

UNIVERSITÉ DE GENÈVE
INSTITUT UNIVERSITAIRE DE HAUTES ÉTUDES INTERNATIONALES

Right to Life and the Use of Deadly Force
Under the European Convention on Human Rights

Mémoire

Présenté en vue de l'obtention du
diplôme d'études approfondies
en relations internationales

Mention: Droit international

Par

Alexandre de M. L. Tolipan
(Brazil)

Genève
Octobre 2006

I object to violence because when it appears to do good,
the good is only temporary; the evil it does is permanent.

Mahatma Gandhi

Table of Contents

| | |
|--|-----------|
| Abbreviations | IV |
| Introduction | 5 |
| 1. The Right to Life and the use of deadly force in International Law | 5 |
| The European Convention on Human Rights and Additional Protocols | 12 |
| 1. Historical Background..... | 12 |
| 2. Reform and Protocol 11 | 13 |
| 3. The Right to Life under the European Convention | 13 |
| The Case law on the Right to Life in the European Court of Human Rights | 16 |
| 1. The McCann Case – a “Sea Change” | 16 |
| The Right to Life according to the European Court of Human Rights | 19 |
| 1. The obligation to have a legal framework to protect the right to life | 19 |
| 2. The obligation not to deprive anyone of his life intentionally..... | 22 |
| 2.1. “Intentionally” | 23 |
| 2.2. “Absolute necessity” | 25 |
| 2.3. The boundaries of the obligation | 28 |
| 2.4. Exceptions to the Obligation..... | 31 |
| 3. The Obligation to Investigate and Prosecute (Procedural Obligation)..... | 36 |
| 3.1. The Purpose of the Procedural Obligation..... | 40 |
| 3.2. An Obligation of means not end..... | 42 |
| 3.3. Effective and independent investigation | 43 |
| 3.3.1. Effectiveness..... | 43 |
| 3.3.2. Independent..... | 45 |
| 3.3.3. Evidence (Forensic, eye witness testimony, autopsy)..... | 45 |
| 3.3.4. Conclusion | 47 |
| 3.4. Criminal Procedures..... | 48 |
| 3.5. Civil procedures..... | 51 |
| 3.6. Obligation of the State to the next-of-kin | 52 |
| Jean Charles de Menezes – The case | 54 |
| Shoot to kill Policies, organization and action..... | 56 |
| IPCC Investigation and Report..... | 57 |
| Conclusion..... | 59 |
| Index | i |
| Bibliography | iv |

Abbreviations

CCPR – International Covenant on Civil and Political Rights

CHR – Commission of Human Rights and Human Rights Council

ECHR – European Commission of Human Rights

ECtHR – European Court of Human Rights

EU – European Union

HRC – Human Rights Committee

HRL – Human Rights Law

ICC – International Criminal Court

ICJ – International Court of Justice

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for former-Yugoslavia

IHL – International Humanitarian Law

RUC - Royal Ulster Constabulary

UN – United Nations

IRA – Irish Republican Army

Introduction

On 22 July 2005, the “war on terror” turned deadly once again. This time it was not by the actions of terrorist groups nor by Islamic fundamentalists, and the target was not leading States. The victim, nonetheless, was still an innocent civilian.

Jean Charles de Menezes was a poor Brazilian electrician working and earning a living in London. This fateful day, following his normal routine, he made his way to the subway to go to work. Little did he know that he was being followed and that he had less than an hour to live.

Following failed terrorist attacks the previous day, the police were surveying Mr. de Menezes’ building and the officers decided to follow him under the impression that he was one of the terrorists. In a series of errors and misinterpretations, the police not only wrongly suspected that Jean Charles was one of the terrorists, but that he was on his way to commit yet another attack against the London tube.

With no real positive identification and only a vague suspicion that another attack was imminent, the police took the controversial decision to use armed officers who were ordered to “shoot-to-kill” Mr. de Menezes.

Jean Charles de Menezes was shot eight times. Seven of the shots were to his head!

Was this police action reasonable? Can we accept that this was a regrettable mistake and move along? Does the war on terrorism justify the use of shoot-to-kill policies, especially in public places? Or are there obligations and duties the State must comply with?

This story illustrates the potential tragic outcome when a government abuses its prerogative to use deadly force.

