AUTHORITY FOR THE USE OF FORCE AND ITS LIMITATIONS WITHIN THE SCOPE OF ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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ABSTRACT

The legitimate authority for the use of force in order to maintain public safety and order is under the monopoly of the state. It is surely beyond doubt that the state would use this authority through its agents. The use of force is one of the most commonly-discussed authorities of the law-enforcement officers.

The European Court of Human Rights, especially since the middle of 1990s, rendered several judgments on the events resulting from the state agents' authority for the use of force. A considerable part of these judgments was rendered against the United Kingdom, Russia and Turkey. It is possible to state that the approach of the Court is considerably precise in this regard. However, each case would undoubtedly be assessed under its own circumstances. Therefore, it is of great importance that the Court's case-law, which is the interpretation of the European Convention on Human Rights, be followed.

The main objective of this article is to reflect the viewpoint of the Court in regard to the use of force which could be considered as being in breach of the right to life. For that reason, the law-enforcement officers' authority to use force and its limitations will be assessed pursuant to Article 2 of the Convention. Moreover, the judgments especially relating to Article 3 will be referred when appropriate. Apart from the judgments considered as well-established case-law, recent judgments rendered by the Court will also be referred in this Article as far as possible. Firstly, the terms of "absolute necessity" and "strict proportionality" will be explained in the light of the Court's case-law. Subsequently, the exceptions for the right to life set out in paragraph 2 of Article 2 will be handled. Meanwhile, the issue on planning of the operations will be discussed under a different heading. Lastly, injuring carrying a potential risk of death, protection of right to life by law, training of the security forces and burden of proof will be discussed.

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Keywords: The Use of Force, Absolute Necessity, Strict Proportionality, Legitimate Defence, Arrest, Riot, Planning of the Operations

ÖZET

Kamu güvenliğini ve düzenini sağlamak adına meşru zor kullanma yetkisi devletin tekelindedir. Şüphesiz ki devlet bu yetkisini, görevlileri aracılığıyla kullanacaktır. Zor kullanma, kolluğun en çok tartışılan yetkilerinin başında gelmektedir.

Avrupa İnsan Hakları Mahkemesi, özellikle 1990'ların ortasından bu yana, devlet görevlilerinin zor kullanma yetkisinden kaynaklanan olaylarla ilgili çok sayıda karar vermiştir. Bu kararların önemli bir bölümü, Birleşik Krallık, Rusya ve Türkiye hakkındadır. Mahkeme'nin bu konudaki yaklaşımının büyük oranda belli olduğunu söyleyebiliriz. Ancak, her dava şüphesiz kendi koşullarında değerlendirilecektir. Bu nedenle, Mahkeme'nin Avrupa İnsan Hakları Sözleşmesi'nin yorumu niteliğindeki içtihatlarının takip edilmesi büyük öneme sahiptir.

Makalenin temel amacı, yaşama hakkının ihlali sayılabilecek nitelikteki zor kullanma eylemlerine ilişkin Mahkeme'nin bakış açısını yansıtmaktır. Bu nedenle, kolluğun zor kullanma yetkisi ve sınırları, Sözleşme'nin 2. maddesine ilişkin AİHM içtihatları çerçevesinde incelenecektir. Ayrıca, yeri geldiğinde özellikle 3. maddeyle ilgili kararlara da değinilecektir. Makalede, ana içtihat niteliğindeki kararların yanı sıra, mümkün olduğunca, güncel kararlara da yer verilecektir. Öncelikle "kesinlikle gereklilik" ve "katı orantılılık" kavramları yine içtihatlar doğrultusunda açıklanacaktır. Daha sonra 2. maddenin 2. fıkrasında düzenlenen yaşama hakkının istisnaları ele alınacaktır. Bu arada operasyonların planlanması konusu ayrı bir başlık altında incelenecektir. Son olarak, potansiyel ölüm riski taşıyan yaralama, yaşama hakkının kanun tarafından korunması, güvenlik güçlerinin eğitimi ve ispat yükü konularına değinilecektir.

Anahtar Kelimeler: Zor Kullanma, Kesinlikle Gereklilik, Katı Orantılılık, Meşru Savunma, Yakalama, Ayaklanma, Operasyonların Planlaması.

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INTRODUCTION

The convergence of the international instruments on human rights concerning the protection of the right to life is significant: it indicates that the right to life is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights.[1] As a matter of fact, that, the breach of the

[1] Osman Doğru and Atilla Nalbant, Avrupa İnsan Hakları Sözleşmesi-Açıklamalı ve Önemli Kararlar, Yüksek Yargı Kurumlarının Avrupa Standartları Bakımından Rollerinin Güçlendirilmesi

right to life would make recognition of other rights unreasonable.[2] Therefore, even though there is not any hierarchical relation among the rights in theory, we can say that the right to life is prerequisite for enjoying of all rights. For example, precisely granting freedom of expression and right to a fair trial to a person whose right to life has been violated would not make a sense. Besides, while any person whose right is violated is generally granted just satisfaction in case of breach of other rights, only the relatives of the deceased can be paid damage in case of breach of the right to life.[3] However, no matter how high, it is clear that this amount of compensation would never be valuable consideration of this lost of life in any case. Therefore, it is not wrong to say that the absolute redress of the right to life is not possible.

Protection of the right to life is also regarded as one of the basic and fundamental rights in terms of the European Convention on Human Rights (hereinafter "the ECHR" or "the Convention").[4] Together with Article 3 which sets out the prohibition of torture, "the right to life has been merely consecrated as one of the basic values of democratic societies making up the Council of Europe."[5] Therefore, deprivations of life must be subjected to "the most careful scrutiny" by the Court (hereinafter "the ECtHR" or "the Court").[6]

Ortak Projesi, 1. Cilt, Ankara: Şen Matbaa, 2012, p. 9; for example see Streletz, Kessler and Krenz v. Germany [GC], no. 34044/96, 35532/97 and 44801/98, 22 March 2001, § (paragraph) 94; The judgments of the European Court of Human Rights cited in the article, except for the ones separately referred, are taken from the official web-site of the Court: http://hudoc.echr.coe.int

2 Mark W. Janis, Richard Kay and Anthony W. Bradley, European Human Rights Law, 3rd Edition, New York: Oxford University Press, 2008, p. 119.

3 In order to hold that the right to life is breached it is not necessary that this person must have certainly died. In certain circumstances, the injuries may be assessed not in the scope of Article 3, setting out the prohibition of torture and ill-treatment, but in the scope of Article 2, setting out the right to life, by the Court. This issue will be discussed in detail below.

4 Javaid Rehman, International Human Rights Law, London: Pearson, 2010, p. 187.

5 Giuliani and Gaggio v. Italy [GC], no. 23458/02, 24 March 2011, § 174 (This judgment was cited from the Book on Avrupa İnsan Hakları Mahkemesi Kararları-20 Seçme Karar: Avrupa İnsan Hakları Mahkemesi Kararları-20 Seçme Karar, Giuliani ve Gaggio-İtalya Kararı, Çeviren: Hasan Kemal Elban, Yüksek Yargı Kurumlarının Avrupa Standartları Bakımından Rollerinin Güçlendirilmesi Ortak Projesi, Ankara: Şen Matbaa, 2011); Andronicou and Constantinou v. Cyprus, no. 25052/94, 9 October 1997, § 171; Solomou and Others v. Turkey, no. 36832/97, 24 June 2008, § 63; McCann and Others v. the United Kingdom [GC], no. 18984/91, 27 September 1995, § 147; Soering v. the United Kingdom [GC], no. 14038/88, 7 June 1989, § 88; Finogenov and Others v. Russia, no. 18299/03 and 27311/03, 20 December 2011, § 206; Salman v. Turkey [GC], no. 21986/93, 27 June 2000, § 97; Gül v. Turkey, no. 22676/93, 14 December 2000, § 76.

6 Gül v. Turkey, § 78; Avşar v. Turkey, no. 25657/94, 10 June 2001, § 391; Musayev and Others v. Russia, no. 57941/00, 58699/00 and 60403/00, 26 July 2007, § 142.

Article 2 of the Convention[7], which guarantees the right to life and sets out under which circumstances deprivation of life shall be found justified, as stated above, is one of the main articles guaranteed in the Convention, and is not allowed to be suspended under any circumstances. The Court emphasizes in its numerous judgments that it classifies Article 2 of the Convention as one of the most important articles of the Convention which does not accept any derogation even in time of war and exceptional circumstances (except for the deaths resulting from lawful acts of war) within the scope of Article 15.[8]

For that reason, the grounds which justify the deprivation of life are interpreted in a narrow way. The object of the Convention as an instrument for protection of individuals, requires interpretation and implementation of the protective elements provided by Article 2 in a way to make them practical and effective.[9]

The prohibition of death penalty by Additional Protocols no. 6 and 13 to be mentioned below has led to the shifting the centre of gravity of Article 2 from the second sentence of the first paragraph to the second paragraph on the

7 Article 2 of the Convention on the right to life is as follows:
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.

8 Article 15 of the Convention on derogation in time of emergency is as follows:
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 therefore. 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.

9 McCann and Others v. the United Kingdom, §§ (paragraphs) 146-147; Salman v. Turkey, § 97; Ali and Ayşe Duman v. Turkey, no. 42942/02, 8 April 2008, § 59; Uçar v. Turkey, no. 52392/99, 11 April 2006, § 102; Anguelova v. Bulgaria, no. 38361/97, 13 June 2002, § 109; Soering v. the United Kingdom, §§ 87-88; Loizidou v. Turkey (Preliminary Objections) [GC], no. 15318/89, 23 March 1995, § 72; Giuliani and Gaggio v. Italy, § 177; Solomou and Others v. Turkey, § 63.

limitations of "the use of force which is no more than absolutely necessary". In parallel with this development, the Court has developed new criteria to protect the right to life.[10] These criteria will be addressed in detail below.

The use of force is the duly use of power by the authorised persons with the aims of preventing person from giving harm to himself or other, ensuring compliance with law, equally enjoyment of fundamental rights and freedoms by everyone.[11] Use of any kinds of physical force, objects and/or weapons which might damage the physical integrity and the right to life of any person should be assessed within the scope of "use of force".[12] The Court has held that the notion of the "use of force" in Article 2 is not limited to the use of weapons or physical violence, but extends to other potentially lethal practices such as the use of an army vehicle to break down a barricade.[13]

It is not possible for the police to implement laws, and to ensure and maintain public order without authority such as the use of force and depriving people of their freedoms.[14] However, when exercising these powers, a right balance between the liberty and security, between of which there is a paradoxical relation, should be struck in a sensitive way. Dispensing the security for liberty would cause chaos in society. When the liberty is dispensed for the sake of security, a repressive regime would appear. In either case, the community-residing persons would not enjoy their democratic rights, and the community would be unrest and unhappy.

Use of force, especially use of weapon in the scope of this authority, has been one of the most debated powers of the law-enforcement officers time out

10 Fernando Rey Martinez, "Legal Protection of Life: Transformation and Expansion", Javier Garcia Roca and Pablo Santolaya (Ed.), Europe of Rights: A Compendium on the European Convention of Human Rights (41-64), Leiden-Bostan: Martinus Nijhoff Publishers, 2012, p. 43.

11 Ahmet Karagöz, "Özel Güvenlik Kuruluşları Eğitimi, Görev ve Yetkileri", Kolluğun Silah Kullanma Yetkisi, Istanbul: Türk Ceza Hukuku Derneği Yayınları, No: 6, 2005 p. 43.

