ECtHR did find some shortcomings in the way the negotiations with the hostage taker were conducted, it nevertheless concluded that they were conducted in a manner said to be reasonable in the given circumstances. The ECtHR also concluded that the use of the MMAD officers was justified given the nature of the operation that was contemplated and found no flaws in the chain of decision-making leading to their deployment. Finally, the ECtHR also found no violation in the decision to arm the MMAD officers with machine guns nor did it find any violation in the instructions on their use. The planning and control of the operation fell within the demands of article 2 (2).

In *Ergi* the ECtHR made clear that the planning and control of operations of security forces should not only take into account the interests of the suspects but that "*the responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life. Thus, even though it has not been*

[173] The ECtHR found no violation by 5 to 4 votes.
[174] Andronicou and Constantinou v. Cyprus, Judgement of 9 October 1997, 25 E.H.R.R. 491, paragraph 181.

established beyond reasonable doubt that the bullet which killed Havva Ergi had been fired by the security forces, 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."[175] In the present case a woman had been caught in crossfire between security forces and PKK terrorists in her village. Even though it could not be established who had killed the woman the state was held responsible. The ECtHR held that "*even if it might be assumed that the security forces would have responded with due care for the civilian population in returning fire against terrorists caught in the approaches to the village, it could not be assumed that the terrorists would have responded with such restraint. There was no information to indicate that any steps or precautions had been taken to protect the villagers from being caught up in the conflict.*"[176]

In *Ergi* the ECtHR placed a considerable burden upon the state when it engages in any security operation. All feasible measures need to be taken in order to prevent the loss of life of any individual. This obligation further does not only affect the taking of life by the security forces involved, but by anyone involved in the operation including the opponents. In *Avsar* the ECtHR added to these responsibilities the responsibility for the training and control of volunteers acting as security forces and it held that "*the village guards enjoyed an official position, with duties and responsibilities. They had been sent to Diyarbakir to participate in the apprehension of suspects and they held themselves out to the Avsar family as acting on authority. The seventh person, a security officer, also held himself out as acting officially. The participants were, and purported to act as, agents of the State, and made use of their position in forcing Mehmet Serif Avsar to go with them. In these circumstances, the Government is answerable for their conduct… According to the regulations provided by the Government, village guards were hierarchically subordinate to the district gendarme commander. However, it is not apparent what supervision was, or could be exerted over guards who were engaged in duties outside the jurisdiction of the district gendarme commander. Nor, as the village guards were outside the normal structure of discipline and training applicable to gendarmes and police officers, is it apparent what safeguards there were against wilful or unintentional abuses of position carried out by the village guards either on their own*

[175] Ergi, *op. cit.*, note 123, paragraph 79.
[176] *Ibidem*, note 123, paragraph 80.

initiative or under the instructions of security officers who themselves were acting outside the law."[177] Thus a wide responsibility for actions of security forces is ensured.

The ECtHR has been willing to examine all circumstances leading to the use of lethal force and has therefore opened the door for the scrutiny of a wide range of activities in the field of security forces' operations. Security forces need to be trained, instructed, controlled and supervised to prevent the loss of any lives and the security operations need to be planned and controlled as thoroughly as possible. In *Ögur* the ECtHR found a violation of article 2 amongst others due to a lack of possibilities to communicate between the members of the security forces involved, which in the opinion of the ECtHR "*must necessarily have made it difficult to transmit orders and to control the operations.*"[178] It is noteworthy that the ECtHR does not seem to allow much room for anything like a margin of appreciation. While the ECtHR showed an awareness of the difficulty and immediate nature of certain types of operations,[179] it nevertheless did not hesitate to condemn states in precarious situations including those that involve anti-terrorist activities.

5.3. Positive measures for the protection of the life and health of individuals

Security forces' operations are not the only situations in the public sphere where the ECtHR has placed positive obligations upon the state. In *LCB* the ECtHR was confronted with the question whether the respondent state had done all that could have been required in the given circumstances to prevent the applicant's life from being avoidably put at risk The applicant suffered from leukaemia which was allegedly caused by her father's presence at nuclear tests conducted by the United Kingdom before the applicant's birth. The ECtHR examined whether "*in the event that there was information available to the authorities which should have given them cause to fear that the applicant's father had been exposed to radiation, they could reasonably have been expected, during the period in question, to provide advice to her parents and to monitor her health. The Court considers that the State could only have been required of its own motion to take these steps in relation to the applicant if it had appeared likely at that time that any such exposure of her father to radiation might have engendered a real risk to her health.*"[180] However, the ECtHR concluded that neither a causal link between the possible exposure of the father to radiation and the leukaemia of the daughter could be

[177] Avsar v. Turkey, Judgement of 10 July 2001, paragraphs 413-414.
[178] Ogur, *op. cit.*, note 106, paragraph 83.
[179] Andronicou and Constantinou, *op. cit.*, note 177, paragraph 181.

established nor that it was proven that monitoring of the applicant's health would have had any positive effects. However, the latter argument of effectiveness is not decisive for the determination of a positive obligation to provide information. The ECtHR noted that if there had "*been reason to believe that she was in danger of contracting a life-threatening disease owing to her father's presence on Christmas Island, the State authorities would have been under a duty to have made this known to her parents whether or not they considered that the information would assist the applicant.*"[181] Even though the ECtHR did not find a violation of article 2, it had indicated that providing information could be regarded as the necessary and appropriate step to safeguard the lives of those within its jurisdiction.

The protection of the right to life and health of individuals has also been dealt with in relation to the provision of medical care and especially in cases dealing with persons in detention or custody to whom the ECtHR awards special protection. *Velikova* dealt with a suspected thief dying in custody after complaining of pains and illness. The ECtHR not only concluded that there was sufficient evidence beyond reasonable doubt that the suspect died as a the result of injuries while he was in the hands of the police, but also found that there was "*no evidence of Mr Tsonchev having been examined with the care one would expect from a medical professional at any time while in custody, and suffering from severe injuries (...).*"[182] On these grounds it concluded that there had been a violation of article 2. In *Velikova* the lack of medical care contributed to the establishment of a substantive violation of the right to life. In *Anguelova* the ECtHR went even further and found a direct violation of article due to the failure of the authorities to provide adequate and timely medical care to a detainee.[183] The delay in the provision of medical assistance had contributed in a decisive manner to the fatal outcome. The fact that the police officers did not recognise the deteriorating health situation as a medical emergency could not absolve the state's responsibility, especially since afterwards no criticism or disapproval of the manner of dealing with the detainee's medical problem was given. The ECtHR found that "*the lack of any reaction by the authorities constituted a violation of the State's obligation to protect the lives of persons in custody.*"[184] As people in custody find themselves in particularly vulnerable situations, the findings of the ECtHR are an important step forward in their protection. The latter point is stressed by

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[180] LCB, *op. cit.*, note 165, paragraph 38.
[181] *Ibidem*, paragraph 40.
[182] Velikova, *op. cit.*, note 135, paragraph 74.
[183] Anguelova v. Bulgaria, Judgement of 13 June 2002.
[184] *Ibidem*, paragraph 130.

Demiray in which a detainee was killed by an explosion.[185] The ECtHR reiterated that states are under special obligation when dealing with persons in custody and said that "*article 2 may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual for whom they are responsible (...)*."[186] This formulation is taken from cases dealing with protection against risks created by individuals and will be closer examined the next chapter. However, in the present case the ECtHR found that the authorities had not taken all the reasonable measures to protect the right to life of the detainee.

It has not yet been made clear how far the obligation to provide medical care can be stretched beyond cases where people find themselves within the direct power of the state. In the interstate case between Cyprus and Turkey the ECtHR did observe that "*an issue may arise under article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population in general.*"[187] On the facts of the case the ECtHR was unable to conclude that the lives of any patients were put in danger on account of delays in individual cases or that people were prevented from seeking medical care in other places. The ECtHR further noted that it did "*not consider it necessary to examine in this case the extent to which Article 2 of the Convention may impose an obligation on a Contracting State to make available a certain standard of health care.*"[188] Thus besides saying that a state is under the obligation to provide to each person the life saving medical care it has established under its health policy, the ECtHR further indicated that article 2 might contain some minimum standards for the level of health care available in the states. However, regarding the diversity in the health care services in the various contracting parties it is doubtful that the ECtHR will specify such minimum demands in the near future.

The ECtHR did indicate that article 2 requires states to ensure that hospitals have regulations for the protection of patients and that they establish an effective system of judicial investigation into medical accidents.[189] In *Calvelli* the ECtHR noted that states' obligations to take appropriate steps to safeguard the right to life were applicable in the public-health sphere and continued by specifying that "*the aforementioned positive obligations therefore require States to make regulations compelling hospitals, whether public or private, to adopt*

[185] Demiray v. Turkey, 21 November 2000.
[186] *Ibidem*, paragraph 41.
[187] Cyprus v. Turkey, *op. cit.*, note 124, paragraph 219.
[188] *Ibidem,* paragraph 221.
[189] Powell v. United Kingdom, Judgement of 4 May 2000.