The Jean Charles de Menezes incident was not only a major blow to civil rights, but it was also a blow against the “war on terror”. For the first time, the risks and the evils of the policies governments have been implementing since September 11 became clear to the general public. Most of the cases studied in this paper which

came before the European Court of Human Rights were related to terrorism and most of them involved the use of force against terrorists and armed groups. The most important of these cases, the McCann Case, involved the killing of terrorists as they were preparing another attack.

In all these cases, even when the Court decided against the State, the public was divided. Some believed the terrorists got what they deserved and the State did what was necessary, while others believed that even if they were terrorists, they had rights and these were infringed.

In the case of Jean Charles de Menezes, there was no doubt that he was innocent, and even the most vocal defender of the State cannot do more than argue that this was an unfortunate event. There was no public voice defending the government's actions. The shoot-to-kill policy in force in England and elsewhere; and the methods employed in the "war on terror" even now are under scrutiny.

It is undisputed at this point that the State is the only subject of internal or international law that has the prerogative to use an amount of force that may cause someone's death. It is also uncontroversial that this prerogative of the State has been limited in scope since the creation of the notion of the rule of law.

This limitation, and the belief that all humans have an inherent right to life, leads to several questions. The main question is: What are the obligations of the State in relation to this prerogative?

This question leads to several others: When can the State actually employ this prerogative? What must the State do before applying deadly force? What must the State do after applying such force?

In other words, what exactly is the scope of the right of life and the prerogative to use lethal force? When can society accept that a life has been legally taken?

Our first step is to understand the right to life and the use of deadly force in international law.

1. The Right to Life and the use of deadly force in International Law

“The right to life is undoubtedly the most fundamental of all rights. All other rights add quality to the life in question and depend on the pre-existence of life itself for their operation.”¹

These words open Rhona Smith’s chapter on the right to life and are echoed in several other analyses of this right. It is a matter of pure logic that life is the fundamental pre-requisite to enjoy all other rights, so it is also a matter of logic that a right to life must be defended above all others in international human rights.

Nevertheless, and somewhat contradictorily, there is not yet consensus as to whether the right to life is a *Ius Cogens* right and, if so, what are its boundaries and scope. The truth is that the right to life is probably one of the most nuanced and complex of all rights. While it appears that there is consensus among scholars and human rights advocates about a total and non-derogable prohibition on torture or genocide, the same cannot be said about the prohibition on taking life. War itself is based on an exception to this fundamental right. The Human Rights Committee in its General Comment 29 on Article 4 of the CCPR expressed the view that the enumeration in this Article is partly a recognition of the preemptory character of the rights listed. The Committee stated:

“11. The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of preemptory norms of international law. The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the preemptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7). However, it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights

¹ Smith, Rhona K. M. “Right to Life” in *TextBook on International Human rights*, Oxford University Press, 2nd Ed., New York, 2005, p. 205

during a state of emergency (e.g., articles 11 and 18). Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.”²

The right to life has faced difficulties in being accepted as a peremptory norm, not so much for the fact that it has exceptions, but mainly because its scope and its exceptions are not yet completely clear. A *Ius Cogens* norm can contain exceptions, the main example being the prohibition on the use of force. It is not in the scope of this work to further analyse this point, but it suffices to point out that I believe the Committee is right that there is already a peremptory norm of *Ius Cogens* prohibiting the “*arbitrary*” taking of life. The limits and contours of this right, as well as its obligations, are the subject of this study.

As we will see, the word “*arbitrary*”, or some other form of conveying the same idea, is found in almost all legal texts on the subject. This is the first and probably the most important nuance to be understood about this right. Life, thus, must always be protected against arbitrary deprivation.

The right to life entails not merely a negative obligation, but also a positive obligation imposed, above all, on the State. This means that the State is not only obliged to refrain from taking life, but in several circumstances, it is under an obligation to take active steps to prevent the taking of life. As we will see, this has important repercussions for the interpretation of this right.

The use of lethal force, on the other hand, is the prerogative or privilege of the State to use a level of violence that may lead to the death of a targeted person. This is

² HRC, General Comment 29, State of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/ADD.11 (2001)

directly connected to the Weberian³ view that the State has a monopoly on the use of force. The State was once unconstrained in the use of this privilege, having the power of life and death over its subjects. However, since the creation of the notion of the rule of law, this prerogative has seen increasing limitations to its use. Nevertheless, it is still accepted that the State and only the State has this power under certain circumstances.