12 İsmail Turgut Kıldan and Oktay Bahadır, "Zor Kullanma Yetkisine İlişkin Sınırın Aşılması Suçu", Türkiye Adalet Akademisi Dergisi, Sayı 11 (Ekim 2012), p. 196-197.

13 Donna Gomien, Short Guide to the European Convention on Human Rights, 3rd Edition, Strasbourg: Council of Europe Publishing, 2000, p. 16; for example see McShane v. the United Kingdom, no. 43290/98, 28 May 2002.

14 Ralph Crawshaw, "International Standards on the Right to life and the Use of Force by Police", The International Journal of Human Rights, Vol. 3, No: 4 (Winter 1999), p. 78.

of mind. The law-enforcement officers have been frequently criticized on the grounds that they have used excessive force in the course of some social events. Determination of the conditions and restrictions of this power is a compulsion for establishing a state of law which respects for human rights.[15]

It has to be emphasized that the events where the authority for the of use force is abused should be reduced to a minimum level; because violations of serious human rights including the right to life could occur as a result of the use of force by the police. This situation makes maintenance of security, which is difficult and dangerous enough, more difficult due to immediate and long-term reactions. Unlawful recourse to physical force by the police disturbs the public order. Unnecessary and dangerous events may be experienced due to the intervention by police to reconstitute the public order. These events may make the police prone to the interventions "with the aim of punishing". This leads to the loss of public confidence and support in police. On the other hand, appropriate and lawful use of force is an explicit sign indicating that the police respects for human rights and provide the security which is a positive factor in the protection of human rights.[16]

The main objective of this article is to reflect the viewpoint of the Court in regard to the use of force which could be considered as being in breach of the right to life. For that reason, the law-enforcement officers' authority to use of force and its limitations will be assessed pursuant to Article 2 of the Convention. Moreover, the judgments especially relating to Article 3 will be referred to when appropriate. Apart from the judgments considered as well-established case-law, recent judgments rendered by the Court will also be referred in the article as far as possible. Firstly, the terms of "absolute necessity" and "strict proportionality" will be explained pursuant to case-law. Subsequently, the exceptions for the right to life set out in paragraph 2 of Article 2. Meanwhile, the issue on planning of the operations will be discussed under a different heading. Lastly, injuring having potential risk of death, protection of right to life by law, training of the security forces and burden of proof will be discussed.

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15 Kıldan and Bahadır, p. 195.

16 Crawshaw, p. 79.

While reference is made to the Court's judgments, name of the case, application number and paragraph number are noted respectively in the first reference. If the reference judgment is rendered by the grand chamber, this is also stated. In the second and subsequent references made to the same judgment, only name and paragraph number of the case are cited. The ECtHR judgments to which reference is made are listed in alphabetical order in the bibliography.

I. ASSESSMENT OF THE EXCEPTIONS SET OUT IN PARAGRAPH 2 OF ARTICLE 2 OF THE ECHR IN TERMS OF AUTHORITY FOR THE USE OF FORCE

A. Requirement of *"Absolutely Necessary"* and Principle of *"Strict Proportionality"*

The use of force by the state authorities is set out within the framework of the principles of proportionality and necessity in the international law. These principles are explicitly set forth by the convention bodies which are in charge of interpreting the provisions prohibiting the arbitrary deprivation of life. Same principles are also included in the European Convention on Human Rights which sets out that deprivation of life shall not be regarded as inflicted in contravention of Article 2 when it results from the use of force which is "no more than absolutely necessary" for certain special purposes.[17]

Paragraph 2 of Article 2 only permits killings caused by the use of force which is "no more than absolutely necessary" for the achievement of one of or several purposes set out. In the event that the use of force is "strictly proportionate" to achieve one permitted purpose, it is "absolutely necessary".[18] The Court makes its own objective assessment whether the use of force is strictly proportionate or not.[19] In assessing whether the use of force is strictly proportionate, the

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17 Crawshaw, p. 89.

18 Jan Kratochvil, "The Right to Life in the Perspective of the Human Rights Committee and the European Court of Human Rights", 2006, http://ssrn.com/abstract=95125 (3 March 2012), p. 4; David Harris, Michael O'Boyle and Colin Warbrick, Law of the European Convention on Human Rights, 2nd Edition, New York: Oxford University Press, 2009, p. 61; Douwe Korff, The Right to Life, Human Rights handbooks, No. 8, Belgium: Council of Europe Publishing, 2006, p. 23-24; for example see Ramsahai and Others v. the Netherlands [GC], no. 52391/99, 15 May 2007, § 286; Salman v. Turkey; p 98; Oğur v. Turkey [GC], no. 21594/93, 20 May 1999, § 78; McCann and Others v. the United Kingdom, § 149.

19 Harris, O'Boyle and Warbrick, p. 62.

court would take into consideration the nature of the aim pursued, especially the dangers to life and limb inherent in the situation and the degree of the risk as usual.[20] For example, the use of lethal force to arrest a person, who is a suspect of a simple offence such as defamation and displaying behaviour to endanger the traffic would not be excused. In such a case, when the aim pursued and force used are compared, it is obvious that it is not "strictly proportionate", in other words "disproportionate".

According to the Court, the term of "absolutely necessary" in paragraph 2 of Article 2 indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2.[21] For that reason, it shall not be wrong to state that paragraph 2 of Article 2 requires a stricter and more compelling test of necessity than applicable in paragraph 2 of Articles 8 to 11 of the Convention.[22] Because while the term of "necessary" is used in other articles, the term of "absolutely necessary" is used in paragraph 2 of Article 2.

Another important difference among these articles is that the states have no "margin of discretion" or at least less "margin of discretion" within the scope of paragraph 2 of Article 2 due to the fact that use of force must be in accordance with the principle of "strict proportionality".[23] Accordingly, the Court tries to determine common, applicable standards for 47 member countries of the Council of Europe, development levels of which are quite different from each others. However, it determines much higher standards required to be complied with all countries as regards Article 2 (and Article 3). For example, the Court

[20] Karen Reid, A Practitioner's Guide to The Europen Convention on Human Rights, 4th Edition, London: Sweet & Maxwell, 2012, p. 744; Leach, p. 184; for example see Stewart v. The United Kingdom, no. 10044/82, 10 July 1984.

[21] Giuliani and Gaggio v. Italy, § 176; McCann and Others v. The United Kingdom, § 149; Andronicou and Constantinou v.Cyprus, § 17; Ramsahai and Others v. the Netherlands, § 287; Salman v. Turkey, § 98, Oğur v. Turkey, § 78; Ergi v. Turkey, no. 23818/94, 28 July 1998, § 79; Isayeva v. Russia, no. 57950/00, 24 February 2005, § 173; Finogenov and Others v. Russia, § 210; Gül v. Turkey, § 77.

[22] Harris, O'Boyle and Warbrick, p. 62; Reid, p. 744; Martinez, p. 46.

[23] Harris, O'Boyle and Warbrick, p. 62; Reid, p. 744.

does not excuse the poor training of the law-enforcement officers by taking into consideration the development level of the relevant state. On the other hand, for the matters such as abortion on which there is no consensus in the countries ofEurope, it abstains from drawing sharp borders as a necessity of respect for the principle of the states' sovereignty.

Before use of force, applying peaceful means and use of only minimum force in any case are basic principles.[24] Therefore, it is of great importance that the law-enforcement officers are ensured to use force to a required extent only when it is absolutely necessary and for performing of their duties.

The requirement of strict proportionality may require an oral warning and a warning shot in the air before use of potential lethal force. The Court, in many of its judgments, especially states that if possible, a warning shot should be fired before opening a fire.[25] However, it is obvious that an oral warning or warning shot would not be necessary in every case. This depends on the circumstances of the present case. For example, a direct shot against the dangerous person, who is raising his/her hand to point the gun on the security officers and having a risk of firing his weapon at any time, may be, under specific circumstances of the case, assessed within the scope of self-defence.

On the other hand, use of firearm during an arrest is deemed justifiable only when the warning shot is fired in the air not on the person to be arrested.[26] For example, as stated in the judgment of Oğur v. Turkey, to arrest a person, a warning shot is to be fired in the air. According to the Court, strike of the warning shot, fired by the security forces during an operation to arrest the person running away, in a fatal part of the body, for instance the nape of the neck, casts doubt on the justification of being a warning shot in the present case. Even supposing that it is a warning shot, the firing of that shot is badly executed, to the point of constituting gross negligence.[27]

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24 Crawshaw, p. 79.

25 Harris, O'Boyle and Warbrick, p. 62; for example, see Kakoulli v. Turkey, no. 38595/97, 22 November 2005, § 118; Oğur v. Turkey, § 83; Nachova and Others v. Bulgaria [GC], 43577/98, 43579/98, 6 July 2005, § 99; Giuliani and Gaggio v. Italy, § 177; Kallis and Androulla Panayi v. Turkey, no. 45388/99, 27 October 2009, § 62; also see below Article 10 of the UN Principles.

26 Harris, O'Boyle and Warbrick, p. 65.

27 Oğur v. Turkey, § 83.

Relevant articles of the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (the UN Principles)[28] to which the ECtHR occasionally refers to in its judgments[29] are:

" *2. Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.*

...

9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

10. In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident."

In the term of proportionality, a reasonable error which may be made by the perpetrator should also be taken into consideration. For example, the police

[28] The UN Principles were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from 27 August to 7 September 1990.

[29] For Example, see Giuliani and Gaggio v. Italy, § 154.

may believe that the gun at the aggressor's hand is a real or loaded although it is actually a toy or empty gun. In this case, the issue of whether the police officer's shooting back is proportionate or not should be assessed by also taking into consideration the conception of the events. Moreover, it should be also taken into consideration whether the law-enforcement officer has time to make assessment of the situation.[30] These matters shall be discussed in more detail below.

B. Exceptions Permitted in Article 2 § 2 of the ECHR

One of the primary or probably the most important resource concerning the international law on the subject of the use of force by law-enforcement officers is Article 2 of the ECHR. This article includes a key provision for the protection of human life. First sentence of the first paragraph of this Article states that everyone's right to life shall be protected by law. Second sentence prohibits the deprivation of life intentionally "save in the death penalty".

Accordingly the death penalty is set out as an exception to the prohibition of intentional killing. In other words, "the execution of a sentence rendered by a court following its conviction of an offence for which death penalty is provided by law" is not regarded in breach of the right to life. However, the death penalty was abolished in time of peace by Additional Protocol no. 6 to the Convention dated 28 April 1983 and later in all circumstances by Additional Protocol no. 13 to the Convention dated 03 May 2002.

Second paragraph of Article 2 provides a series of grounds for compliance with law. For that reason, it is not possible to say that the right to life is an unlimited right.

According to second paragraph of Article 2, if the certain actions resulting in the death of persons are in compliance with the specified criteria, "it shall not be regarded as inflicted in contravention of this Article", namely, it is not considered as breach of the right to life. First of all, the actions must serve the absolute and limited purposes.[31] The second paragraph of Article 2 lists three

[30] Harris, O'Boyle and Warbrick, p. 62; for example, see Stewart v. the United Kingdom; McCann and Others v. the United Kingdom; Ergi v. Turkey; also see the UN Principles.