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 (...)."[190] The ECtHR however also indicated that in the specific field of medical negligence and unintentional killings criminal redress would not always be necessary when civil or disciplinary remedies were available. It was argued by the dissenting judges that such an approach would lead to privatisation of the right to life, making the protection of the right to life no longer the responsibility of the state but of private persons. However, one could counter this argument by stating that criminal proceeding will still be needed if the civil or disciplinary measures do not enable liability of the medical personnel involved. This can be inferred from the fact that the ECtHR demands states to set up judicial systems that ensure accountability and enable liability of the doctors concerned.[191]

In *Öneryildiz* the ECtHR again examined the obligation of states to provide information to protect the right to life and health of individuals.[192] *Öneryildiz* combined environmental issues and health issues and dealt with the specific question whether the Turkish government had taken sufficient precautions to protect the lives and health of people living in a shanty town in Istanbul, built on land surrounding a rubbish tip owned by the Treasury. A methane gas explosion on the waste-collection site had occurred burying 11 houses and killing several people. Previous reports had already indicated the serious dangers the rubbish tip posed to the life and health of the inhabitants of the neighbouring slum quarters due to its failure to conform to the technical standards and had revealed that the local and ministerial authorities had clearly failed to take the measures required by the relevant regulations. Even though the authorities had not encouraged individuals to set up their homes in the vicinity of the rubbish tip, the ECtHR noted that they had neither discouraged them either. After reiterating that article 2 required states to take the appropriate steps to safeguard the lives of individuals, the ECtHR indicated that states are under the obligation "*to take concrete measures to avoid that risk ... if it is established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an individual or individuals and that they failed to take measures within the scope of their powers which might have been expected to avoid that risk (...).*"[193] Even though the wording of the ECtHR referring to the awareness of a real and immediate risk limits the situations in which

[190] Calvelli, *op. cit.*, note 127, paragraph 49.
[191] *Ibidem,* paragraphs 49 & 51.
[192] Öneryildiz, *op. cit.*, note 114.

governments are obliged to act, the ECtHR nevertheless concluded that in principle "*the positive obligation which derives from Article 2 (...) is indisputably also applicable to the sphere of public activities in question here; contrary to the Government's assertions (...), no distinction needs to be drawn between acts, omissions and 'negligence' by the national authorities when examining whether they have complied with that obligation...*"[194] The ECtHR had no difficulty in establishing a causal link between the negligent omissions and the accident. The ECtHR then continued by examining "*whether the Turkish authorities had at least endeavoured to respect the public's right to information*."[195] The ECtHR reiterated that "*in the Guerra and Others case, it held that the State had infringed Article 8 of the Convention for failing to communicate to the applicants essential information 'that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory' (...). The Court does not see any aspect in the circumstances of the present case distinguishing it from the circumstances of Guerra and Others, taking into account that the reasoning in that judgement is applicable a fortiori in respect of Article 2 and, moreover, fully applies to the present case*."[196] In this respect the ECtHR again concluded that the authorities had been negligent. The authorities should have taken an active stand in providing the public with the relevant information and the fact that the applicant might have been in the position to assess some of the risks did not absolve the authorities from their duties. The decision in *Öneryildiz* confirms that states need to take an active stand for the protection of the right to life, which includes a thorough provision of information to the public of the existence of any dangers to their right to life. Negligence on this account leads to accountability of the authorities. The decision in *Öneryildiz* is also important for bringing the field of environmental issues within the scope of article 2.[197] The ECtHR previously been inclined to examine these issues primarily under article 8, rendering an additional examination under article 2 unnecessary. In the future the ECtHR might be inclined to make more use of article 2 as well.

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[193] *Ibidem*, paragraph 63.
[194] *Ibidem*, paragraph 65.
[195] *Ibidem,* paragraph 81.
[196] *Ibidem,* paragraph 84.
[197] However, the case will be re-heard by the Grand Chamber.

5.4. Conclusion

The development of the case law under article 2 indicates that in cases falling within the public domain far-reaching positive obligations have been created. The ECtHR is willing to closely scrutinise acts as well as omissions that may affect the right to life when examining areas of the public domain. By doing so the ECtHR has widened the states' responsibility for security forces' operations. The state is held responsible not only for the actual use of lethal force by its agents, but for shortcomings in the planning and control of the operation leading to the use of lethal force. The latter responsibility will be invoked if any shortcomings occur during any phase of the operation and with regard to any participant in the operation, including opponents of the state's agents. The ECtHR has further found that states may violate article 2 in cases relating to medical and environment issues if certain positive obligations are not fulfilled. The provision of adequate medical care, especially for persons in vulnerable positions but also for the population in general, has the potential to place important obligations on the state in the future. The duty to protect people from risks to their lives and the duty to provide information on possible serious risks give article 2 more possibilities of protection.

The approach chosen by the ECtHR is to be welcomed. The ECtHR itself stresses over and over again the fundamental character of article 2 and it overarching value. Such language needs to be accompanied by the broadest possible range of obligations, especially in fields where public authorities possess huge powers and influence.

6. Protecting the right to life from risks created by private actors

6.1. Introduction

It is not difficult to accept that in the public sphere states are under the obligation to take positive measures to protect the right to life of those living under its jurisdiction. However, this presumption becomes less obvious when dealing with the private sphere. The ECHR is a treaty directed at its Contracting States and places the duty to ensure the full enjoyment of the rights enshrined in the convention upon those states. According to this reasoning the ECHR does not place any obligations upon non-state actors nor does it regulate their behaviour. On the other hand, the fact that article 2 requires the right to life to be protected by law already indicates that states are under the obligation to regulate private conduct with regard to the right to life, thereby penetrating the private sphere as well.[198] Under article 2 the ECtHR has even concluded that the need for domestic regulation extends to privatised institutions as well. In *Calvelli* dealing with the death of a child due to negligence by the medical staff of a clinic the ECtHR held that the positive obligations under article 2 "*require States to make regulations compelling hospitals, **whether public or private**, to adopt appropriate measures for the protection of patients' lives.*"[199] Protection of the right to life by law thus already has a big impact on the behaviour of private parties. This chapter will examine whether article 2 contains more possibilities for penetrating the private sphere.

6.2. The *Drittwirkung* of the European Convention on Human Rights

The extent to which the ECHR is applicable to the behaviour and conduct of non-state actors is often referred to as the question of the '*Drittwirkung*' of the ECHR.[200] The concept derives from Germany where it refers to the possibility to apply the German Basic Law in cases where both parties are non-state actors, thereby giving the German Basic Law '*third party effect*'. In the literature *Drittwirkung* combines two views. [201] The first view deals with the enforcement of human rights and claims that *Drittwirkung* only exists if individuals have the possibility to enforce their human rights against other private parties in court. A distinction must be made between enforcement at the national and at the European level. At the national

[198] See for other convention articles e.g. X and Y v. The Netherlands, *op. cit.*, note 69.
[199] Calvelli, *op. cit.*, note 127, paragraph 49, emphasis added.
[200] For an extensive overview on the issue see: Clapham, A., *The 'Drittwirkung' of the Convention*, in R. MacDonald, F. Matscher & H. Petzold, *The European system for the protection of human rights*, Dordrecht, Kluwer Academic Publishers, 1993, pp. 163-206.

level domestic arrangements may very well enable individuals to enforce their human rights in horizontal relations. However, at the European level in Strasbourg only states can be the respondents of any claims. According to the second view on *Drittwirking* the application of human rights should not be limited to relations where states are involved, but should equally apply in legal relations between private parties. The fundamental character of the rights enshrined in the ECHR can be seen as a justification for the *Drittwirkung* of convention rights. The wording of some of the articles of the ECHR is also referred to justify the *Drittwirkung* of the ECHR. Especially the broad wording of article 1, article 13 guaranteeing an effective remedy "*notwithstanding that the violation has been committed by persons in an official capacity*", article 17 prohibiting "*any State, group or person*" to destruct the rights and freedoms of the ECHR and the limitation clauses of articles 8-11 referring to the "*protection of the rights of others*" are regarded as indications for the *Drittwirkung* of the ECHR.[202] While some articles thus open the way for the *Drittwirkung* of the ECHR, not all rights are formulated in way to allow their applicability in horizontal relations. However, even if it is accepted that the ECHR might allow for the applicability of the convention rights in horizontal relations, enforcement at the international level can only take place if the violation in the horizontal relation can be attributed to the state. Since the ECtHR can only hold states responsible for human rights violations, the ECHR can only have '*mittelbare*' or indirect *Drittwirkung*.[203] The private parties themselves cannot be held responsible or punished and for the injured party only just satisfaction is possible.