It is important at this point to highlight that the rules on the use of deadly force vary greatly between human right standards applied in peacetime and humanitarian law prevailing during conflicts. The application of these two frameworks, when one starts and the other ends, is a matter of controversy in international law.

The ICJ attempted to deal with this issue in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons⁴. The Court was asked if the threat or the use of nuclear weapons is legal in international law, and under what circumstances. In a controversial opinion, the Court concluded that the right to life as protected under the CCPR still exists during armed conflicts, but the test of what is arbitrary falls to humanitarian law. The Court stated:

*“25. The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. **The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities.** Thus whether a particular loss of life, through the use of a certain weapon in*

³ Weber, Max. “Politics as a vocation”, on the internet:
http://www.ne.jp/asahi/moriyuki/abukuma/weber/lecture/politics_vocation.html

⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion 8 July 1996 (Reports 1996)

warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself”⁵ (Emphasis added)

As Prof. Gowlland stated, this decision relegates human rights to the back-stage⁶. During a conflict, situations (such as occupation) in which typical human rights issues are intermingled with conflict issues can easily be envisaged, and the sole use of humanitarian criteria is a serious blow to the purpose of both systems.

“What is puzzling, therefore, is the Court’s conclusion that the test of what is an arbitrary deprivation of life contrary to Article 6 of the Covenant must solely (The French text explicitly uses the word ‘uniquement’) be decided in time of armed conflict by reference to humanitarian law and not the Covenant.”⁷

One must, therefore, concur with Prof. Gowlland that this reference is puzzling and also with her conclusion that the criteria of what is arbitrary deprivation must be assessed within the whole context of human rights and humanitarian law and its evolving standards. It is perhaps desirable here to add to the criteria the factual situations brought before the courts.

“The notion of what is ‘arbitrary’ deprivation of life under the Covenant must in addition be interpreted in the context of the treaty as a whole, in the light of its object and purpose, and against constantly evolving standards, for the Covenant has been acknowledged as a living instrument.”⁸

We cannot, nevertheless, ignore here the possible impact from the advisory opinion of the Court in the Wall Case:

⁵ Ibid, §25

⁶ GOWLLAND-DEBBAS, Vera "The Right to Life and Genocide: the Court and an International Public Policy", in International Law, the International Court of Justice and Nuclear Weapons, Philippe Sands and Laurence Boisson de Chazournes (eds.), Cambridge University Press, 1999, pp.315-337, p. 319

⁷ Ibid, p. 325

⁸ Ibid, p. 326

*“106. More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; **others may be exclusively matters of human rights law**; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”*⁹(Emphasis added)

In the Nuclear Weapons advisory opinion, the Court only mentions that human rights continue to apply during armed conflicts. However, in its opinion on the Wall Case, the Court actually admits that even during armed conflict, there are situations where human rights prevail.

The language used by the Court leaves very little room for argument that humanitarian law alone should define what is arbitrary. When the Court states that some situations are “exclusively” a matter for human rights law, there is no doubt that humanitarian law should play no role there.

It is still not clear how the two laws interact and it is difficult to assess when one or the other will apply, or even what is the nature of the third type of situation referred to and how to resolve it. It is at least clear that even in armed conflicts there are situations where human rights apply without the interplay of humanitarian law.

In conclusion, the ICJ not being a human rights (or even humanitarian law) oriented body, has had very little, in fact only one chance, to address the issue of the right to life and its decision is controversial at best. The latest Advisory Opinion may have improved the interpretation but it did not address the issue directly and created more questions than it actually answered on the topic.

⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ, Reports, 2004, p. 136, § 106

Although there are different frameworks on the right to life, this study focuses only on the human rights point of view, and more specifically on the findings of the European Court of Human Rights on the subject. The question of humanitarian law will be left for other scholars.

The European Convention on Human Rights and Additional Protocols

From the beginning, this study aimed to examine the relationship between the right to life and the use by the State of deadly force under the specific framework of the European Convention. This was not a choice made by chance. The need for constraint was compounded by the fact that it is in the European Court of Human Rights that most of the development on the subject has occurred especially after the 1990s.