[31] Korff, p. 23; Harris, O'Boyle and Warbrick, p. 61; Reid, p. 744.

circumstances, except for the death penalty, where the deprivation of life by the state is justified:

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

This list is exhaustive. In the first phase of the draft, a forth exception was included: "use of force for the purpose of prevention of entrance to a place where passing is clearly determined to be prohibited in terms of national security". This expression was not included in the text following the debates as permission for killing with such a reason was not deemed appropriate.[32]

It is a remarkable consideration that use of force for the purpose of protecting the property is not included in this list. This issue was included in Article 6 of the draft text of the UN Covenant on Civil and Political Rights, sister instrument of the Convention. However it was excluded from the text when a strong opposition was faced with. As both instruments were drawn up correspondingly, non-existence of this article in the ECHR is not a coincidence. This indicates that unless the life together with the property is hanged by a threat, the use of lethal force for the purpose of protection of the property is not regarded justifiable.[33] Even if killing for the purpose of protection of the property is regarded as being in compliance with the domestic law, it is in contravention of the ECHR.[34]

Furthermore, deprivation of life by the state only for the purpose of "maintaining public security" could not be regarded as a justification.[35] Killing

32 Harris, O'Boyle and Warbrick, p. 61.

33 Korff, p. 23.

34 Durmuş Tezcan, Mustafa Ruhan Erdem and Oğuz Sancaktar, Avrupa İnsan Hakları Sözleşmesi Işığında Türkiye'nin İnsan Hakları Sorunu, 2. Baskı, Ankara: Seçkin Yayıncılık, 2004, p. 216.

35 Crawshaw, p. 78.

for the purpose of prevention of the offence[36] or escape from the country[37] is not also permitted.[38]

On the other hand, systematic interpretation of the exceptions in paragraph 2 indicates that "intentional" killing is not permitted beforehand. This is mostly in respect of the use of force which may result in death as an undesired result and is in compliance with law.[39] Therefore, the exceptions set out in Article 2 § 2 do not allow the state to directly kill any person. Protection of the right to life is the primary duty of the state; however the state has no liability for the deaths if they result from the use of force which is no more than absolutely necessary.[40]

The exceptions defined in Article 2 § 2 points out that Article 2 is not only restricted with intentional killing but comprehensive to the extent it would cover the intentional killing. Taking into account the text of Article 2 of the Convention as a whole indicates that paragraph 2 does not primarily defines the circumstances under which intentional killing of the person is permitted; however defines "the use of force" which may result in unintentional deprivation of live. Besides, the force used should not be more than "absolutely necessary" for achieving one of the purposes set out in subparagraphs (a), (b) or (c).[41]

In brief, Article 2 prohibits the deprivation of life save in aforementioned four exceptions. This prohibition includes unintentional/accidental killings as well as the intentional killings.[42] In other words, although the term of "intentionally" is used in Article 2 § 1, Article 2 is interpreted in a way to include

36 For example see Kelly v. The United Kingdom, no. 17579/90, 31 January 1993.

37 For example see Streletz, Kessler and Krenz v. Germany.

38 Harris, O'Boyle and Warbrick, p. 61

39 Tezcan, Erdem and Sancaktar, p. 216.

40 Ömer Anayurt, Avrupa İnsan Hakları Hukukunda Kişisel Başvuru Yolu, Ankara: Seçkin Yayıncılık, 2004, p. 97.

41 Giuliani and Gaggio v. Italy, § 175; McCann and Others v. the United Kingdom, § 148; Solomou and Others v. Turkey, § 64; Oğur v. Turkey, § 78; Ramsahai and Others v. the Netherlands, § 286; Salman v. Turkey, § 98; Gül v. Turkey, § 80.

42 Harris, O'Boyle and Warbrick, p. 56; Leach, p. 184; Janis, Kay and Bradley, p. 136-137; Martinez, p. 46.

the unintentional deprivation of life by using legal force.[43] The state shall be responsible for the deaths resulting in use of force by the law enforcement officers having no intention for the purpose of achieving the specified legal purposes if the force used is not absolutely necessary or proportionate.[44]

This matter emerged in the event where a 13-year old child was shot with a plastic bullet and killed by a soldier during a demonstration. The domestic court held that the soldier had not intended to kill the child but targeted a demonstrator next to the child. The European Commission of Human Rights[45] (hereinafter "the Commission") has assessed that Article 2, when dealt with as a whole, must be interpreted in a way to set out the use of force resulting in deaths whether intentional or unintentional. The Commission considers that another interpretation to be made would not be in compliance with the liability to protect the right to life or purpose of the Convention.[46]

Besides, it is beyond any doubt that the intentional killings (extrajudicial execution) by agents of the state would also be assessed in the scope of Article 2. Similarly, cases regarding "disappear of a person" where any news about the person taken into custody by state agents could not be received and this person has been possibly killed are also taken into consideration in this scope.[47]

Article 2 is applied to the deprivation of life by the police officers,[48] soldiers,[49] and other state agents[50]. The state is not directly responsible for the deprivation

43 Reid, p. 745.

44 Doğru and Nalbant, p. 16.

45 Additional Protocol no. 11 which entered into force in 1998 terminates the double control system consisting of the Court and the Commission. Furthermore, the judicial duties of the Committee of Ministers were abolished. The ECtHR was commissioned as an exclusive judicial unit which operates full-time.

46 Reid, p. 745; Stewart v. the United Kingdom, §§ 169-171; also see recently rendered judgments Makaratzis v. Greece [GC], no. 50385/99, 20 December 2004, § 55 (Article 2 is applied without taking into account whether the police intend to kill the applicant or not) and Saoud v. France, no. 9375/02, 9 October 2007, § 73 (Article 2 may be applied to the unintentional killings resulting from the method of neutralization to arrest).

47 Korff, p. 23.

48 For example see Kakoulli v. Turkey.

49 For example see Isayeva, Yusupova and Bazayeva v. Russia, no. 57947/00, 57948/00 and 57949/00, 24 February 2005.

50 For example see Avşar v. Turkey (village guards).

of life by private individuals. In such cases, the state's responsibility is limited to provide protection as per the first sentence of Article 1 § 1.[51] Therefore, if public officers have negligence in prevention of the murder committed by private individuals, the state may have responsibility. However, this risk to the life should have become close and real.

1. In Defence of Any Person from Unlawful Violence

Article 2 § 2 (a) allows the person to use force in defence of himself/herself or someone else. However, as stated above, it does not allow use of force for protection of the property.

The person's himself/herself defence from an unjust aggression gives a right to kill the aggressor if there is necessity in doing so. For instance, paragraph 2 (a), under certain circumstances, allows for intentional shooting in order to rescue the hostage whose life is under threat.[52] However, if the person is killed due to the fact that the shots are continued to be fired even after his or her neutralization by the law enforcement officers, the State's obligation for intentional killing may arise.[53]

Only use of force with a view to making self-defence is found justified in the event that it is "absolutely necessary". It is determined that this criterion was not complied in the case of McCann and Others v. the United Kingdom. In this case, three persons, who were members of the Irish Republican Army (IRA), were killed in Gibraltar by the soldiers of the Special Air Service (SAS). These persons killed by English soldiers that were allowed to cross the border in Spain. The persons were suspected of resulting in death of many people by detonating the radio-controlled and high explosive bomb placed in a car parked at a public location. However, there was any such mechanism neither on the body of the suspects nor in the car. In fact, the car was left at the parking area in order to make bombing at a later time and meanwhile the suspects carried out reconnaissance in Gibraltar. The Court held unanimously that factual act of killing had not been in breach of Article 2 on the grounds that the soldiers

51 Harris, O'Boyle and Warbrick, p. 56.

52 Tezcan, Erdem and Sancaktar, p. 216.

53 Doğru and Nalbant, p. 17.

had a reasonable and honest belief that the suspects moved to enable the radio-controlled device when they fired shots in order to kill the suspects, and the detonating would result in serious loss of life. In conclusion, the Court held in the judgment of McCann and Others that the soldiers could not be accused as they reasonably and honestly believed that they had to shot the suspects in order to prevent them from bombing. However, as stated below, the Court concluded that taken into consideration the events including the operation as a whole, the use of lethal force had not been absolutely necessary and the act of killing must be regarded as in contravention of Article 2.[54] The Court, for the first time, found a European State unjust on the grounds of use of unlawful lethal force by the security forces in this judgment.[55]

The Court's approach in the case of McCann and Others was maintained in the judgment calledAndronicou and Constantinou, rendered recently by the Court. However, in this case the Court decided by votes of five to four in favour of the state. The *Cyprus Police* (*MMAD-Mihanokiniti Monada Amesis Drasis*) was informed that a young man was taken his fiancée hostage with his gun in an apartment house. When MMAD entered into the house to rescue the hostage, they killed the couple by using lethal force to defend both the hostage and themselves. Having regard to the circumstances of the case, the Court held that the actual killing was "strictly proportionate" and the right to life was not breached.[56]

The Court, in such cases, applies a test which is substantially relative based on the criteria of the state agents' honest belief in the course of using force. The Court considers that the use of force by the state agents may be justified in the event that it is based on honest belief, which is perceived, for good reasons, to be valid at the time even if it subsequently turns out to be mistaken**.**. The Court is of the opinion that to hold otherwise would be to impose an unrealistic burden on agents of the State to the detriment of their lives and those of others. However, this criterion also includes objective factors such as the honest in such a way that the perception of honest belief should be based

54 McCann and Others v. the United Kingdom, §§ 202-214.

55 Korff, p. 24.

56 Andronicou and Constantinou v. Cyprus, §§ 167-192 (Furthermore, planning and management of the operations were held to be "strictly proportionate").

on good reasons, namely substantial grounds and so should be reasonable. [57] Undoubtedly, the sense to be given the term of "reasonable" will vary by the specific circumstances of each case.[58] The Court states in many judgments that when called upon to examine whether the use of lethal force was legitimate, it cannot substitute its own assessment of the situation for that of an officer who was required to react in the heat of the moment to avert an honestly perceived danger to his life.[59]

The Court's sympathy for honest belief in the force used under duress in state of emergency leads to determination of violation in respect to use of lethal force in very few cases under Article 2. However, in the case of Gül v. Turkey, the state any longer would not hide behind the honest errors of its agents.[60] The Court, in present case, reached a different solution by assessing the circumstances under which the event took place. In this event, more than fifty gunshots were fired through the door locked by the suspect. The suspect was in an apartment where innocent civilians, women and children were residing. The shootings fired led to multiple and fatal injuries. The Court held that the police had used "grossly disproportionate" force in comparison to the force they needed for self-defence and there had been no reasonable belief that their lives had been in danger.

In a later case of Ahmet Özkan and Others v. Turkey,[61] decision of Turkish security forces to set intensive fire to a village to counteract the fire, which was opened upon them, was found "absolutely necessary" for the protection of life. However, the Court considered that the obligation to protect individual's life under Article 2 had been infringed on the grounds that the soldiers had not controlled whether the civilians had been injured or not following the incident.

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57 Finogenov and Others v.Russia, § 219; Giuliani and Gaggio v. Italy, § 178; McCann and Others v. the United Kingdom, § 200; Andronicou and Constantinou v. Cyprus, § 192.

58 Kratochvil, p. 5; for example see Makaratzis v. Greece, §§ 64-65.

59 Giuliani and Gaggio v. Italy, § 179; Bubbins v. the United Kingdom, no: 50196/99, 17 Mart 2005, § 139.

60 Elizabeth Wicks, The Right to Life and Conflicting Interests, New York: Oxford University Press, 2010, p. 142.

61 Ahmet Özkan and Others v. Turkey, no. 21689/93, 6 April 2004.

In the case of Brady v. the United Kingdom,[62] the police accidentally killed a robber, supposing that he had a gun. The Court held that the honest belief could be explained with "visual perception distortion" caused by high level stress and low illumination, and declared the application inadmissible as being manifestly ill-founded.