Since the ECHR only allows for *mittelbare Drittwirkung*, making the *Drittwirkung* dependent on the responsibility of the state, broadening the scope of the responsibility of the state can have an important influence on the *Drittwirkung* of the convention. Positive obligations can play a major role in this sense, especially when they entail obligations in the private sphere. In the 1970s the European Commission was already confronted with a claim for state protection against risks to the right to life created by non-state actors and in 1983 the European Commission again dealt with the issue. The applicant maintained that unique and personalised protection against terrorist attacks should have been provided to prevent the death of her husband. Referring back to the case from the 1970s,[204] the European Commission pointed out that "*article 2 cannot be interpreted as imposing a duty on a State to give*

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[201] Dijk, P. van & Hoof, G.J.H. van, *op. cit.*, note 78, p. 23.
[202] Alkema, E.A., *The third-party applicability or 'Drittwirkung' of the European Convention on Human Rights*, in T. Matscher & H. Petzold (eds.), *Protection human rights, the European dimension. Studies in honour of Gérard J. Wiarda*, Berlin, Carl Heymans Verlag KG, 1988, p. 36.
[203] *Ibidem*, p. 38.

protection of this nature, at least not for an indefinite period of time."[205] The European Commission even explicitly introduced the concept of positive obligations into article 2, but immediately continued by limiting the scope of these positive obligations by denying that "*a positive obligation to exclude any possible violence could be deduced from this article*". While denying the obligation in the present case, the European Commission nevertheless seemed willing to accept that article 2 contains the obligation to install protective measures against risks created by private parties. More than a decade later the ECtHR was confronted with a claim for individual protection against risks created by an individual and concluded that such an obligation indeed may exist.[206] After establishing the general obligation to take preventive operational measures, the ECtHR has in its case law been willing to interpret this obligation in a broad manner. The following paragraphs will give an overview of the development of this obligation under the ECHR.

6.3. Preventive operational measures against risks created by other individuals

In *Osman* a teacher had become obsessed with one of his students and had after several threats killed the father of the pupil and severely wounded the student. The teacher further killed the son of the deputy head master and wounded the deputy head master whom he blamed for having lost his teaching position. Even though the police had been informed of the teacher's obsession and his threats, they had not taken any further steps since they felt it to be a matter of internal concern for the school authorities. The ECtHR held that:

> "*The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (...). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the*

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[204] X. v. Ireland, Yearbook, Vol. 16 (1973), p. 388.
[205] W. v. United Kingdom, *op. cit.*, note 109.
[206] Osman, *op. cit.*, note 113, paragraph 115.

> *authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.*"[207]

The ECtHR then continued to determine the scope of the obligation. It was willing to accept that to prevent an impossible or disproportionate burden being placed on the state "*not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.*"[208] 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 fact that the control and prevention of crime are limited by several human rights and fundamental freedoms are circumstances that need to be taken into account when establishing the obligation. States are under obligation to take preventive operational measures only if it is established that "*the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.*" The criterion of awareness of a real and immediate risk indicates that strict requirements need to be met before the any positive obligation will arise. It is further required that one is the specific object of any threat; one needs to be identified from the population in general. No obligation arises if one falls within a general category of persons who might be at risk nor if the target eventually turns out to be somebody else. [209] However the ECtHR did not accept 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...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.*"[210] While examining all the particular circumstances of the case, the ECtHR concluded that it had not been proven that the police knew or ought to have been aware of the immediate and real risk posed by the teacher nor that the police could be

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[207] *Ibidem.*
[208] *Ibidem*, paragraph 116.
[209] McBride, J., *Protecting life: a positive obligation to help*, in «European Law Review, Human Rights Survey», vol. 24, 1999, p. 46.
[210] Osman, *op. cit.*, note 113, paragraph 116.

criticised for "*attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would in fact have produced concrete results.*"[211] One can infer from this judgement that the ECtHR will be very cautious in establishing the existence of an obligation to implement preventive operational measures. The enumeration of circumstances that might prevent a positive obligation from emerging is broadly formulated and gives the states considerable room for rebutting any claims.

The development of the obligation to provide preventive operational measures and the application of the criteria developed in *Osman* have played an important role in certain areas that are caught by terrorism and its counter activities, such as south-east Turkey. The ECtHR concluded in *Mahmut Kaya* that the Turkish authorities had failed to take reasonable measures available to them to prevent a real and immediate risk to the life of Mr Kaya, a doctor suspected of aiding and abetting the PKK.[212] It had not been established beyond reasonable doubt that the doctor had been killed by any state agents, but the ECtHR concluded that there were strong interferences that the perpetrators of the murder were known to the authorities. This made the ECtHR examine whether the authorities had failed in a positive obligation to protect the life of Mr Kaya. The ECtHR placed the murder of Mr Kaya within the framework of "*unknown perpetrator phenomenon*" which included the killings of several prominent Kurdish figures and concluded that Mr Kaya "*as a doctor suspected of aiding and abetting the PKK, was at that time at particular risk of falling victim to an unlawful attack. Moreover, this risk could in the circumstances be regarded as real and immediate.*"[213] With these words the ECtHR clarified that preventive measures might also be required if a certain group within the population is at risk as long as a particular risk for the people involved can be established. The ECtHR was further satisfied that the authorities were aware of this risk and that they were or ought to have been aware of the possibility that this risk derived from persons or groups acting with the knowledge or acquiescence of elements in the security forces. The ECtHR found that several defects in the implementation of the criminal law in respect of unlawful acts carried out with the involvement of the security forces undermined and even removed the effectiveness of the protection of the criminal law for Mr Kaya. Since "*a wide range of preventive measures would have been available to the authorities regarding the activities of*

[211] *Ibidem*, paragraph 121.
[212] Mahmut Kaya v. Turkey, Judgement of 28 March 2000.
[213] *Ibidem*, paragraph 89

their own security forces and those groups allegedly acting under their auspices or with their knowledge" the ECtHR found a violation of article 2 in this respect.[214] On the same day and following the reasoning of *Mahmut Kaya* the ECtHR reached the same conclusion *Kilic* dealing with the murder of a journalist of a Kurdish newspaper.[215] Several months later in *Akkoc* the ECtHR again found the Turkish authorities to violate article 2 since they failed to provide the reasonable preventive measures to protect the life of a Kurdish teacher in the south-east of Turkey.[216] The application of the criteria developed in *Osman* enabled the ECtHR to establish yet another line of responsibility in situations where killings occur but where any violation of the negative obligations under article 2 is hard to establish.

The series of judgements on the right to life in the South-eastern part of Turkey gave the ECtHR the opportunity to elaborate on the criteria it had developed in *Osman*. From the reasoning of the ECtHR one can deduce three elements that need to be fulfilled before the obligation to provide preventive protection arises: significance of the threat ("*a real and immediate risk*"), specificity of the target ("*at particular risk of falling victim to an unlawful attack*"), and official awareness of the risk ("*the authorities knew or ought to have known*").[217] While the ECtHR proved willing to impose the obligation to provide preventive operational measures on Turkey, it refused to impose the same obligation on Cyprus after the murder of a Turkish man in Cyprus.[218] One may thus conclude that a very high threshold must be met before a breach of the positive obligation of article 2 is to be found. The risks posed from within the security forces, the failures in the implementation of the criminal law fostering a lack of accountability of members of the security forces, structural deficiencies in the rule of law in the region and the failure to provide any protection to persons in cases which screamed for preventive operational measures made the Turkish authorities liable under article 2. The Cypriot situation lacked similar characteristics and the ECtHR proved wary to impose any additional duties upon the state.

6.4. Persons within the power of the state and preventive operational measures

In order not to place a disproportionate burden on the state, the ECtHR has been willing to find an obligation to take preventive operational measures to protect the lives of individuals

[214] *Ibidem*, paragraph 99.
[215] Kilic v. Turkey, Judgement of 28 March 2000, 33 E.H.R.R. 1357.
[216] Akkoc v. Turkey, Judgement of 10 October 2000.
[217] McBride, J., *op. cit.*, note 209, pp. 45-48.
[218] Denizci, *op. cit*., note 185, paragraph 376.

from risks created by other individuals only in very specific circumstances such as the security situation prevailing in Turkey. In other instances the ECtHR has given prevalence to the limitations authorities face in protecting the right to life. However, as in other parts of its case-law, the ECtHR has found specific obligations to arise when people find themselves in vulnerable positions under the power of the state such as persons in detention or in custody. In *Edwards* the ECtHR commenced its examination by stressing the state's responsibility for the life and welfare of persons in vulnerable positions as it reiterated that "*in the context of prisoners, the Court has had previous occasion to emphasise that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them. It is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies*" and specified that in the present case "*Christopher Edwards was killed while detained on remand by a dangerous, mentally ill prisoner, Richard Linford, who was placed in his cell. As a prisoner he fell under the responsibility of the authorities who were under a domestic law and Convention obligation to protect his life.*"[219] The ECtHR was satisfied that the authorities knew or ought to have known that Mr Linford posed a real and immediate risk to anyone placed together with him in one cell, since sufficient information was available of Mr Linford's mental illness, his record of violence as well as his violent behaviour on and following arrest. The ECtHR continued by examining the measures which might have been taken to avoid that risk and observed that "*that the information concerning Richard Linford's medical history and perceived dangerousness ought to have been brought to the attention of the prison authorities, and in particular those responsible for deciding whether to place him in the Health Care Centre or in ordinary location with other prisoners. It was not.*"[220] Therefore the ECtHR concluded that article 2 had been violated since "*the failure of the agencies involved in this case (medical profession, police, prosecution and court) to pass on information about Richard Linford 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.*"[221] The main importance of *Edwards* lies in the fact that it elucidates that preventive operational measures need not necessarily involve police protection against risks posed by private parties. On the contrary, preventive operational measures consist of a wide array of measures to deter any risks posed to the right to life. The measures are to be taken by

[219] Edwards, *op. cit.*, note 148, paragraphs 56-57.
[220] *Ibidem*, paragraph 61.
[221] Edwards, *op. cit.*, note 148, paragraph 64.

any public agency or authority whose awareness of the real and immediate risk can be established. It is yet to be seen whether this wide notion of preventive operational measures will also apply outside the scope of persons in vulnerable positions. The prominent place of article 2 in the hierarchy of the ECHR would justify such an approach. There is no reason to only make states liable for actions or omissions of its police force when preventive operation measures are needed, especially since the ECHR generally makes the state responsible for all its organs.