1. Historical Background¹⁰

Having entered into force in 1953, the European Convention for the Protection of Human Rights and Fundamental Freedoms was based on the Universal Declaration of Human Rights of 1948, and was created with the purpose of furthering the enforcement of some of the rights created by the Universal Declaration. More than restating the rights, the Convention further detailed them, and created the necessary institutions and mechanisms to enforce those rights.

This task was given to three new institutions: the European Commission of Human Rights, The European Court of Human Rights and the Committee of Ministers.

The task of the Commission was to receive complaints and to determine their admissibility, working thus as a screening mechanism. The Commission also served as a mediator to broker a peaceful settlement. When that was not possible, the Commission created a report with an opinion on the merits of the case that was sent to the Committee of Ministers.

¹⁰ <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/>

The Committee then determined whether there was a violation or sent the case to the Court. The acceptance by the accused State of the compulsory jurisdiction of the Court was the criterion to choose between the two.

In the early stages, the Court's jurisdiction was not yet compulsory and only cases involving the States that accepted this jurisdiction were sent to the Court. Otherwise, complaints were settled by the Committee which was composed of the Ministers of Foreign Affairs of the Member States.

It is important to note that the right of individual application was also not obligatory and was exercised only against States that had accepted it. Individuals did not have direct access to the Court even when they had the right to complain.

The Committee also supervised the execution of the Court's judgments.

2. Reform and Protocol 11¹¹

This earlier mechanism was subject to amendments and modifications through several different protocols. The most significant of these was protocol 11 of 1998, which reformed the whole system of enforcement to make it more expeditious following the rapid increase in the workload of the institutions. The most significant modifications were the abolition of the adjudication by the Committee of Ministers, making the system fully compulsory to all Member States and making the Court a full-time institution encompassing both the part-time Court and the Commission. Together with other changes, these modifications served to increase the strength of the judicial character of the system.

Since then, new reforms have been under discussion due to the rapid increase in demand.

¹¹ Idem

3. The Right to Life under the European Convention

The right to life is enshrined in the Convention in Article 2 under the heading Rights and Freedoms, which makes it the first right of the document.

“Article 2 . Right to life

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

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

a. in defence of any person from unlawful violence;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. in action lawfully taken for the purpose of quelling a riot or insurrection.”¹²

This right is further modified in two protocols, 6¹³ and 13¹⁴, and is also affected, as we will see, by Article 1¹⁵. Protocols 6 and 11 deal exclusively with the death penalty; the former abolishes it in times of peace, making it only a tool of war, while Protocol 13 completely abolishes the death penalty in Europe.

¹² European Convention on the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Rome, 4.XI.1950

¹³ Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, Strasbourg, 28.IV.1983

¹⁴ Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the abolition of the death penalty in all circumstances, Vilnius, 3.V.2002

¹⁵ “Article 1 . Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

The first paragraph can be divided into three parts. The first two parts establish the main obligations for States: to create a legal framework that defends this right under their sovereignty as well as a positive duty not to take life intentionally. It is interesting that the word “intentionally” here is not being used instead of “arbitrary”. The third part deals with the death penalty and is completely abolished by Protocol 13 as noted above.

From the reading of paragraph 1 alone, one may consider that this right is absolute as it does not have any built-in escape clause such as the use of the word “arbitrary”. An obvious exception is the use of the word “intentionally”, but it is a clear and definite one. The State cannot “intentionally” commit murder, but in the course of law enforcement action, killing may be the undesirable outcome. This must be understood in the light of the whole Article as we will see.

Paragraph 2, nevertheless, gives much more depth to the Article by creating a very specific set of exceptions to paragraph 1. It is important as well to notice the use of the expression “absolutely necessary”; if the State takes a life, it must be in one of the three circumstances envisaged by this article and it must also be under a very stringent criterion of absolute necessity. If an agent of the State kills someone in the course of a lawful arrest, the State must prove not only that this was so, but also that the State had no other means to apprehend the victim. Law enforcement personnel cannot shoot down a robber as a means to defend someone from him if he was unarmed and posed no real threat to either the victim or someone else, including the policemen.