Similarly, the Court held that there had not been any violation in the case of Bubbins v. the United Kingdom where the police officer killed a person having a blank firing gun on the ground that the officer could not realize whether the gun was real or not. The Court admitted that the police officer honestly believed that his life was in danger and he should fire a shot to protect himself or his colleagues. The Court considers that the use of force was "highly regrettable" but not disproportionate.

The Court also held in Giuliani and Gaggio v. Italy case where Carlo Giuliani was shot and killed by a military personnel during the demonstrations on the fringes of the G8 summit in Genoa in 2001 that there had been no violation in respect of the Convention. The Court concluded in the present case that use of lethal force was absolutely necessary for "in defence of any person from unlawful violence" within the meaning of Article 2 § 2 (a).

In the case of Yüksek Erdoğan and Others v. Turkey,[63] where the applicant's relative was shot by the police in a cafe in Istanbul, use of lethal force for arresting and self-defence was not regarded disproportionate. The Court admitted the establishments of the domestic court that firstly the police told the decease to give over, made the necessary warnings and started firing only after the deceased had opened fire.

As can be inferred from the Court's aforementioned case-law, killing of a person by agents of state can only be justified when it is absolutely necessary in order to save the life of an innocent who is currently under threat. In other words, the death could purely and simply be justified as a way of saving the lives threatened by the aggressor. Killings by agents of the State for reasons

62 Brady v. the United Kingdom, no. 55151/00, 3 April 2001.

63 Yüksel Erdoğan and Others v. Turkey, no. 57049/00, 15 February 2007.

such as punishing a person or preventing future offence no matter how outrageous offences the person has committed could never be legitimized.[64]

2. Effect the Arrest and Prevention the Escape

The use of force could be deemed legitimate within the scope of Article 2 § 2 (b) in the event that it is "absolutely necessary" to effect a lawful arrest and prevent the escape of a person. In other words, Article 2 § 2 (b) forms a basis for use of firearms in order to effect the arrest or to prevent the escape of a dangerous person. However, endangering the life shall only be regarded justifiable only when use of a firearm is "absolutely necessary".[65]

The Court states in many judgments that in principle there can be no such necessity where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost.[66] This attitude signifies a reasonable balance between the adverse interests (the public interest and protection of life).[67] As can be inferred, the Court, except for certain circumstances, concedes an advantage to the protection of human rights over the public interest. The person's posing a threat to life and limb and having suspicion on the committement of a violent offence are listed as exceptional circumstances by the Court. It is obvious that the Court, in these exceptions, pursues an aim of protecting the lives of the public officers or other persons in the society.

The crucial element in the planning of an arrest operation is to make analysis of all the available information about the surrounding circumstances, including, the nature of the offence committed by the person to be arrested and the degree of danger posed by that person. The question whether and in what circumstances recourse to firearms should be envisaged if the person to

64 Wicks, p. 149.

65 Tezcan, Erdem ve Sancaktar, p. 216-217.

66 Kakoulli v. Turkey, § 108; Finogenov and Others v. Russia, § 220; Nachova and Others v. Bulgaria, § 95; Wasilewska and Kalucka v. Poland, no. 28975/04 and 33406/04, 23 February 2010, § 43 (Even though the suspects firstly posed a risk in terms of the secuirty of the police officer, this risk did not exist during shooting and the police officers only opened fire to prevent the escape of the suspects).

67 Wicks, p. 64.

be arrested tries to escape must be decided on the basis of clear legal rules, adequate training and in the light of that information".[68]

In this regard, in the case of Kelly v. the United Kingdom, use of lethal force by the soldiers in order to effect the arrest was justified. In the event subject matter of the case, the soldiers opened fire to cease the car which was driven towards the Belfast check point. The Commission held that belief that these persons were terrorists was admissible on the grounds that their driving style put the soldiers' lives in danger, and shooting at the car was found legitimate as being absolutely necessary to effect a lawful arrest. When rendering this judgment, the Commission gave particular importance the difficult condition in Belfast and considered that the soldiers had to react within seconds in the course of the event. However, this judgment was widely criticized on the grounds that the persons in the car did not previously commit an offence, the soldiers did never recourse to other methods such as shooting at the tyres and the soldiers did not adequately take into account the possibility that the persons in the car were drunk and reckless drivers.[69]

On the other hand, in the case of Aytekin v. Turkey where a driver, who went through the check point, was shot and killed by the soldier, the Commission reached a conclusion in contrary to Kelly v. the United Kingdom by considering the conduct of the driver. The Commission is of the opinion that the driver, an ordinary civilian working for the State, did not act in a way to give an impression that he was a suspect.[70]

In the case of Nachova v. Bulgaria, the persons, who were suspected of the offence of absence without leave, escaped in order not to be arrested although the police told them stop, or otherwise they would shoot. The Court held on the aforementioned ground that Article 2 had been breached as these persons known to be unarmed and non-violent persons shot and killed.[71] However,

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68 Nachova and Others v. Bulgaria, § 103.

69 Reid, p. 748.

70 Aytekin v. Turkey, no. 22880/93, 23 September 1998 (This case was examined by the Court on the merits on the ground that domestic remedies had not been exhausted).

71 Nachova and Others v. Bulgaria, § 95.

the use of firearms in such an event could be permitted in the scope of self-defence on the basis of the specific circumstances of each event.[72]

In the case of Scavuzzo-Hager and Others v. the Switzerland, a person died after being arrested by the police. The authorities then established that this person died because of over drug use. The Court held that there had been no obligation within the meaning of Article 2 § 2 (a) on the grounds that it was impossible for the police officers to know that the person had been in a vulnerable position in which the minimum intervention would lead to a fatal complication. Besides, there had been no violation in terms of the obligation to protect the life (positive obligation) as the police officers had tried to do what was necessary by immediately calling an ambulance and turning the fainted person on his side.[73]

In the case of Saoud v. France, the Court concluded that the use of force by the police officers with a view to arresting a schizophrenic person and ensuring the security of lives of his mother and sister had been justified. However, after being arrested, the police officer made this person lie on the ground for 35 minutes and he was died from a heart attack. The Court held that there had been a violation within the meaning of Article 2 as he had not been examined and such a capturing technique had been applied.

The existence of arrest conditions, in principle, results in the authority to use force. However, in case the force used is beyond the purpose of arrest and disproportionate, Articles 2, 3 and 8 of the ECHR could be breached depending upon the result caused by the force used and type of the right infringed. The circumstances and conditions of the present case are taken into consideration when determining whether the force used is beyond the purpose of the arrest and "disproportionate" or not.[74]

For example, in the case of Dalan v. Turkey, the Court found the force used for arresting three women, who were not posing a serious threat to the police

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72 Harris, O'Boyle and Warbrick, p. 65.

73 Scavuzzo-Hager and Others v. Switzerland, no. 41773/98, 7 February 2006.

74 Serkan Cengiz and Others, **Avrupa İnsan Hakları Mahkemesi Kararları Işığında Ceza Yargılaması Kurum ve Kavramları**, Ankara: Avrupa Konseyi-Türkiye Barolar Birliği Yayını, Şen Matbaa, 2008, p. 22.

officers, "excessive" and held that there had been a violation within the meaning of Article 3, having regard to the number and severity of injuries on the applicant's body.[75] On the other hand, in the case of Raninen v. Finland, it stated that handcuffing would not normally give rise to an issue under Article 3 where measure imposed in connection with lawful arrest or detention. The Court also emphasized that it was of importance for handcuffing a person that there was a ground to believe that person concerned would resist arrest or abscond, cause injury or damage or suppress evidence.[76]

The above-mentioned assessments are also legitimate in using force for prevention of the person lawfully arrested or detained.[77] However, there is not any judgment rendered by the Court in respect to prevention of the escape.[78]

3. Quelling a Riot or Insurrection

The last condition, which is provided in Article 2 § 2 (c) of the ECHR and justifies the killing, is riot and insurrection. However, in such cases, the use of force in order to reinstate the public order must be "absolutely necessary".

The riot means the excessive events where a large number of people use massive violence.[79] The terms of "riot" and "insurrection" in Article 2 § 2 (c) have autonomous meanings. In terms of the "riot", this issue was discussed in the case of Stewart v. the United Kingdom. The assessments made are also valid for the term of "insurrection".[80] In the case of Stewart v. the United Kingdom, the Commission dismissed to define the term of "riot". It only rendered a judgment within the framework of the events subject matter of the case: "It is an important matter that a hostile assembly of 150 people throwing missiles at a patrol of soldiers risked serious injury and this would, under any circumstances, constitute a "riot". Similarly, without defining the term, the

75 Dalan v. Turkey, no. 38585/97, 7 June 2005, §§ 25-27.

76 Ranien v. Finland, no. 20972/92, 16 December 1997, § 56.

77 Harris, O'Boyle and Warbrick, p. 65.

78 Reid, p. 748.

79 Tezcan, Erdem and Sancaktar, p. 218.

80 Harris, O'Boyle and Warbrick, p. 65.

Commission held in the case of Güleç v. Turkey that "throwing of sticks and stones for injuring the security forces and breaking of the windows by the group consisting of thousands of people" had been "a riot".[81]

In the aforementioned case of Stewart v. the United Kingdom, a 13-year old child was accidentally shot by an English soldier in Belfast. The Commission stated that the use of rubber bullet would be excused in quelling a riot. It held that Article 2 had not been breached on the grounds that the child died due to the fact that the soldier's aim was disturbed at the moment of discharge when he was struck by several missiles thrown by the demonstrators after the soldier had aimed his gun at the foot of the riot leader. The Commission also stated that there was not any obligation to withdraw while quelling a riot.

As stated in the case of Şimşek and Turkey, the use of force may be justified under Article 2 § 2 (c), in cases where the action is taken for the purpose of quelling a riot or insurrection. However, the officer's directly shooting at the demonstrators without first having recourse to less life-threatening methods, such as tear gas, water cannons or rubber bullets means that the domestic law provisions allowing police officers to use firearms only in limited and special circumstances are not applied. This could not be justified by maintaining that the police officers had been under great stress and psychological pressure during the incident. Since the Court is of the opinion that the police play a vital role in protecting the right to life. They should therefore be able to evaluate all parameters and carefully organise their operations. The Governments should undertake to provide effective training to the police force with the objective of complying with international standards for human rights and policing.[82] Training of the law enforcement officers will be discussed below in detail.

In the cases where agents of the State cause death of a person by using force during detention or prisons, namely under the State's control, the Court does not specify as per which paragraph of Article 2 it finds a violation, if any. However, as the Court does not discuss the legitimacy of the killing as per

[81] Stewart v. the United Kingdom; Güleç v. Turkey, no. 21593/93, 27 June 1998, § 68.

[82] Şimşek and Others v. Turkey, no. 35072/97 and 37194/97, 26 June 2005, §§ 108-109.

Article 2 § 2 of the Convention, it could be said that it reaches a conclusion that the prohibition of intentional killing has been breached within the meaning of Article 2 § 1 of the Convention.[83]

The cases regarding the law enforcement officers' interference with the social events are generally lodged with the Court within the scope of Articles 2, 3 and 11 of the Convention.