In *Mastrematteo* the ECtHR was faced with the dilemma whether states should be under the obligation not only to provide personal protection to individuals who face risks to their right to life posed by private parties, but whether there exists an "*obligation to afford general protection to society against the potential acts of one or of several persons serving a prison sentence for a violent crime and the determination of the scope of that protection*."[222] Mr Mastromatteo had been shot during a robbery by two prisoners who had been granted prison leave. The ECtHR first examined whether the Italian system of alternative measures to imprisonment, including prison leave, raised any issue under article 2. While noting that prison sentences serve to protect society, the ECtHR also valued the need for integration policies for persons sentenced to imprisonment. After examining the features of the Italian system of integration measures the ECtHR concluded that the system contained sufficient protective measures for society and that no issue arose under article 2 on that account. The ECtHR then continued by examining whether the individual decisions to grant prison leave to the murderers of Mr Mastromatteo violated article 2. The argument that the murder would not have occurred if no prison leave had been granted was rebutted by the ECtHR since "*a mere condition sine qua non does not suffice to engage the responsibility of the State under the Convention; it must be shown that the death of A. Mastromatteo resulted from a failure on the part of the national authorities to 'do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge' (...)*"[223] In this quote the ECtHR confirms that the *Osman-test* needs to applied when dealing with both personal protection as well as protection of the society at large. On the fact the ECtHR then concluded that "*there was nothing in the material before the national authorities to alert them to the fact that the release of M.R. or G.M. would pose a real and immediate threat to life, still less that it would lead to the tragic death of A. Mastromatteo as a result of the chance sequence of events which occurred in the present case. Nor was there anything to alert them*

[222] Mastromatteo, *op. cit.*, note 130, paragraph 69.
[223] *Ibidem,* paragraph 74.

to the need to take additional measures to ensure that, once released, the two did not represent a danger to society."[224] Finally, the ECtHR took into account that the normal system of supervision for persons on prison leave was applicable and that the police could therefore not have been said to have acted negligently as far as the perpetrators were concerned. No violation of article 2 was found in the present case. It is important that the ECtHR in principle accepted the possibility that states may be obliged to afford general protection to society in general against risks posed by private parties.

In conclusion one may say that *Edwards* and *Mastrematteo* both point in the direction of a wide interpretation of the obligation to implement preventive operational measures. The ECtHR scrutinised in both cases whether the measures taken to protect the right to life were sufficient. At the same time the characteristics of the cases might limit such a wide interpretation. Both cases dealt with persons, either the victim or the perpetrator, who found themselves within the power of the state. This particular position might have engaged a wider responsibility for the state than usual and placing more obligations upon them. However, the growing importance of the right to life under the ECHR might still justify a wide interpretation in other circumstances as well.

6.5. Protection against self-inflicted harm

In most cases the threat to one's right to life stems from external sources such as state-agents or non-state actors. However, people are also capable of inflicting life-threatening harm upon themselves. Most cases dealing with self-inflicted harm are dealt with under other convention articles,[225] but an issue may also arise under article 2. In *Keenan* a mentally ill prisoner committed suicide after being placed in segregation.[226] The ECtHR did not accept the state's assertion that its capacity to take any measures was limited by the principles of dignity and autonomy of the person which prohibit any oppressive removal of a person's freedom of choice and action. The ECtHR said that "*restraints will inevitably be placed on the preventive measures by the authorities by, for example in the context of police action, the guarantees of Articles 5 and 8 of the Convention (...). The prison authorities, similarly, must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned. There are general measures and precautions which will be available to diminish the*

[224] *Ibidem*, paragraph 76.
[225] X. v. Germany, Judgement of 10 May 1984, 7 E.H.R.R. 152.
[226] Keenan v. United Kingdom, Judgement of 3 April 2001, 33 E.H.R.R. 913.

opportunities for self-harm, without infringing personal autonomy. Whether any more stringent measures are necessary in respect of a prisoner and whether it is reasonable to apply them will depend on the circumstances of the case."[227] Besides the general measures, which should be available to the public in general, specific personal measures might also be required for the prevention of self-inflicted harm. Again the question remains whether these measures will also need to be taken outside the scope of persons in custody or detention. The ECtHR then 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 reasonably could have been expected of them to prevent that risk*."[228] Thus the *Osman-test* is applicable in cases dealing with protection against risks posed by other individuals as well as cases dealing with self-inflicted harm. The ECtHR found that the prison authorities were aware of Mr Keenan's problems and despite the facts that it was unclear whether Mr Keenan had the intention of killing himself nor whether there existed a continued risk, on the facts of the case judged that a real and immediate risk existed. When examining the measures taken by the relevant authorities the ECtHR concluded that on the whole the authorities made a reasonable response to Mr Keenan's conduct and therefore concluded that no violation of article 2 was to be found in this case. The ECtHR again proved willing to examine whether any obligation to provide preventive operational measures exist and whether the authorities have fulfilled this obligation, but refused to establish a violation. Still, it has again broadened the scope of the preventive operational measures making them include situations of suicide as well.

Euthanasia is another situation in which issues of self-inflicted harm and the protection of the right to life might be raised. While mainly examining its effects under article 8, in *Pretty* the ECtHR did briefly deal with the issue of euthanasia under article 2. After referring to *Osman* and *Keenan* the ECtHR noted that "*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...*" and accordingly found 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.*" [229] The ECtHR further refused to examine in abstracto whether the extent to which a state that regulates euthanasia might raise issues of personal freedom or public interests. Even though it

[227] *Ibidem*, paragraph 91.
[228] *Ibidem*, paragraph 92.
[229] Pretty, *op. cit.*, note 50, paragraphs 39-40.

would be possible for the ECtHR to deal with euthanasia under the heading of suicide, it is understandable that the ECtHR did not apply the reasoning it applied in *Keenan*. Not only did *Keenan* deal with the specifics of a person in the power of the state, but also the divergent views in the contracting parties on the issue of euthanasia would have made the introduction of any specific obligations extremely controversial.

6.6. Conclusion

Even though article 2 of the ECHR lacks *Drittwirkung* in the real sense of the word, the positive obligations under this article dealing with preventive operational measures have indeed broadened its *mittelbare Drittwirkung*. States failing to provide the measures necessary once they become aware of real and immediate threats posed by private parties to the right to life of others risk violating article 2. Admittedly, the ECtHR is cautious not to place an impossible or disproportionate burden on the states and a high threshold needs to be met before any responsibility will be assumed. Nevertheless, the ECtHR has been willing to scrutinise states in cases dealing with personal protection against threats posed by individuals in tense security situations, threats posed to the society as a whole, threats to and by persons within the power of the state as well as risks posed by self-inflicted harm. The fact that the ECtHR has only rarely found a violation of article 2 on this account does not diminish the potential value of the preventive operational measures for the *mittelbare Drittwirking* of the ECHR.

7. Appreciation and evaluation

7.1. Introduction

The previous chapters have given an overview of the wide array of positive obligations that the ECtHR has read into article 2 to make its safeguards practical and effective. After the ECtHR introduced the positive obligations under article 2 in *McCann* a wide range of very different obligations has been developed. However, a common feature of all positive obligations is that they have been particularly stringent when dealing with persons in vulnerable positions or under the power of the state.[230] The need to prevent abuse of power and to ensure liability in cases where public scrutiny of governmental behaviour is often difficult to achieve have made the ECtHR adopt stringent obligations in such cases.