This is merely a first glance analysis of the Article; most of the rights and obligations that arise from this Article are born through its interpretation and are clear in the jurisprudence of the Court.

Before we pass to the study of this jurisprudence, we must raise one other obligation that will come out in all cases related to the right to life. The Court, as we will see, interpreted Article 2 in connection with Article 1 to derive a whole series of procedural rights. According to the Court, for Article 1 to be effective, there must be an obligation on the State to investigate thoroughly all instances of killing by State agents. Further analysis of this question is found below.

The Case law on the Right to Life in the European Court of Human Rights

As Hendin points out, the first case related to Article 2, dates back to 1964. The author goes on to affirm that “*Of the first 50 cases brought all but two were found to be either inadmissible or, the alternative, struck off the list.*”¹⁶ However, this changed dramatically in the beginning of the nineties when the Court developed a prolific jurisprudence on the topic. Since then, Article 2 of the Convention has been deeply analysed and developed. Several aspects of the State’s obligations have been developed while others have seen increased enforcement.

These changes came about for several reasons, but the case that is most emblematic and that Aoláin calls “*a Sea-change to right to life jurisprudence*” is the McCann case and it will be examined closely below¹⁷.

1. The McCann Case¹⁸ – a “Sea Change”

*“The right to life emerged from the McCann decision as a strict scrutiny right subject to enhanced review.”*¹⁹

Daniel McCann, Mairead Farrell and Sean Savage were three IRA (Irish Republican Army) operatives back in 1988; their Active Service Unit (ASU) had been planning a terrorist attack in Gibraltar for some time. The British, Spanish and Gibraltar governments had them under investigation since at least as far back as 4 March 1988 and probably since the beginning of the year²⁰. The target was supposed to be the changing of the guard in the assembly area south of Ince’s Hall where the Royal Anglian Regiment assembled in Gibraltar.

The British SAS, a military Unit, coordinated with local Gibraltar police in an operation aiming to arrest the three suspects and gather sufficient evidence to prosecute and convict them.

¹⁶ HENDIN, Stuart E. “The Evolution of the Right to Life by the European Court of Human Rights”, *Baltic Yearbook of International Law*, Vol. 4, 2004, p. 75

¹⁷ AOLÁIN, Fionnuala Ni. “Truth Telling, Accountability and the Right to Life in Northern Ireland” in *European Human Rights Law Review*, Issue 5, 2002, pp. 574-575.

¹⁸ McCANN and Others v. the United Kingdom [GC], no. 18984/91, ECHR-1995

¹⁹ AOLÁIN, op. cit, p. 577

²⁰ McCANN and Others v. the United Kingdom [GC], no. 18984/91, ECHR-1995, §§ 13 and 14

The suspects had been sighted crossing the border in a car that would later be suspected to contain a remote detonating bomb. The police decided not to apprehend them in a controversial decision to gather more evidence. The police were afraid that if they apprehended them at that point, they would have to set them free and they could re-plan the assault in a way that would elude the intelligence service. This decision was one of the main points the Court would later criticize.

On March 6, the police and the SAS agents in the field received intelligence that the suspects were prepared to detonate the bomb with a “button job” - in other words they could trigger the bomb at a moment’s notice - which made apprehending them a very difficult task because any suspect movement could be misinterpreted as an attempt to detonate. With this information and orders to arrest, the SAS team had them followed and ended up, in the attempt to arrest them, killing the three.

This case is very important because it is the first time the Court found a breach of Article 2 on a case of police shooting. It is also especially important because in the case at hand the suspects were far from innocent; they were terrorists and were on their way to executing a major attack.

Against this background, the Court found that, although the agents in the field were not in error in their judgements, seeing that they had to rely on the intelligence received, the State itself failed in more than one instance in its obligations regarding the right to life of the victims: first, for not apprehending them when they had the chance without further risk, second, for relaying poor or bad information to the agents in the field, which actually made any scenario other than the killings impossible, and, finally, for the reflexive use of force without due care for the victims’ right to life.

The Court, thus, concluded:

“213. In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists

constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) (art. 2-2-a) of the Convention.”²¹

For this reasons, Aoláin referring to McCann stated:

“The decision which brought a sea-change to right to life jurisprudence under the Convention was the first case in which the Court itself directly examined the deliberate taking of life by law enforcement officials.”²²(Emphasis Added)

As noted before, after this case, a whole jurisprudence on the right to life emerged and continues to develop.