In the Court's opinion, where demonstrators do not engage in acts of violence, the public authorities must show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance. The interferences with the right guaranteed by that provision are in principle justified for the prevention of disorder or crime and for the protection of the rights and freedoms of others where demonstrators engage in acts of violence.[84] Besides, it is important that preventive security measures such as, the presence of first-aid services at the site of demonstrations, be taken for protection of the right to life.[85]

In the relevant case of Gülizar Tuncer v. Turkey, the security forces interfered to disperse the crowd including the applicant. The applicant considered that the police officers used excessive violence against her and the demonstrators. The Court states that when the person is deprived of his/her liberty or faces with the security forces, unless required by his or her own conduct, use of physical force against this person is an attack on human dignity and in principle constitutes a violation Article 3. The Court notes that the Beyoğlu Criminal Court of General Jurisdiction rendered decision of acquittal for the applicant on the ground that the act did not constitute any element of offence. It emphasizes that after examining the case file, it was concluded that the demonstration was of a peaceful nature and the applicant was not aggressive, violent and armed. In the Court's opinion, it was not established that the applicant physically or severely resisted the police officers. Any element in

83 Doğru and Nalbant, p. 15.

84 Giuliani and Gaggio v. Italy, § 251; Patyi and Others v. Hungary, no. 5529/05, 7 October 2008, § 43; Oya Ataman v. Turkey, no. 74552/01, 5 December 2006, §§ 41-42; Protopapa v. Turkey, no. 16084/90, 24 February 2009, § 109.

85 Oya Ataman v. Turkey, § 39.

the case-file did not verify that the use of such severe violence by the police officers had been necessary. The Court therefore held that the force used was not "absolutely necessary" but "excessive and unjustified" and there was a substantive violation of Article 3 of the Convention.[86]

It should be finally stated that the use of force must be lawful. In the case of X v. Belgium, the police officer's shooting an innocent person in the course of quelling a riot was not justified within the scope of Article 2 § 2 (c) as the use of firearm by the police officer was not "lawful" as per the Belgian laws.[87]

C. Planning of the Operations

As stated above, a State could be responsible not only for the acts of killings but also for failing to plan and conduct (control) the operation carried out for the event at the same time.

Where a person is killed by agents of the state especially during the security operations, the state shall be responsible for failing to fulfil its negative obligation.[88] Some positive obligations[89] especially regarding the control of such operations has been added to this negative obligation with the Court's case-law. It should be stated that this obligation does not arise automatically, but prevails within the framework of examination of necessity the Court applies in such circumstances. There are two main conclusions of this obligation.[90] It is incumbent on the state to firstly establish a legal system which enables

86 Gülizar Tuncer v. Turkey, no. 23708/05, 21 September 2010; for similar judgments also see Biçici v. Turkey, no. 30357/05, 27 May2010; Gazioğlu and Others v. Turkey, no. 29835/05, 17 May 2011.

87 X v. Belgium, no. 2758/66, 21 May 1969.

88 Negative obligation is an obligation not to deprive a person of his life (not to kill) except for the restricted situations compatible with the law (Rehman, p. 187). Second sentence of Article 2 § 1 which sets out "No one shall be deprived of his life intentionally..." and Article 2 § 2 which prohibits the use of force which is "more than absolutely necessary" even in circumstances of legal use of force form the legal basis of the State's negative obligation (Doğru and Nalbant, p. 14). The negative obligation has appeared as a result of the principle of "no one shall be arbitrarily deprived of his life.

89 Positive obligation is an obligation to take effective measures with a view to protecting the life of the persons (Rehman, p. 187). The legal basis of this obligation is the first sentence of Article 2 § 1 of the Convention, which states "everyone's right to life shall be protected by law" (Doğru and Nalbant, p. 14).

90 Jean-François Akandji-Kombe, **Positive Obligations under the Eupean Convention on Human Rights**, Human Rights Handbooks, No. 7, Belgium: Council of Europe Press, 2008, p. 23.

strictly controlling of the security forces' activities. Although in the case of McCann and Others v. the United Kingdom,[91] the Court behaved reservedly in this regard, this obligation of the states were partially emphasized in the Case of Nachova and Others v. Bulgaria[92] and wholly in the case of Makaratzis v. Greece.[93]

Secondly, the planning and controlling the conduct of the police operations are required in order to "minimize the recourse to lethal force as much as possible".[94] For that reason, the Court "excessively" examines the matters such as "conduct of the operation, measures taken, the force used, orders given, information provided to the officers in the operation and harmony among these persons". In the event that the Court concludes that there is not "absolute necessity" in the use of force within the meaning of Article 2 § 2 of the Convention, it would hold that the right to life has been violated.[95]

The Court states in its numerous judgments that the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used. In such cases, it states that 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 must be taken into consideration. The Court will generally examine in such cases 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 or not. Besides, it will consider whether all possible measures in determining the methods and means of the security operations were taken and the authorities were defective in determining the action style.[96] This issue is probably the most significant

91 McCann and Others v. the United Kingdom, § 153.

92 Nachova and Others v. Bulgaria, §§ 96-97.

93 Makaratzis v. Greece, § 58; Akandji-Kombe, p. 23-24.

94 McCann and Others v. the United Kingdom, § 194.

95 Akandji-Kombe, p. 24; for example see Ergi v. Turkey; Nachova and Others v. Bulgaria, Makaratzis v. Greece and etc.

96 McCann and Others v. the United Kingdom, §§ 150 and 194; Ergi v. Turkey, § 79; Isayeva, Yusupova and Bazayeva v. Russia, § 171; Nachova and Others v. Bulgaria, § 93; Oğur v.Turkey, § 78; Giuliani and Gaggio-Italy, § 176; Andronicou and Constantinou v. Cyprus, § 171; Avşar v. Turkey, § 391; Musayev and Others v. Russia, § 142; Stewart and the United Kingdom, §§ 149-150; Finogenov

determination of the Court stated for the first time in the case of McCann and Others.[97] The Court has consistently reiterated this case-law in its numerous judgments.

As is inferred, the Court divides acts of killings by agents of the State into two phases which are planning of the operation and occurrence of the main act of killing. Scrutinizing the first phase, planning of the operation by the Court reflects the emphasis that it places on the right to life and effective protection of this right.[98]

The Court held by ten votes to nine in the above-cited McCann and Others case that there had been a violation of Article 2 as the force used was not "strictly proportionate" with the aim pursued. Because the operation could have been planned and administered without leading to the killings of the suspects. This judgment is based on three main assessments: The first one is that the authorities could have prevented the suspects from entering Gibraltar. In this way, the risk of losing lives for the innocent persons could be eliminated.[99] Secondly, the authorities might have made incorrect assessment regarding the probabilities as they insufficiently interpreted the information. Especially, the soldiers had acted in a way as if the suspicion concerning the device and bomb had been real. For that reason, the use of lethal force then became "nearly inevitable". Thirdly, the soldiers shot not to wound the suspects by considering the thought that neutralizing the suspects is necessary for protection of others' lives in accordance with their training; but shot to kill them. In the opinion of majority, this situation harmed "the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects".[100] The Court showed "an equal approach" in terms of the right to life in this case.

and Others v. Russia, § 208; Hugh Jordan v. the United Kingdom, no. 24746/94, 4 May 2001, § 103.

97 Wicks, p. 63.

98 Kratochvil, p. 4; for example see McCann and Others v. the United Kingdom, § 150; Andronicou and Constantinou v. Cyprus, § 171.

99 The Court rejected the state's submission that the interference had been legitimate, at that moment there might not have been sufficient evidence to warrant the detention and trial of the suspects and they would attempt to engage in such activities after release (§ 204).

100 McCann and Others v. the United Kingdom, § 212.

It determines that the status of victims would not derogate the obligation to protect their lives under the scope of Article 2.[101]

Since the case of McCann, the Court has found and still continues to find violations in respect to the organization of the operations in many judgments.

For example, in the case of Ergi v. Turkey, an innocent villager who was not involved in the incident was killed while the security forces fired back against the attacks by the terrorist. The Court held that there had been a violation of Article 2 on the ground that the operation had not been planned in a way to minimize the risk to the lives of third persons.

Similarly, in the case of Güleç v. Turkey, the security forces used real bullet in order to disperse 3.000 villagers who indulged in extravagances during a demonstration held to protest the damages occurring in the contiguous village in the course of the fight against terrorism. As a result of this incident, the applicant's son together with another person was killed. The Court considered in contrary to the government's claim that the demonstrators had been unarmed and the security forces had not fired shots at not over the heads of the demonstrators but at towards the ground and in front of the demonstrators despite of the risk of ricocheting of the bullet. It held that the force used had not been "absolutely necessary". Relying on the judgment of McCann and Others, the Court concluded: The operation had not been planned in a way to minimize the risk to the life. The security forces used real bullets as they had not been provided any less powerful weapons such as truncheons, riot shields, water cannon, rubber bullets or tear gas. However, the incident has been experienced in a region in which a state of emergency had been declared, where at the material time disorder could have been expected.

But nonetheless, the Court concluded in the case of Andronicou and Constantinou v. the Cyprus where a young couple was killed by a police officer in the course of the operation to rescue the hostage that the operation organized met the requirements of Article 2.

The Court stated in the case of Makaratzis v. Greece that the use of lethal force had been regarded reasonable as the police believed that the applicant

[101] Cited from F. Ni Aolain: Wicks, p. 63.

had been armed and dangerous. However, it determined that the right to life had been breached stating that the firearms had been used in the incident, a great number of police officers moved in a indecisive and uncontrolled way and there had been any clear chain of command.

The Court stated in some judgments that it has been acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence, and recognises the complexity of this problem.[102] However, it still imposes heavy responsibility especially upon the states which carry out a pre-planned operation. The states are liable to pay "due care and attention" in planning, organizing and controlling of such operations. They have to protect or endeavour to protect not only the lives of victims but also, if possible, the terrorists. If the state could conduct an operation in which the terrorists and other suspects would be captured alive without endangering the other individuals or security forces, it is obliged to do this.[103]

It is possible to make a distinction between the incidents where a reaction is showed to a situation occurring instantly and swiftly and the incidents where a pre-planned operation is carried out. In the second incident, the Court carries out a severe examination on the subject whether the operation is planned to the extent that would risk the lives at a minimum level.[104] In terms of the sudden and unpredictable large-scale incidents, the Court displays more pragmatic attitude.[105] In brief, even though the requirements for the planning and conduct of the operations are less severe in the unplanned (sudden) operations, there still exists the state's obligation.[106]

The Court and former Commission has examined a great number of cases resulting from the security forces' anti-terrorism activities in the southern east part of Turkey since the middle of 1990s.

For example, the Court held in the case of Oğur v. Turkey that there had been a violation of Article 2 on the grounds of Turkish security forces' deficiencies

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102 For example see Finogenov and Others v. Russia, § 212; Ramirez Sanchez v. France [GC], no. 59450/00, 4 July 2006, §§ 115-116.