Each of the positive obligations individually may induce liability under article 2,[231] but the ECtHR has proven more than willing to establish separate violations of negative and positive obligations,[232] or of cumulative positive obligations in the same case.[233] Just like its negative counterparts, the positive obligations do not ensure an absolute right to life. Although they impose a substantial duty upon states to protect the right to life, this duty cannot be fulfilled under all circumstances.[234] No matter how thorough and rigorous an official effective investigation may be, sometimes the perpetrators are simply not to be found nor held accountable. Similarly, the nature of the risks posed to individuals in either the public or the private sphere inevitably determines whether these risks can be effectively averted. Even though the ECtHR has only explicitly indicated that the obligation to investigate suspicious deaths is "*not an obligation of result, but of means*",[235] one may conclude that all positive obligations under article 2 are obligations of means.[236] The ECtHR thus only examines whether "*the State did all that could have been required of it*" to protect the right to life.[237] If a state satisfies this demand, it cannot be held responsible under article 2, despite the fact that lives have been lost.

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[230] Edwards, *op. cit.*, note 148, paragraph 56.
[231] See e.g. Kaya, *op. cit.*, note 119, where no substantive violation could be established, but where the ECtHR found a violation of the procedural obligation of article 2.
[232] See e.g. Timurtas, *op. cit.*, note 89, where the state was held responsible for the death in custody of a disappeared person as well as for violation the procedural obligation.
[233] See e.g. Ergi, *op. cit.*, note 123, where a violation of the planning and control of security forces' operations was found as well as a violation of the procedural obligation.
[234] McBride, J., *op. cit.*, note 209, p. 52.
[235] Kelly, *op. cit.*, note 118, paragraph 95.
[236] McBride, J., *op. cit.*, note 209, p. 51.
[237] See e.g. LCB, *op. cit.*, note 165, paragraph 36.

However, despite the clear fact that the positive obligations have broadened state responsibility, the scope of these obligations might still be disputed. One may wonder whether the duties they place on states are realistic or whether they pose too heavy a burden on the state. On the contrary, one could also argue that the obligations do not yet go far enough and claim that more stringent demands should be placed on the states. This chapter will evaluate the current positive obligations by analysing their scope and contents. It will also be examined whether the limits of the positive obligations under article 2 have been reached or whether future extensions are likely to evolve in the near future.

7.2. The procedural obligation

The procedural obligation to investigate suspicious deaths has become an important source of state responsibility. Especially in cases where a substantive violation of article 2 could not be established, such as cases of disappearances, the procedural obligations has proven to be an effective means of ensuring practical and effective protection of the right to life. At the introduction of this procedural obligation the ECtHR was guided by the recommendations and General Comment 6 (16) of the Human Rights Committee and by rulings of its counterpart on the American continent, the Inter-American Court on Human Rights (hereafter IACHR). In 1982 the Human Rights Committee already indicated that the right to life under the ICCPR contained procedural elements which require the establishment of "*effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which might involve a violation of the right to life*",[238] which was later expanded to cover all state killings.[239] Faced with the enormous problem of disappearances on the continent, the IACHR introduced the triple obligation to "*prevent, investigate and punish*" any violation of the rights enshrined in the ACHR and continued by specifying that "*the State is obliged to investigate every situation involving a violation of the rights protected by the Convention [ACHR]…The same is true when the State allows private persons or groups to act freely and with impunity…The duty to investigate is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective…*"[240]

[238] General Comment 6 (16), paragraph 4.
[239] Baboeram v. Suriname (146, 148-154/83).
[240] Velásquez Rodríguez v. Honduras, *op. cit.*, note 16, paragraphs 166, 176-177.

The ECtHR duly followed the lead of the IACHR and accepted the need for an effective official investigation into suspicious deaths, caused either by state-agents[241] or non-state actors.[242] The fact that an investigation is also required when non-state actors are involved is a natural corollary of the main purposes of an effective investigation to secure effective implementation of domestic legislation and to ensure liability.[243] An effective investigation into any suspicious death will prevent impunity and will therefore function as a deterrent for the society as a whole. One could also argue that the investigation of suspicious deaths is an inherent aspect of democracy and the rule of law, and therefore not only derives from article 2 itself, but also from the prerequisites of a genuine and functioning *Rechtsstaat*.

To ensure that the investigation will indeed be effective the ECtHR has developed a non-exhaustive list of requirements relating to procedural and institutional aspects of the investigation.[244] The demands posed by the ECtHR have made the procedural obligation a detailed and foreseeable obligation. It has placed certain clear duties upon the states that should enable them to prevent violations of article 2 on this account. The requirements closely follow international standards dealing with criminal and other kind of investigations.[245] Therefore one may conclude that the procedural obligation is a reasonable and valuable extension of article 2. It has become a useful additional source of state-responsibility, but without placing unreasonable or unexpected burdens upon the states.[246]

7.3. The positive obligations in the pubic sphere

The positive obligations the ECtHR has developed in the public sphere are natural consequences of the dogma that the state should be responsible for the actions and omissions of all its agents when violations of the ECHR occur. The fact that the ECtHR proved willing to examine "*all the surrounding circumstances*" leading to the use of lethal force is an indication of the ECtHR's awareness of the major role the planning and controlling activities play in security forces' operations, whether dealing with terrorist activities[247] or any other

[241] McCann and Others, *op. cit.*, note 18.
[242] Ergi, *op. cit.*, note 123.
[243] Kelly, *op. cit.*, note 118.
[244] *Ibidem.*
[245] Ni Aolain, F., *op. cit.*, note 74, p. 35 & e.g. Gül, *op. cit.*, note 146, paragraph 89, referring to the United Nations' Model Autopsy Protocol.
[246] Note that under the African system the duty to investigate suspicious death is dealt with under article 7 containing the right to have one's cause heard, see 74/92 Commission Nationale des Droits de l'Homme et des Libertés/ Chad.
[247] McCann and Others, *op. cit.*, note 18, paragraph 150.

security operation.[248] The actual use of lethal force is merely the result of a chain of events such as the training, instructing and planning of the operation. Making the state not only responsible for the actual use of lethal force when falling outside the scope of exceptions of article 2 (2), but also ensuring liability for that chain of events leading up to the use of lethal force simply accepts the reality of security forces' operations.

Since the right to life is the supreme right under the ECHR, it is reasonable for states to ensure that their planning and control of security forces' operations do not only take into account the right to life of the suspects,[249] but also the right to life of other individuals that might become involved.[250] States are further responsible for all persons that can be associated with it security forces.[251] In the same vein, article 2 may demand that a state not only ensures that its agents do not use lethal force contrary to article 2 but also ensure that it does not trigger its opponents to use lethal force violating the right to life of others.[252]

One could claim that the demands placed upon states might hinder the effectiveness of security forces' operations, especially since they are often carried out in dangerous situations where immediate and sensitive decisions need to be taken. The ECtHR itself recognises these difficulties, but refuses to let such situations fall outside the scope of article 2.[253] On the other hand one may argue that the current stand of technology, training and intelligence and information services does enable states to take sufficient precautions to prevent violations of the right to life. One could further argue that especially in tense security situations, where states are aware of the risks to life and where the loss of lives might even be expected, high demands should be placed on the states to prevent avoidable loss of life and to take all the feasible precautions. What exactly the extent of those precautions may be will vary according to the specific circumstances of the situations. Higher demands will be placed in situations where sophisticated means of planning and control are available and where states have had more time to prepare the actual security forces' operations compared to situations where the planning and control are placed under constraints and a reasonable preparations time is lacking.[254] One may even draw a parallel with the obligation to provide preventive operational measures in cases where official awareness of a real and immediate risk to the right to life exists. The more real and immediate the risk is, inter alia in tense security situations, the

[248] Andronicou and Constantinou, *op. cit.*, note 174, paragraph 181.
[249] McCann and Others, *op. cit.*, note 18, paragraph 201.
[250] Ergi, *op. cit.*, note 123, paragraph 79.
[251] Avsar, *op. cit.*, note 177, paragraph 413.
[252] Ergi, *op. cit.*, note 123, paragraph 80.
[253] *Ibidem*, paragraph 85 & Andronicou and Constantinou, *op. cit.*, note 174, paragraph 181.
[254] The judgements of the ECtHR in McCann and Andronicou seem to support such an approach.

higher the demands for protection will be. As said before, states are under an obligation of means, not of result. Since inevitable loss of life does not infer liability as long as the planning and control met the demands of article 2, the efforts the ECtHR requires states to take must be regarded as reasonable and falling with the scope of article 2.

The public spheres of medical care and environmental issues opened the way for other positive obligations. They require states "*to take appropriate steps to safeguard the right to life*".[255] This wide formulation may include a broad range of steps to be taken to meet the demands of article 2. The duty to inform the public about risks that might affect their right to life is applicable in both fields.[256] If a state is aware of the existence of certain real risks to the life and health of the public, and the public can not be expected to obtain that information through other sources, an obligation to impart the relevant information arises to enable the public to assess the risks posed to their right to life. The ECtHR originally established the existence of such a right to information under article 8,[257] but the incorporation of the right in other articles is a welcome extension. If simply providing information can avert risks to the right to life, it is not more than natural to expect a state to indeed communicate the risks to the people involved.[258]

However, the mere provision of information might not be sufficient to safeguard the right to life. Preventive operational measures might need to be taken if the state is aware or should have been aware of the existence of a real and immediate threat to the right to life.[259] The protection of the right to life requires states to take an active stand and to avert risks whenever possible. These obligations could have far-fetching consequences in the current era where many controversies exist about issues as genetically modified food, chemical products, nuclear power, safety regulations and the storage of dangerous materials such as fireworks.[260] However, since these are mainly areas where specified knowledge is required and where the assessment of the risks posed require multidisciplinary knowledge,[261] governmental responsibility whenever a real and immediate risk occurs in these areas is a logical consequence of the public's inability to assess and avert these risks themselves.

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[255] LCB, *op. cit.*, note 165, paragraph 36.
[256] *Ibidem* & Öneryildiz v. Turkey, *op. cit.*, note 114.
[257] Guerra and Others v. Italy, Judgement of 19 February 1998, 26 EHRR 357.
[258] See for similar duties under other human rights systems e.g. 155/96 The Social and Economic Rights Action Center and the Center for Economic and Social Rights/ Nigeria.
[259] Öneryildiz, *op. cit.*, note 114, paragraph 83.
[260] McBride, J., *op. cit.*, note 209. p. 44.
[261] *Ibidem*, p. 48.

In the medical field the ECtHR has established that besides the obligation to provide life-saving medical assistance to people under the power of the state,[262] states may not deny individuals the life saving health care which they have undertaken to make available to the population in general.[263] The latter wording indicates that equal access to existing medical care for all individuals should be guaranteed. The ECtHR further indicated that article 2 might contain minimum standards for the level of health care in the member states.[264] However, one may wonder whether such an obligation would not stretch beyond the parameters of article 2. Even though the ECHR must be interpreted in a dynamic way to ensure its value as a living instrument, the interpretation may not go beyond the purpose and scope of the ECHR. Requiring states to comply with certain minimum health standards would imply the existence of a certain medical services, including an infrastructure, specialised personnel and educational and vocational training facilities. The varying economic and technological conditions in the state parties may therefore inhibit the establishment of minimum requirements. The fact that the procedural obligation under article 2 does require the existence of a governmental apparatus for the investigation of suspicious deaths does not alter this conclusion. Such a governmental apparatus is an inherent element of democratic states that abide the rule of law and thus a prerequisite for becoming state parties to the ECHR, which cannot be compared to the demand to provide a minimum standard of health care. In addition it would be very unlikely for the ECtHR to establish such a far-fetching obligation specifically under article 2. Despite its overarching value, the wording of article 2, lacking a limitation clause and only permitting an exhaustive list of exception, seems to hinder the imposition of such obligations. Especially when examining the positive obligations that have been imposed under articles that have a much broader formulation, inter alia article 8 under which the broadest range of positive obligations has been established,[265] one must conclude that the obligation to provide a minimum level of health care goes beyond any of those other positive obligations imposed. To expect the ECtHR to incorporate such a wide-ranging positive obligation under article 2 and its narrow wording then seems unrealistic.

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[262] Velikova, *op. cit.*, note 135, paragraph 74 & Anguelova, *op. cit.*, note 183, paragraph 130.
[263] Cyprus v. Turkey, *op. cit.*, note 124, paragraph 219.
[264] *Ibidem*, paragraph 120.

7.4. The *mittelbare Drittwirkung* of the European Convention on Human Rights

While the obligation to protect the right to life by law already had a great impact on the behaviour of private parties, the introduction of the obligation to provide preventive operational measures has broadened the *mittelbare Drittwirkung* of article 2. States can be held responsible for not preventing violations of the right to life by private parties and are thus forced to intervene in horizontal relationships whenever they become aware or ought to have been aware of the existence of a real and immediate threat to the right to life. This obligation does not only extend to protection against threats posed by other individuals,[266] but also when persons pose a threat to themselves.[267] One can also infer from the jurisprudence that the preventive operational measures are not confined to measures to be taken by the police, but need to be taken by any relevant public agency or body.[268] Even though the ECtHR has only established the latter obligation in relation to persons in vulnerable positions and under the power of the state, one may assume that public agencies are under the obligation to take preventive operational measures in other cases as well. The supreme value of article 2 and the doctrine of state responsibility for all its agents justify such a conclusion.

However, the ECtHR has proven sensitive to the practical problems that the provision of preventive operational measures may entail and has established that a high threshold needs to be met before the obligation will arise. The seriousness of the threat, specificity of the target and official awareness of the risk are the three cumulative conditions that need to be fulfilled before preventive operational measures will be required. In the exceptional case that the threat is posed by persons who should be under the power of the state, states might even be under the obligation to provide preventive operational measures to protect society at large.[269] In other cases the three conditions need to be met to prevent an unrealistic burden from being placed on the state.

7.5. The right to live

Even though the positive obligations have greatly broadened the scope of protection of article 2, many people will argue that the protection offered is not sufficient to fully guarantee the

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[265] See for an overview Velde, J. van der, *op. cit.*, note 40, pp. 13-17.
[266] Osman, *op. cit.*, note 113, paragraph 115.
[267] Keenan, *op. cit.*, note 226, paragraph 117.
[268] Edwards, *op. cit.*, note 148, paragraph 110.
[269] Mastromatteo, *op. cit.*, note 130, paragraph 69.

right to life. Many authors argue that one should not refer to a right to *life* but to a right to *live*, which should include the right to have satisfactory living conditions.[270] According to this line of thought the right to life contains certain socio-economic aspects. It is maintained that the satisfaction of survival requirements such as food, water and health protection, but also a right to peace and a safe environment are to be incorporated into the right to life "*since more people die on account of hunger and disease than are killed*".[271] The Human Rights Committee has supported this view in its General Comment on article 6 when it said that "*it would be desirable for States Parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics*".[272] In many of its subsequent Concluding Observations and Recommendations the Human Rights Committee has referred to other socio-economic aspects that the right to life should contain.[273] The IACHR adopted a similar approach when it stated in the *Street Children-case* that "*owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence.*"[274] It must be noted that in *Pretty* the ECtHR explicitly denied that article 2 dealt with the quality of life. In the famous *Ogoni-case* the African Commission on Human and Peoples' Rights proved willing to include elements of a right to food and a clean environment into the right to life guaranteed under the ACHPR.[275]

Despite the fact that on the international level the incorporation of socio-economic aspect into the right to life seems to be accepted, this does to lead to the conclusion that they should be incorporated into article 2 of the ECHR as well. The General Comments and other findings of the Human Rights Committee lack legal status and are not binding upon the State-Parties to the ICCPR. Even though the findings of the Human Rights Committee are highly respected, their practical value is diminished by their non-binding capacity.[276] With regards to

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[270] Prémont, D. & Montant, F. (eds.), *The right to live, forty years after the adoption of the Universal Declaration of Human Rights: evolution of the concept, norms and case-law*, Geneva, CID, 1992, p. 3.
[271] B. Ramcharan quoted in Joseph, S., Schultz, M. & Castan, M., *The International Covenant on Civil and Political Rights, cases, materials and commentary*, Oxford, Oxford University Press, 2001, p. 131 & see also Ramcharan, B.G. (ed.), *op. cit.*, note 75, ch. 1.
[272] General Comment 6 (16), paragraph 5
[273] See e.g. UN Doc. CCPR/C/79/Add.105 on homelessness and health problems in Canada
[274] Villagrán Morales and Others v. Guatemala, *op. cit.*, note 12, paragraph 144.
[275] 155/96 The Social and Economic Rights Action Center and the Center for Economic and Social Rights/ Nigeria, paragraphs 64-67.
[276] Novak, M., *The Covenant on Civil and Political Rights*, in R. Hanski & M. Suksi, *An introduction to the international protection of human rights*, Turku, Institute for Human Rights, 2001 (2nd edition), p. 97.

the findings of the regional counterparts of the ECtHR, one must bear in mind that regional characteristics might colour the judgements of the supervisory mechanisms. In this respect one may refer to the *Ogoni-case* where it was outlined that "*human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa.*"[277] Thus, obligations developed within other human rights systems need not necessarily translate into corresponding obligations at the European level. In addition, when comparing the ECHR to the other regional instruments one notices that the ACHR as well as the ACHPR both contain certain economic and social rights, either in the original document or in additional protocols. As was said before, the ECHR focuses on the protection of civil and political rights and a completely separate instrument containing its own supervisory mechanisms has been developed for the protection of economic and social rights, the European Social Charter.[278] This might be an explanation for the cautious approach the ECtHR has taken in regard to the incorporation of social and economic rights into the ECHR. Only in very rare cases has the ECtHR been willing to include socio-economic obligations into convention articles.[279] Recently in a series of judgements the ECtHR denied that article 8 contained the socio-economic aspect of a right to housing.[280] Since the ECtHR generally denies the existence of socio-economic aspects under the broader formulated articles of the convention, incorporating them into article 2 seems highly unlikely.