103 Korff, p. 32.

104 Reid, p. 752; for example see Mansuroğlu v. Turkey, no. 43443/98, 26 February 2008, §§ 85-89.

105 Reid, p. 752; for example see Giuliani and Gaggio v. Italy, §§ 252-262.

106 Kratochvil, p. 4; for example see Makaratzis and Greece, § 69.

in the planning and conduct of the operation which led to shooting of Musa Oğur. In the above cited case of Ergi v. Turkey, the Court also found that there had been a violation of Article 2 on the grounds of deficiencies in the planning and conduct of the operation.[107]

On the other hand, in several cases including the case of Ergi v. Turkey, the applicants maintained that their relatives had been intentionally killed by the State, in other words executed with extreme prejudice. However, the Committee and Court concluded in these cases that there had not been any factual or evidential sufficient basis which is beyond reasonable doubt regarding the fact that the victims had been intentionally killed by agents of the state.[108]

The Court has concluded numerous judgments which were lodged against Russia regarding the conflicts in Chechnya since 2005. The extra-judicial executions,[109] forced disappearances,[110] deaths due to aerial and land bombardments[111] and deaths due to land mines[112] have frequently resulted in determination that the right to life has been infringed.[113] Especially, the inadequacies in the planning of operations performed in the course of interventions by the Russian soldiers the events experienced in Chechnya is one of the reasons for these violation judgments.

For example, in the case of Isayeva v. Russia, a significant group of Chechen fighters entered the applicant's village, populationof which was about 20.000

[107] Also see Demiray v. Turkey, no. 27308/95, 21 November 2000; Mansuroğlu v. Turkey.

[108] Leach, p. 188-189.

[109] For example see Khashiyev and Akayeva v. Russia, no. 57942/00 and 57945/00, 24 February 2005; Estamirov and Others v. Russia, no. 60272/00, 12 October 2006; Luluyev and Others v. Russia, no. 69480/01, 9 November 2006; Bitiyeva and X v. Russia, no. 57953/00 and 37392/03, 21 June 2007; Musayev and Others v. Russia.

[110] For example see Bazorkina v. Russia, no. 69481/01, 27 July 2006; Imakayeva v. Russia, no. 7615/02, 9 November 2006; Malika Dzhamayeva and Others v. Russia, no. 26980/06, 21 December 2010.

[111] For example see Isayeva v. Russia; Isayeva, Yusupova and Bazayeva v. Russia; Abuyeva and Others v. Russia, no. 27065/05, 2 December 2010; Esmukhambetov and Others v. Russia, no. 23445/03, 29 March 2011.

[112] For example see Albekov and Others v. Russia, no. 68216/01, 9 October 2008.

[113] Leach, p. 189.

at that time. Thereupon, the Russian armed forces attacked the village with aviation heavy weapons by means of missile attacks and using heavy aviation bombs having high explosive power. A bomb falling down from the Russian military aircraft exploded near the minivan in which the applicant's family were travelling while they endeavoured to escape from the village. In the incident the applicant was wounded, her son and her three nephews were killed. The Court determined that "using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, was impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society". It accepted that Article 2 § 2 (a) permits the state to use force with the aim of protecting the lives of innocents when the population of the village were held hostage by a large group of well-equipped and well-trained fighters. Despite, according to the Court, "the massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind." Although the Court accepted that the operation had a legitimate aim, it was not of the opinion that the operation was planned and executed with the requisite care for the lives of the civilian population. For that reason, it found that there had been a violation of Article 2.

A similar planning and execution deficiency was also found in the case of Isayeva, Yusupova and Bazayeva v. Russia. In this case, the Russian military planes participating in an anti-terrorism operation in the region bombed a large civilian convoy escaping from the armed conflict in Grozny. During this incident, both two children of the applicants were killed together with other people. The pilots maintained that they had granted permission from the air controller, they had defended themselves against the machine gun shooting from two trucks filled with the Chechen fighters and they had not realized the convoy. The Court, not accepting that the pilots had not seen the convoy, held that the anti-terror operation had not been planned with the requisite care for the protection of the possible civil death and use of indiscriminate missiles had been disproportionate under the incident conditions.

Consequently, it should be stated that the use of lethal force is the last resort that the state agents (and private persons) could have recourse when there is not any other means to prevent the aggressor from killing the innocent person

or persons. Therefore, each operation which may lead to the use of lethal force must be planned and conducted in a manner factually considering a person's death as a last resort.[114]

D. Potentially Lethal Injuries

In this section, we will look for an answer for the question: whether Article 2 would only be applied if the victim "dies" or would also be applied if the victim is wounded by being based on the Court's judgments.

The Court held in the case of Yaşa v. Turkey dated 1998 where the victim was gravely wounded by weapon that there had been a violation of Article 2 in its procedural aspect, namely due to the fact that an effective investigation had not been carried out.[115]

But, the Court has obviously stated in certain judgments that Article 2 would be applied only under exceptional circumstances if the victim has not died. For example, it stated in the case of İlhan v. Turkey dated 2000 where excessive force was used that the use of force putting the right to life at danger would only require the application of Article 2 under special circumstances.[116] It is obviously emphasized in the case of Berktay v. Turkey dated 2001 that in the use of force which only leads to wounding, not Article 2 but Article 3 must be applied as to the merits.[117]

One of the ECtHR's remarkable judgments having the characteristics of case-law is the judgment of Makaratzis v. Greece dated 2004. In the case of Makaratzis v. Greece, the applicant who had driven through a red traffic light in the centre of Athens had been ceased by several police officers in cars and on motorcycles. Upon the applicant's failing to stop his car, the police officers fired at the car and shot and injured the applicant on the right arm, the right foot, the left buttock and the right side of the chest. The Court held in this judgment that the case must be examined under Article 2 by stating that "a

114 Wicks, p. 149.

115 Yaşa v. Turkey, no. 22495/93, 2 September 1998.

116 İlhan v. Turkey [GC], no. 22277/93, 27 June 2000.

117 Berktay v. Turkey, no. 22493/93, 1 March 2001.

potentially lethal force" had been used and the fact that the applicant had not been killed was "fortuitous". According to the Court, there were "exceptional circumstances" to necessitate the application of Article 2 in this case. In spite of having any intent to kill the applicant, the force used was "potentially lethal" and the fact that the applicant did not die was only a "fortuitous".[118]

On the other hand, the ECtHR have dealt with the incidents of serious injury resulting from the use of force by the law-enforcement officers only within the scope of Article 2 in numerous recent judgments such as Evrim Öktem v. Turkey[119] dated 2008, Seyfettin Acar and Others v. Turkey[120] dated 2009 and Peker v. Turkey[121] dated 2011 and rendered judgments of convictions. It is inferred from these judgments that in recent years the Court has been in a tendency to examine such judgments under Article 2.

To state briefly, the Court has held in many cases it has handled that the activities of using life-threatening force (posing risk to life) by the law-enforcement officers, under certain conditions, would constitute a violation of Article 2 even if it does not result in death.

As could be understood from the Court case-law, the Convention protects not only a person's life in biological-physical sense, but also the right to life of the person as a legal value. For that reason, where the victim is exposed to an activity which puts the right to life at danger, even if he/she has not died, this right would be considered to be violated.[122]

Consequently, the degree and type of force used and the unequivocal intention or aim behind the use of force would be determinant factors in assessing under which article the case would be examined.[123]

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118 Makaratzis v. Greece, §§ 49-55; also see Green v. the United Kingdom, no. 28079/94, 19 May 2005.

119 Evrim Öktem v. Turkey, no. 9207/03, 4 November 2008.

120 Seyfettin Acar and Others v. Turkey, no. 30742/03, 6 October 2009.

121 Peker v. Turkey, no. 42136/06, 12 April 2011.

122 Durmuş Tezcan and Others, **İnsan Hakları El Kitabı**, Ankara: Seçkin Yayıncılık, 2011, p. 95.

123 Harris, O'Boyle and Warbrick, p. 56; Leach, p. 188; for example see İlhan v. Turkey, § 75; Berktay v. Turkey, §§ 153-154; Denis Vasilyev v. Russia, no. 32704/04, 17 December 2009, §§ 92-96.

E. Protection of the Right to Life by Law

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.[124] In this regard, the provision "Everyone's right to life shall be protected by law" sets forth that the law of a state which is party to the Convention protects the individuals from being killed if it is no more than "absolutely necessary".[125]

In order to accept that the deprivation of life could be justified under Article 2 § 2, the activity carried out must be lawful. The lawfulness of the activity means: The activity must be lawful in terms of domestic law. By this means, the use of force has been allowed under a certain circumstance by domestic law.[126] The domestic law must also be in compliance with the requirements of the Convention. However, in domestic law the necessity is not required to be stated as "absolute necessity". It is enough to have the same meaning in essence.[127]

The use of lethal force by police officers may be justified under certain circumstances. Nonetheless, Article 2 does not grant a carte blanche. Unregulated (uncontrolled) and arbitrary action by State agents is incompatible with effective respect for human rights. This means that policing operations must be sufficiently regulated by national law, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force. Police officers should not be left in a vacuum when performing their duties. A legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect.[128]

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124 Giuliani and Gaggio v. Italy, § 208; L.C.B. v. the United Kingdom, no. 23413/94, 9 June 1998, § 36; Osman v. the United Kingdom [GC], no. 23452/94, 28 October 1998, § 115, Hamiyet Kaplan and Others v. Turkey, no. 36749/97, 13 September 2005, § 47.

125 Korff, p. 25.

126 Harris, O'Boyle and Warbrick, p. 62; for example see Kelly v. the United Kingdom; Stewart v. the United Kingdom, X v. Belgium.

127 McCann and Others v. the United Kingdom, § 152.

128 Giuliani and Gaggio v. Italy, § 249; Makaratzis v. Greece, § 58.

In this context, the primary duty on the State to secure the right to life is to put in place an appropriate legal and administrative framework, in particular, defining the limited circumstances in which law enforcement officials may use force and firearms, in the light of the relevant international standards.[129] In line with the principle of strict proportionality inherent in Article 2 (see paragraph 176 above), the national legal framework must make recourse to firearms dependent on a careful assessment of the situation.[130] Furthermore, the national law regulating policing operations must secure a system of adequate and effective safeguards against arbitrariness and abuse of force and even against avoidable accident.[131] Otherwise, even if the killing is in compliance with domestic rules on the use of firearms by police or other public officers, Article 2 would be violated as long as it does not meet the principle of "strict proportionality" laid down in Article 2.[132]

In the case of McCann and Others v. the United Kingdom, the applicants maintained that the domestic law to be implemented must protect the right to life. The Court states that the Convention does not oblige Contracting Parties to incorporate its provisions into national law. Furthermore, it is not the role of the Convention bodies to examine in abstracto the compatibility of national legislative or constitutional provisions with the requirements of the Convention.[133] The Court has concluded that "the Convention standards are stricter than the national standards of the relevant state". But nonetheless, it has decided that the difference between the two standards is not sufficiently great that a violation of Article 2 § 1 could be found on this ground alone.[134]

[129] Bakan v. Turkey, no. 50939/99, 12 June 2007, § 49; Makaratzis v. Greece, § 57; Giuliani and Gaggio v. Italy, § 209; Finogenov and Others v. Russia, § 228; also see below the UN Principles.

[130] Nachova and Others v. Bulgaria, § 96; Hamiyet Kaplan and Others v. Turkey, § 47; Giuliani and Gaggio v. Italy, § 209.

[131] Hamiyet Kaplan and Others v. Turkey, § 48; Soare v. Romania, no. 24329/02, 22 February 2011, §§ 135-137; Giuliani and Gaggio v. Italy, § 209; Makaratzis v. Greece, § 58; Finogenov and Others v. Russia, § 207.

[132] Harris, O'Boyle and Warbrick, p. 56; for example see Nachova and Others v. Bulgaria; Makaratzis v. Greece.

[133] McCann and Others v. the United Kingdom, § 153; also see Klass v. Germany, no. 15473/89, 22 September 1993, § 33.