In addition one may note that all the current positive obligations fall within the ambit of the effective functioning of a democratic *Rechtsstaat* and its existing organs and institutions. The positive obligations that the ECtHR has identified do not go beyond the original mandates and powers of bodies that already exist or should exist within democratic states. The legislative power should be competent to provide a democratic state with a coherent and consistent body of laws and regulations. In a law-abiding state the effective

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[277] 155/96 The Social and Economic Rights Action Center and the Center for Economic and Social Rights/ Nigeria, paragraph 68.

[278] See for extensive coverage Harris, D.J. & Darcy, J., *The European Social Charter*, New York, Transnational Publishers Inc., 2001 (2nd edition).

[279] Notable examples are e.g. Airey, *op. cit.*, note 47; Schuler-Zgraggen v. Switzerland, Judgement of 24 June 1993, 16 EHRR 405; López Ostra v. Spain, Judgement of 9 December 1994, 20 EHRR 277; Gaygusuz v. Austria, Judgement of 16 September 1996, 23 EHRR 364; D. v. United Kingdom, Judgement of 2 May 1997.

[280] Chapman v. United Kingdom, Judgement of 18 January 2001, paragraph 99; Jane Smith v. United Kingdom, Judgement of 18 January 2001, Beard v. United Kingdom, Judgement of 18 January 2001; Foster v. United Kingdom, Judgement of 18 January 2001; Lee v. United Kingdom, Judgement of 18 January 2001.

enforcement of all those laws and regulations includes the investigation into violations of those laws and regulations by either the executive or judiciary branch of government. Hence the procedural obligation to investigate suspicious deaths is an inherent aspect of democratic law enforcement for which a state should be held accountable. Similarly, one can trace the lines of hierarchical responsibility from public institutions back to the executive power, i.e. the respective ministries and their leaders. The obligations that have been developed in the public sphere do not demand more from the relevant institutions than their mandates and tasks already require. Finally, protecting individuals from threats posed by third parties might indeed place a burden on the police and the other institutions involved, but the created positive obligations fall within the original mandate of the relevant bodies. On the contrary, the inclusion of socio-economic aspects into article 2 would require states to engage in activities that stretch beyond its existing functions.

One cannot but subscribe to the fact that many socio-economic rights are necessary prerequisites for living. Without food, water, shelter and medical care life as such might very well be impossible. Even though all efforts should be made to ensure that each and every individual has access to all the basic survival requirements, it is not feasible to incorporate these survival requirements into the right to life as contained in article 2 of the ECHR. The wording of the article, its place among the other convention rights and the place of the ECHR within the European human rights system prevent such an extensive interpretation of the right to life. However, one must keep in mind that the development of the case-law of the ECtHR very much depends on the cases it will have to judge upon and on its composition. As the close vote in some of the landmark cases indicates, personal opinions may have a huge influence on the development of positive obligations.

7.6. Conclusion

The ECtHR has taken an active stand in the protection of the supreme value of the ECHR and has paid tribute to its doctrine to interpret the ECHR in the light of present-day conditions to ensure that its safeguards are made practical and effective. The right to life currently not only contains the negative duty to refrain from arbitrary and unlawful taking of life, but also includes a broad range of positive obligations designed to protect the right to life. However, even though the positive obligations do impose operational and financial burdens upon the states, the ECtHR has been careful not to lose sight of reality. All the current positive obligations are obligations that the organs and bodies of a well-functioning democratic

Rechtsstaat should be able to fulfil from the outset. Any future extensions of the positive obligations are likely to follow the same path. The ECtHR has only placed positive obligations upon states that can reasonable be inferred from article 2 which do not place an unrealistic burden upon the states. Consequently, despite the fact that socio-economic aspects might be essential for living, they have not been incorporated into article 2. In light of the current status of the right to life their exclusion is fully justified. However, since the convention is a living instrument and it articles will be interpreted in a dynamic way, the future will tell us whether the boundaries of article 2 will be further expanded to include even more positive obligations.

Bibliography

Books and articles

- Alkema, E.A., *The third-party applicability or 'Drittwirkung' of the European Convention on Human Rights*, in T. Matscher & H. Petzold (eds.), *Protection of human rights, the European dimension. Studies in honour of Gérard J. Wiarda*, Berlin, Carl Heymans Verlag KG, 1988, pp. 33-45.
- Black-Branch, J.L., *Being over nothingness: the right to life under the Human Rights Act*, in «European Law Review, Human Rights Survey», Volume 26, 2001, pp. 23-42.
- Clapham, A., *The 'Drittwirkung' of the Convention*, in R. MacDonald, F. Matscher & H. Petzold, *The European system for the protection of human rights*, Dordrecht, Kluwer Academic Publishers, 1993, pp. 163-206.
- Davidson, S., *The Inter-American human rights system*, Aldershot, Dartmouth Publishing Company, 1998.
- Dijk, P. van, *'Positive obligations' implied in the European Convention on Human Rights: are the states still the 'masters' of the Convention*, in M. Castermans, F. van Hoof & J. Smith (eds.), *The role of the nation states in the 21st century*, The Hague, Kluwer Law International, 1998, pp. 17-33.
- Dijk, P. van & Hoof, G.J.H. van, *Theory and Practice of the European Convention on Human Rights*, The Hague, Kluwer Law International, 1998.
- Eide, A., *Economic, social and cultural rights as human rights*, in A. Eide, C. Krausse & A. Rosas (eds.), *Economic, social and cultural rights: A textbook,* Dordrecht, Martinus Nijhoff Publishers, 1995, pp. 21-40.
- Evans, M.D. & Murray, R. (eds.), *The African Charter on Human and Peoples' Rights, The system in practice, 1986-2000*, Cambridge, Cambridge University Press, 2002.
- Forder, C.J., *Positieve verplichtingen in het kader van het Europees Verdrag tot bescherming van de Rechten van de Mens en de fundamentele vrijheden*, in «NJCM-Bulletin», Volume 17, Number 6, 1992, pp. 611-637.
- Harris, D.J., O'Boyle, M. & Warbick, C., *Law of the European Convention on Human Rights*, London, Butterworth, 1995, ch. 2.
- Harris, D.J. & Livingstone, S. (eds.), *The Inter-American system of human rights*, Oxford, Clarendon Press, 1998.

- Harris, D.J. & Darcy, J., *The European Social Charter*, New York, Transnational Publishers Inc., 2001 (2nd edition).
- Joseph, S., Schultz, M. & Castan, M., *The International Covenant on Civil and Political Rights, cases, materials and commentary*, Oxford, Oxford University Press, 2001.
- Kuijer, M., *Oneryildiz vs Turkije*, in «NJCM-Bulletin», Volume 28, Number 1, 2003, pp. 54-72.
- Lawson, R., *Positieve verplichtingen onder het EVRM: opkomst en ondergang van de 'fair-balance'-test – deel 1*, in «NJCM-Bulletin», Volume 20, Number 5, 1995, pp. 558-573.
- Lawson, R., *Positieve verplichtingen onder het EVRM: opkomst en ondergang van de 'fair-balance'-test – deel 2*, in «NJCM-Bulletin», Volume 20, Number 6, 1995, pp. 727-750.
- McBride, J., *Protecting life: a positive obligation to help*, in «European Law Review, Human Rights Survey*»,* Volume 24, 1999, pp. 43-54.
- Merrills, J.G. & Robertson, A.H., *Human rights in Europe, A study of the European Convention on Human Rights*, Manchester, Manchester University Press, 2001 (4th edition), ch. 1.
- Merrils, J.G., *The development of international law by the European Court on Human Rights*, Manchester, Manchester University Press, 1993 (2nd edition), ch. 5.
- Myjer, E., *Positieve verplichtingen tegen een doorgedraaide leraar*, in «NJCM-Bulletin», Volume 24, Number 4, 1999, pp. 512-525.
- Mowbray, A., *Cases and materials on the European Convention on Human Rights*, London, Butterworths, 2001, ch. 2.
- Mowbray, A., *The European Convention on Human Rights: The abolition of capital punishment and recent cases*, in «Human Rights Law Review», Volume 2, Number 2, Autumn 2002, pp. 311-329.
- Ni Aolain, F., *The evolving jurisprudence of the European Convention concerning the right to life*, in «Netherlands Quarterly for Human Rights», Volume 19, Number 1, 2001, pp. 21-42.
- Novak, M., *The Covenant on Civil and Political Rights*, in R. Hanski & M. Suksi, *An introduction to the international protection of human rights*, Turku, Institute for Human Rights, 2001 (2nd edition), pp. 79-100.

- Ovey, C. & White, R., *Jacobs and White, The European Convention on Human Rights*, Oxford, Oxford University Press, 2002 (3rd edition), ch. 3 & 4.
- Prakke, L., Reede, J.L. de, & Wissen G.J.M. van, *Pot, C.W. van der & Donner, M., Handboek van het Nederlandse staatsrecht*, Deventer, W.E.J. Tjeenk-Willink, 2001 (14e editie).
- Prémont, D. (ed.), *Essays on the concept of a 'right to live'*, Brussels, Etablissements Emile Bruylant S.A., 1988.
- Prémont, D. & Montant, F. (eds.), *The right to live, forty years after the adoption of the Universal Declaration of Human Rights: evolution of the concept, norms and case law*, Geneva, CID, 1992.
- Ramcharan, B.G. (ed.), *The right to life in international law*, Dordrecht, Martinus Nijhoff Publishers, 1985.
- Rosas, A. & Scheinin, M., *Categories and beneficiaries of human rights*, in R. Hanski & M. Suksi, *An introduction to the international protection of human rights*, Turku, Institute for Human Rights, 2001 (2nd edition), pp. 49-64.
- Shue, H., *Basic rights, subsistence, affluence and U.S. foreign policy*, Princeton, Princeton University Press, 1996 (2nd edition).
- Starmer, K., "*European Human Rights Law, The Human Rights Acts 1998 and the European Convention on Human Rights*", Glasgow, Bell & Bain Ltd., 1999.
- Starmer, K., *Positive obligations under the Convention*, in J. Jowell & J. Cooper (eds.), *Understanding human rights principles*, Oxford, Hart Publishing, 2001, pp. 139-160.
- Steiner, H. & Alston, P. (eds.), *International human rights in context, Law, Politics and Morals*, Oxford, Oxford University Press, 2000 (2nd edition).
- Teitgen, P.H., *Introduction to the European Convention on Human Rights*, in R. MacDonald, F. Matscher & H. Petzold, *The European system for the protection of human rights*, Dordrecht, Kluwer Academic Publishers, 1993, pp. 3-14.
- Velde, J. van der, *Positieve verplichtingen: over het ontstaan en het karakter van Positieve verplichtingen*, in «EVRM R&C», Katern 2.2, 2002.

Case-law

- Abdulaziz, Cabales and Balkandali v. United Kingdom, Judgement of 28 May 1985, 7 E.H.R.R. 471.
- Airey v. Ireland, Judgement of 9 October 1979, 2 E.H.R.R. 305.
- Akkoc v. Turkey, Judgement of 10 October 2000.
- Aktas v. Turkey, Judgement of 24 April 2003.
- Andronicou and Constantinou v. Cyprus, Judgement of 9 October 1997, 25 E.H.R.R. 491.
- Anguelova v. Bulgaria, Judgement of 13 June 2002.
- Artico v. Italy, Judgement of 13 May 1980, 3 E.H.R.R. 1.
- Avsar v. Turkey, Judgement of 10 July 2001.
- B. v. France, Judgement of 25 March 1992, 16 E.H.R.R. 1.
- Belgian Linguistic-case, Judgement of 9 February 1967, 1 E.H.R.R. 241.
- Botta v. Italy, Judgement of 24 February 1998, 26 E.H.R.R. 241.
- Brüggeman v. Germany, Decision of 12 July 1977, 10 D.R. 100.
- Cakici v. Turkey, Judgement of 8 July 1999, 31 E.H.R.R. 133.
- Calvelli v. Italy, Judgement of 17 January 2002.
- Christine Goodwin v. United Kingdom, Judgement of 11 July 2002.
- Cyprus v. Turkey, Judgement of 10 May 2001.
- Diaz Ruano v. Spain, Judgement of 26 April 1994, 19 E.H.R.R. 542.
- Demiray v. Turkey, Judgement of 21 November 2000.
- Denizci v. Cyprus, Judgement of 23 May 2001.
- Dudgeon v. United Kingdom, Judgement of 22 October 1981, 4 E.H.R.R. 149.
- Edwards v. United Kingdom, Judgement of 14 March 2002.
- Ergi v. Turkey, Judgement of 28 July 1998, 32 E.H.R.R. 388.
- Gaskin v. United Kingdom, Judgement of 7 July 1989, 12 E.H.R.R. 36.
- Golder v. United Kingdom, Judgement of 21 February 1975, 1 E.H.R.R. 524.
- Guerra and Others v. Italy, Judgement of 19 February 1998, 26 E.H.R.R. 357.
- Gül v. Turkey, Judgement of 14 December 2000, 34 E.H.R.R. 719.
- Gülec v. Turkey, Judgement of 27 July 1998, 28 E.H.R.R. 121.
- H v. Norway, Decision of 19 May 1992, 73 D.R. 155.
- Hugh Jordan v. United Kingdom, Judgement of 4 May 2001.

- Johnston v Ireland, Judgement of 18 December 1986, 9 E.H.R.R. 203.
- Kaya v. Turkey, Judgement of 19 February 1998, 28 E.H.R.R. 1.
- Klass v. Germany, Judgement of 6 September 1978, 2 E.H.R.R. 214.
- Kelly v. United Kingdom, Decision of 13 January 1993, 74 D.R. 139.
- Kelly v. United Kingdom, Judgement of 4 May 2001.
- Keegan v. Ireland, Judgement of 26 May 1994, 18 E.H.R.R. 342.
- Keenan v. United Kingdom, Judgement of 3 April 2001, 33 E.H.R.R. 913.
- Kilic v. Turkey, Judgement of 28 March 2000, 33 E.H.R.R. 1357.
- Kurt v. Turkey, Judgement of 25 May 1998, 27 E.H.R.R. 373.
- LCB v. United Kingdom, Judgement of 9 June 1998, 27 E.H.R.R. 212.
- Mahmut Kaya v. Turkey, Judgement of 28 March 2000.
- Marckx v. Belgium, Judgement of 13 June 1979, 2 E.H.R.R. 330.
- Mastromatteo v. Italy, Judgement of 24 October 2001.
- Mathieu-Mohin and Clarfayt v. Belgium, Judgement of 2 March 1987, 10 E.H.R.R. 1.
- McCann and Others v. United Kingdom, Judgement of 27 September 1995, 21 E.H.R.R. 97.
- McKerr v. United Kingdom, Judgement of 4 May 2001, 34 E.H.R.R. 553.
- McShane v. United Kingdom, Judgement of 28 May 2002.
- Ocalan v. Turkey, Judgement of 12 March 2002.
- Ogur v. Turkey, Judgement of 20 May 1999, 31 E.H.R.R. 40.
- Öneryildiz v. Turkey, Judgement of 18 June 2002.
- Osman v. United Kingdom, Judgement of 28 October 1998, 29 E.H.R.R. 245.
- Plattform Ärzte für das Leben v. Austria, Judgement of 21 June 1988, 13 E.H.R.R. 204.
- Powell and Rayner v. United Kingdom, Judgement of 12 February 1990, 12 E.H.R.R. 355.
- Powell v. United Kingdom, Judgement of 4 May 2000.
- Pretty v. United Kingdom, Judgement of 29 April 2002.
- Rees v. United Kingdom, Judgement of 17 October 1986, 9 E.H.R.R. 56.
- Salman v. Turkey, Judgement of 27 June 2000, 34 E.H.R.R. 425.
- Shanagan v. United Kingdom, Judgement of 4 May 2001.
- Soering v. United Kingdom. Judgement of 7 July 1989, 11 E.H.R.R. 439.
- Sporrong and Lönnroth v. Sweden, Judgement of 23 September 1983, 5 E.H.R.R. 35.

- Stewart v. United Kingdom, Decision of 10 July 1984, 39 D.R. 162.
- Stjerna v. Finland, Judgement of 25 November 1994, 24 E.H.R.R. 195.
- Streletz, Kessler and Krenz v. Germany, Judgement of 22 March 2001, 33 E.H.R.R. 751.
- Sunday Times v. United Kingdom, Judgement of 26 April 1979, 2 E.H.R.R. 245.
- Tanli v. Turkey, Judgement of 10 April 2001.
- Tanrikulu v. Turkey, Judgement of 8 July 1999, 30 E.H.R.R. 950.
- Timurtas v. Turkey, Judgement of 13 June 2000, 33 E.H.R.R. 121.
- Tyrer v. United Kingdom, Judgement of 25 April 1978, 2 E.H.R.R. 1.
- Velikova v. Bulgaria, Judgement of 18 May 2000.
- W. v. United Kingdom, Decision of 28 February 1983, 32 D.R. 190.
- X. v. Germany, Decision of 10 May 1984, 7 E.H.R.R. 152.
- X. v. Ireland, Yearbook, Vol. 16 (1973), p. 388.
- X. v. United Kingdom, Decision of 13 May 1980, 19 D.R. 244.
- X. and Y. v. The Netherlands, Judgement of 26 March 1985, 8 E.H.R.R. 235.
- Yasa v. Turkey, Judgement of 2 September 1998, 28 E.H.R.R. 408.

Annex: International texts on the right to life

Universal Declaration on Human Rights

Article 3.

Everyone has the right to life, liberty and security of person.

International Covenant on Civil and Political Rights

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of

Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

European Convention on Human Rights

Article 2

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 escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 15

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

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

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

American Convention on Human Rights

Article 4. Right to Life

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply. 3. The death penalty shall not be reestablished in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

Article 27. Suspension of Guarantees

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the

exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

African Charter on Human and Peoples' Rights and Duties

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.