[134] McCann and Others v. the United Kingdom, §§ 154-155; also see Giuliani and Gaggio v. Italy, §§ 211-215.

On the other hand, that the deficiencies in domestic law on the use of lethal or potentially lethal force would amount to the breach of Article 2 was confirmed in the latter case of Makaratzis v. Greece. The Court also determined in this case that the domestic law, which was in force at that time, did not provide sufficient guarantee in relation to the police officers' use of firearms. As the law on the use of force, effective date of which extended until the Second World War, did not give clear instructions to the police concerning the use of force, it was qualified as "old and inadequate" by the Court.[135] It could be clearly inferred from this statement that deficiency of domestic judicial system and its inadequacy in revealing the truths would be examined by the Court in the incidents of killing by the agents of state.[136]

In the case of Nachova v. Bulgaria, two Romanian young men was shot and killed by the gendarmeries, who were commanded to arrest them due to a simple accusation (absent without leave). The regulation on the use of firearms by the gendarmerie allows the use of lethal force even in the course of arrest to be effected due to a simple offence. The Court stated that such a legal framework is deficient and falls well short of the level of protection "by law" of the right to life. The Court consequently found the Bulgarian legislation, which did not include clear protective provisions to prevent the arbitrary deprivation of life, insufficient. Therefore, it held that Bulgaria had breached Article 2 in the incident where two soldiers were killed. It also held that there had been deficiencies in planning and conduct of the operation and the obligation of an effective investigation[137] had not been fulfilled.[138]

In the case of Perk and Others v. Turkey, the Court adopted a similar attitude as in the case of McCann and Others. The Court stated in the judgment that Article 16 of the Law on the Duties and Powers of the Police no. 2559,

135 Makaratzis v. Greece, §§ 56-72.

136 Robin White and Clare Ovey, The Europen Convention On Human Rights, 4th Edition, New York: Oxford University Press, 2006, p. 58.

137 As per the Court case-law, the state also has the obligation to carry out an effective investigation within the scope of state's positive obligation where an incident of death takes place as a result of the use of force or resulting from any reaons. In the event that this obligation is not fulfilled, a violation judgment may be rendered together with in respect to substantive aspect or only in respect to procedural aspect against the relevant state.

138 Nachova and Others v. Bulgaria, §§ 99-102.

which is the most fundamental legislation text, was adopted in 1934 and should be updated having regard to the international norms constituted on this subject. However, it stated that Article 17 of the Turkish Constitution could only justify the use of lethal force under "compulsory circumstances that the law allows" and it decided that the difference between this norm and term of "absolutely necessary" laid down in Article 2 § 2 of the Convention is not sufficiently important in order to conclude that the right to life has been violated only relying on this ground.[139]

In the case of Erdoğan and Others v. Turkey which the Court rendered approximately one month later than this judgment, the Court proved the same Law unsatisfactory. The Court considered that this Law listed a wide range of situations in which a police officer could use firearms without being liable for the consequences. This legal framework would not appear sufficient to provide the level of protection "by law" of the right to life that is required in present-day democratic societies in Europe. The system in place did not give law enforcement officials clear guidelines and criteria governing the use of force when carrying out arrests of dangerous suspects. Thus, it was almost unavoidable that the authorities responsible for the planning of the operation to effect the arrest of the suspects enjoyed an excessively wide autonomy of action and took unconsidered initiatives.[140]

On the other hand, the Court ruled in the case of Bakan v. Turkey that the Regulation on the Organization, Duties and Responsibilities of the Gendarmerie, which sets out the circumstances the gendarmerie could use firearms, was not in breach of the Convention. This regulation listed the circumstances in which the firearms could be used in a restrictive manner. Articles 39 and 40 states that recourse to the use of firearms must be considered as a last resort and a warning shot must be fired before shooting. The ECtHR held on the same ground that the specified rule was not in breach of the right to life.[141]

139 Perk and Others v. Turkey, no. 50739/99, 28 March 2006.

140 Erdoğan and Others v. Turkey, no. 19807/92, 25 April 2006.

141 Bakan v. Turkey, no. 50939/99, 12 June 2007.

The Court stated in the above-mentioned case of Nachova and Others v. Bulgaria that the legal system must meet the requirement of "strict proportionality" and rely on the UN Principles.[142] Some of these principles which are referred by the ECtHR in its numerous judgments:[143]

"1. Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review.

...

11. Rules and regulations on the use of firearms by law enforcement officials should include guidelines that:

(a) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;

(b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;

(c) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;

(d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;

(e) Provide for warnings to be given, if appropriate, when firearms are to be discharged;

(f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty."

F. Training of the Security Forces

Taken into consideration the points such as importance, hazards and ambiguousness of maintaining security, it is clear that the authority to use

142 Nachova and Others v. Bulgaria, §§ 71-75.

143 Giuliani and Gaggio v.Italy, § 154.

force should only be granted to the qualified persons who would exercise this power in the most appropriate way. This means that the law enforcement officers must be selected in a very strict manner and subjected to the training process, administered, controlled and supervised in an effective way, and when the authority is abused, these persons must be strictly held responsible before law.[144]

In particular, law-enforcement agents must be trained to assess whether or not there is an absolute necessity to use firearms, not only on the basis of the letter of the relevant regulations, but also with due regard to the pre-eminence of respect for human life as a fundamental value.[145]

In the case of Makaratzis v. Greece, the Court explicitly examined the training and instructions provided for the security forces, in contrary to the case of McCann and Others.[146] Once again, the state's obligation to provide appropriate training for the police and other persons serving in the security services is explicitly emphasized in the case of Nachova and Others v. Bulgaria.[147] The Court also stated in the case of Kakoulli v. Turkey that the states are obliged to train the individuals authorized to use firearms by "taking into consideration the superiority of respect for the right to life".[148]

The following issues concerning the selection and training of the law enforcement officers are discussed in the UN Principles:[149]

"18. Governments and law enforcement agencies shall ensure that all law enforcement officials are selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. Their continued fitness to perform these functions should be subject to periodic review.

144 Crawshaw, p. 79.

145 Giuliani and Gaggio v. Italy, § 250; Nachova and Others v. Bulgaria, § 97; McCann and Others v. the United Kingdom, §§ 211-212.

146 Makaratzis v. Greece, §§ 61 and 70.

147 Nachova and Others v. Bulgaria, § 97.

148 Kakoulli v. Turkey, § 110.

149 Giuliani and Gaggio v. Italy, § 154.

19. Governments and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use.

20. In the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms. Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents."

In brief, in order to minimize the violation of the human rights, the state must ensure that the law enforcement officers be selected according to merit procedure, have the moral, physiological and physical qualifications required for them to perform their duties in an effective way, take necessary professional training on the subject of the use of force and especially firearms. Periodical controls should be carried out in order to determine whether these officers are appropriate for their missions or not. The law enforcement officers must be informed about the use of means of non-violence. For example, they should be encouraged to have recourse to alternative methods such as peaceful settlement of the conflicts, comprehension of the crowds' behaviours, persuasion, negotiation and reconciliation. The minimization of the human rights violations may only be possible with raising of law enforcement officers who respect for the human rights, contemporary, broad-minded, well-educated, patient and experienced.[150]

G. Burden of Proof

The Court assesses the issues in the light of all materials which are submitted by either the applicants or the government and which the Court itself has provided, when necessary.[151]

[150] Kıldan and Bahadır, p. 220.

[151] McCann and Others v. the United Kingdom, § 173; Cruz Varas and Others v. Sweden, no. 15576/89, 20 March 1991, § 75.

As per the established case-law of the Court, "proof" may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. To reach a conclusion, a certain conviction degree is required.[152] The proof or proofs must be sufficiently strong, clear and concordant.[153]

The diffusion of the burden of proof depends strictly on the circumstances of the incidents and nature of the complaint and the right in question.[154]

According to the Court, the proof submitted concerning the alleged violations of the Convention must provide proof "beyond reasonable doubt". In principle, the applicant is required to prove that a violation has occurred in accordance with this standard. However, where an individual is killed by agents of the State, the state is obliged to prove that the agents' activities have been "absolutely necessary" within the meaning of Article 2.[155] In that case, the burden of proof is on the state to prove that the force used meets this necessity.[156] In sum, proof or proofs "beyond reasonable doubts", which provides proof for the killing of a person by the state agents, must be primarily adduced to hold the state responsible for killing of the person under Article 2. If the perpetrator is shown to be a state agent, then to show the killing complies with one of the exceptions permitted in Article 2 would be under the obligation of state.[157]

On the other hand, where the applicant alleges that the force used in such an incident does not fall into the legitimate aim laid down in Article 2 § 2 of the

152 Doğru and Nalbant, p. 12.

153 Aktaş v. Turkey, no. 24351/94, 24 April 2003, § 270; Finogenov and Others v. Russia, § 199; Avşar v. Turkey, § 282.

154 Doğru and Nalbant, p. 12.

155 Mansuroğlu v. Turkey, § 76; Ağdaş v. Turkey, no. 34592/97, 27 July 2004, § 95; Gömi and Others v. Turkey, no. 35962/97, 21 December 2006, § 52; Yaşa v. Turkey, §§ 93-96; Aydın v. Turkey [GC], no. 23178/94, 25 September 1997, §§ 70-72; Kaya v. Turkey, no. 22729/93, 19 February 1998, §§ 76-77.

156 Harris, O'Boyle and Warbrick, p. 61.

157 Reid, p. 744; Harris, O'Boyle and Warbrick, p. 57.

Convention and therefore his/her relative has been "intentionally killed" by the state agents, the applicant is obliged to prove his/her allegation.[158]

In instances where a person has died in the course of custody, the burden of proof would rest on the state on the grounds that the person in custody is in a weak position and the exclusive information on how the incident has taken place are accessible by the state. In this case, the state must put forth that the death is not under the responsibility of the agents. As is inferred, there is a different presumption in the incidents of death and disappearance in custody. When the incidents of death or injury occur in a place under the control of authority, it is incumbent on the State to provide a satisfactory and convincing explanation of how the incident takes place.[159]

Where any proof which would confirm that the victim was taken into custody in good health and state's allegation that this person was died of heart attack[160] or which would satisfactorily explain how the injuries on the body occurred[161] the burden of proof was not fulfilled. Once again, in the case where the convict died as a result of the explosion and the authorities could not explain why this person was put in such a place where the person's life was in danger[162] the burden of proof was not fulfilled.[163]

This principle is in the same direction for the incidents within the scope of Article 3. Where a person held in state custody is injured, the burden to prove that the injury has not been caused by torture, inhuman or degrading treatment or punishment rests on the state.[164] The ECtHR states in its numerous judgments that where an individual is taken into custody in good

158 Doğru and Nalbant, p. 13-14.

159 Akkum and Others v. Turkey, no. 21894/93, 24 March 2005, §§ 210-211; Mansuroğlu v. Turkey, §§ 80-81; Finogenov and Others v. Turkey, § 237; Varnava and Others v. Turkey [GC], no. 16064/90, 18 September 2009, §§ 183-184; Salman v. Turkey, § 100; Musayev and Others v. Russia, § 144; Çelikbilek v. Turkey, no. 27693/95, 31 May 2005, § 66; Süheyla Aydın v. Turkey, no. 25660/94, 24 May 2005, § 147.

160 Salman v. Turkey; Tanlı v. Turkey, no. 26129/95, 10 April 2001; for opposite see Uçar v. Turkey.

161 Velikova v. Bulgaria, no. 41488/98, 18 May 2000; Anguelova v. Bulgaria.

162 Demiray v. Turkey.

163 Harris, O'Boyle and Warbrick, p. 57.

164 Korff, p. 29.

health but is found to be injured by the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence.[165]

To state briefly, in principle, the complainant is obliged to his/her allegation. However, it is surely beyond doubt that application of this rule at every incident would be contrary to the fairness. For example, in the incidents of "death under the control of state" such as custody or prison, the information concerning how the death occurred is only or considerably possessed by the state. For that reason, the burden of proof would be reversed. In such cases, the state is required to make reasonable and acceptable explanation on the incidents resulting in the death (or injury). Failing to do so, the state would be responsible from the death.[166]

On the other hand, the Court is not always clear and consistent on the subject of the burden of proof. In the case of Kaya v. Turkey, the applicant and other persons including the eyewitnesses did not stand up and give statements before the Commission delegation arriving in Turkey to determine the incidents. The Court, therefore, held unanimously that the allegation that the applicant's brother had been unlawfully killed in breach of Article 2 of the Convention could not be proved (However it found a violation on the ground that an effective investigation was not carried out). But nonetheless, in the cases of Isayeva v. Russia and Ergi v. Turkey, the Court considered the respondent states' failing to give information to the Court against these states.[167]

The Court could either rely on all materials submitted to it with a view to proving the incident in a case, or could carry out investigation and gather evidences under Article 38 (former Article 38 § 1 (a)) of the Convention,[168]

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165 For example see Musa Yılmaz v. Turkey, no. 27566/06, 30 November 2010, § 45; Selmouni v. France [GC], no. 25803/94, 28 July 1999, § 87; Ribitsch v. Australia, no. 18896/91, 4 December 1995, § 34.

166 Doğru and Nalbant, p. 13.

167 Korff, p. 29.

168 Article 38 of the Convention on examination of the case in accordance with the controversial proceedings is as follows:
"The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities."

if necessary. This article imposes an obligation for the respondent state to collaborate with the Court in determination of the incidents subject matter of the case. Where the state contravenes this obligation, the Court may draw legal conclusions from this situation. The state's failing to submit all documents concerning the incidents or file of investigation carried out in domestic law, or make the eyewitnesses who are state agents heard in the hearing in the course of the examination carried out by the Court to reveal the material fact means that the state has contravened the obligation to provide required conveniences.[169] In brief, if the Government does not produce important evidence in the course of proceedings before the Court, the Court may make negative deductions from this circumstance under Article 38 of the Convention.[170]

For example, in the incident subject matter of the judgment of Timurtaş v. Turkey, it was maintained that the applicant's son had been taken into custody by the security forces and subsequently had disappeared. The applicant submitted a document, which indicated that his son had been taken into custody and was alleged to be prepared in the course of military operation by the applicant, to the Commission. The Government claimed that this document submitted by the applicant had been manipulated. However, although the original copy of the document in question was requested, it was not submitted to the Court on the ground that it included military secrets. The Court ruled in favour of the applicant as the Government avoided collaborating with the Court. Depending on this conclusion, the Court accepted the applicant's allegation that his son had been taken into custody.

In accordance with the subsidiarity principle,[171] the Court, as far as possible, prefers relying on the determination of the component authorities within the

[169] Doğru and Nalbant, p. 12.

[170] Finogenov and Others v. Russia, § 237; Tanrıkulu v. Turkey [GC], no. 23763/94, 8 July 1999, § 70; Timurtaş v. Turkey, no. 23531/94, 13 June 2000, § 66.

[171] The subsidiarity principle means that the authority to settle a matter concerning human rights should primarily belong to the state, by force of respect for the states' sovereignty, but if the respondent state fails to find a solution, the European Court of Human Rights would be entitled. The subsidiarity principle fundamentally results from three different articles of the European Convention on Human Rights. Under Article 1 of the Convention, the State Parties undertake to "secure to everyone within their jurisdiction the rights and freedoms". As per the regulation in Article 13 of the Convention, the respondent state must grant an effective remedy for everyone whose rights and freedoms are violated. According to Article 35 § 1 of the Convention, as a reflection of this principle, an application may be lodged with the Court only after the domestic remedies are exhausted.

country. However, this does not mean that the Court completely abandon its supervisory power. When required by the circumstances of a certain case, especially where the death of the victim may result from the use of lethal force by the state agents, the Court may make different assessment on the evidence.[172]

Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them.[173] Though the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts.[174]

On the other hand, the Court's reliance on evidence obtained as a result of the domestic investigation and on the facts established within the domestic proceedings will largely depend on the quality of the domestic investigative process, its thoroughness, consistency, etc.[175]

For that reason, as in the case of Avşar v. Turkey, where the event subject matter of the application has been subjected to proceedings in the domestic courts before being brought the ECtHR, it commonly use the facts established by the domestic courts as a ground for its judgment. Besides, in numerous judgments such as Kaya v. Turkey and Gül v Turkey, where there were serious deficiencies in the investigation conducted by the relevant state into the events and the applicant maintained that these deficiencies made the proceedings in domestic law ineffective, the Commission assigned a delegation in the relevant country to determine the incidents. However, this is a very exceptional method. Under normal circumstances, the proceeding in domestic law and

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172 Finogenov and Others v. Russia, § 237; Golubeva v. Russia, no. 1062/03, 17 December 2009, § 95; Matko v. Slovenia, no. 43393/98, 2 December 2006, § 100; Imakayeva v. Russia, 7615/02, § 113.

173 Edwards v. the United Kingdom, no. 13071/87, 16 December 1992, § 34; Klass v. Germany, § 29.

174 Giuliani and Gaggio v. Italy, § 180; Avşar v. Turkey,§ 283; Barbu Anghelescu v. Romania, no. 46430/99, 5 October 2004,§ 52.

175 Finogenov and Others v. Russia, § 238; Golubeva v. Russia, § 96; Maslova and Nalbandov v. Russia, no. 839/02, 24 January 2008, § 101 et seq.; Betayev and Betayeva v. Russia, no. 37315/03, 29 May 2008, § 74; Isayeva v. Russia, § 179 et seq.

additional information submitted by the parties are adequate for the Court to determine the incidents. For example, in the case of McCann and Others, the Court rejected to carry out further recording of evidence although some important issues remained unanswered.[176]

Even though it is impossible to conclude in some cases that the state's use of force has violated the right to life in respect to substantive aspect, it is determined that Article 2 has been breached on the ground that the state has failed to fulfil its procedural obligation in terms of conducting investigation into the killing.[177] To be more precise, if some matters concerning the incident have not been sufficiently clarified as the relevant state did not carry out an effective investigation, the state could not benefit from this deficiency. Therefore, for example, where the issue whether the victim, who was shot by the police, had a knife at his hand or not was not clarified, the Court would reject the state's allegation that the killing was lawful due to self-defence.[178]

It should be lastly stated that when there have been criminal proceedings in the domestic courts concerning the allegations that Articles 2 and 3 of the Convention have been breached, criminal law liability is distinct from the State's responsibility under the Convention. The Court's competence is confined to the State's responsibility. The Court is not concerned with reaching any findings as to guilt or innocence in that sense.[179]

CONCLUSION

A criterion for the use of force, which is "no more than absolutely necessary", is laid down in Article 2 § 2 of the Convention. It could be explicitly inferred from this sentence that the law enforcement officers would use force only to the extent that it is "absolutely necessary". Furthermore, it is concluded by the case-law that the force used must be "strictly proportionate" to achieve a permitted purpose.

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176 Korff, p. 30.

177 Harris, O'Boyle and Warbrick, p. 57; for example see Akkoç v. Turkey, no. 22947/93 and 22948/93, 10 October 2000; Yaşa v. Turkey; Mahmut Kaya v. Turkey, no. 22535/93, 28 March 2000.

178 Reid, p. 745; for example see Soare v. Romania, §§ 141-150.

179 Giuliani and Gaggio v. Italy, § 182; Tanlı v. Turkey, § 111; Avşar v. Turkey, § 284; Öneryıldız v. Turkey [GC], no. 48939/99, 30 November 2004, § 116; McCann and Others v. the United Kingdom, § 173.

Except for the death penalty abolished by Protocols No. 6 and No. 13 to the Convention, Article 2 lists three exceptions to the right to life. These are: the use of force in defence of any person from unlawful violence (subparagraph a); in order to effect a lawful arrest or to prevent the escape of a person lawfully detained (subparagraph b); and in action lawfully taken for the purpose of quelling a riot or insurrection (subparagraph c). However, it should be immediately stated that in order to deem legitimate the force used, it must not be more than "absolutely necessary" with a view to achieving one of the specified purposed. In other words, the state would be responsible for the death resulting from the use of force by the state to reach the purposes permitted by Article 2 § 2 if the force used is not "absolutely necessary" and proportionate.

Meanwhile, it should be noted that Article 2 is interpreted by the Court in a way to cover the unintentional deprivation of life resulting from the use of lethal force although word of "intentional" is used in paragraph 1 of this article.

The ECtHR also carefully examines whether the security operations, as far as possible, have been organized in a manner to put the lives of third persons, who did not get into the incident, and even perpetrators at risk at a minimum level or not, except for the main incident of killing. For that reason, the state may be held responsible not only for the act of killing but also planning and conduct of the operation carried out concerning the incident.

In recent years, the Court has preferred handling the case under the scope of Article 2 where "potentially lethal" force has been used and the fact that the victim has not been killed is fortuitous.

There are so many violation judgments rendered by the Court on the ground that domestic law of the relevant state did not have the quality to protect the right to life. For that reason, the primary duty of the states is to establish the legal and administrative framework defining the limited circumstances where the law enforcement officers could use force and firearms by taking into consideration the international standards.

The qualification of the law-enforcement officers has been occasionally examined by the ECtHR. In this context, the states must pay special attention

to the selection, pre-vocational and vocational training of these persons. Although a state has a well legislation, this would not provide benefit at the hands of bad enforcement officers.

As per the provision that the claimant is obliged to prove his/her claim, the applicant, in principle, must prove that a violation has occurred. However, when a person is killed by the state agents resulting from the use of force, the burden of proof would shift. In this case, the state is obliged to prove that the killing has been justified under Article 2.

Being interpreted by the Court, Article 2 of the Convention has gained and continues to gain a different and much wider meaning than the firstly envisaged. When the Convention was adopted, there was a strong consideration that the private persons would not be deprived of life but the State could be granted permission under certain conditions. However, after 1980s, this approach has given way to the general trend that the life is a scope in which the public officers could decreasingly interfere.[180]

As a result of this understanding, the Court's case-law has developed in a way that the limits of the use of force must be interpreted in a stricter manner, the planning and conduct of the operations must be examined in a more detailed manner, the adequacy of the legislation protecting the life and the fact whether the law enforcement officers are well-trained or not must be discussed.

The deaths occurring as result of the use of force by the law enforcement officers are regarded as "gross human rights violations". Even though there is any hierarchical relationship between the human rights in theory, it is obvious that the right to life has a privileged position among other rights; because life is the most important treasure of the person of which is not recoverable when he/she losses. Moreover, the right to life is prerequisite for enjoyment of all other rights. In a state where this right is not sufficiently secured, it would not be possible to presume that individuals live in safety and peace. Therefore, as a matter of their positive obligations, the states must take reasonable expected measures with a view to preventing all kinds of violation of the right to life, particularly the deaths resulting from the use of force.

[180] Martinez, p. 62.

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