“The Court has now developed an effective and substantive jurisprudence concerning the Right to Life.”²³

We must now, scrutinize all aspects of the right to life under the Convention and in the light to the Court’s recent jurisprudence.

Another important aspect of the McCann case was the conclusion of the Court as to the investigations carried out by the State. As we will see in further detail, it is in McCann that the Court first mentioned the need for a thorough investigation in every instance of the use of deadly force. The Court said:

“161. The Court confines itself to noting, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to "secure to everyone

²¹ Ibid, § 213

²² AOLAÍN, Op. Cit., p. 576

²³ Ibid, p. 575

within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State."²⁴ (Emphasis added)

The Court went on to conclude that the Inquest in the case fulfilled the necessary requirements under the doctrine of procedural obligation, giving a first indication of what those requirements should be.

The Right to Life according to the European Court of Human Rights

1. The obligation to have a legal framework to protect the right to life

In *Kakoulli v. Turkey*, Mr. Petros Kyriakou Kakoulli, was shot dead by Turkish soldiers while he was collecting snails in a British base area near the border with the Turkish Republic of Northern Cyprus. The facts of the case are not clear; while the Turkish government claims that Mr. Kakoulli entered the Turkish side carrying a potential arm (he was found with a bayonet) and was shot, after refusing to obey orders to stop, the family and witnesses tell another story. According to them, Mr. Kakoulli was never armed and he was seen with the soldiers still outside the line before he was taken in the Turkish side and killed.

The Court found that there was a substantial violation of Mr. Kakoulli's right to life because of the disproportional use of force against him. He was shot twice and then a third time when he was already wounded (the third shot proved fatal) when he posed no threat and showed no signs of carrying any guns or arms. In this case, the Court stated:

"109. In addition to setting out the circumstances when deprivation of life may be justified, Article 2 implies a primary duty on the State to secure the right to life **by putting in place an appropriate legal and administrative framework** defining the limited

²⁴ *McCANN and Others v. the United Kingdom* [GC], no. 18984/91, ECHR-1995, § 161

circumstances in which law-enforcement officials may use force and firearms, in the light of the relevant international²⁵ (*Emphasis added*)

That principle was stated here as a criticism of the reckless use of firearms by the Turkish soldiers who should have been trained to follow specific rules and standards for these situations.

The very first duty of States, established by the European Convention, is the obligation to legally protect the right to life within its jurisdiction.

“Everyone’s right to life shall be protected by law”²⁶

This is an obvious and necessary first step to ensure compliance by States with any right. This obligation may seem a simple one but it entails, in fact, a complex set of rules. It is not enough to enact a general prohibition on killing or even a criminal law punishing the crime. It is necessary to create a whole legal framework defending the right all the way from the constitutional law to the administrative rules on the post-fact investigations. It also implies the creation of law enforcement machinery capable of actually upholding the enacted rules and laws.

*“The Court, in its discussion of Article 2, reviewed briefly its earlier decision in the case of L. C. B. v. United Kingdom (L.C.B. v. the United Kingdom, Application No., 23413/94) and reminded that the State has a positive duty to take steps to protect the lives of persons within the jurisdiction of the State, **This obligation compels the State to put in place criminal law provisions to deter the commission of (criminal) offences, and as well to establish the appropriate State machinery in support of the same.**”²⁷(Emphasis added)*

The jurisprudence of the Court is clear on this topic. A good example, is the Makaratzis v. Greece case where the Court Stated:

²⁵ KAKOULLI v. Turkey, no. 38595/97, ECHR-2005, p. 28, §109

²⁶ European Convention on the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Rome, 4.XI.1950, Article 2

²⁷ HENDIN, Op. Cit., p. 80

“57. The first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also **to take appropriate steps within its internal legal order to safeguard the lives of those within its jurisdiction** This involves **a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework** to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.”²⁸ (*Emphasis added*)

In this case, Mr. Christos Makaratzis, claimed that the Greek police infringed his right to life in the course of trying to arrest him, even though he was not actually killed. After Mr. Makaratzis crossed a red light in front of the American Embassy in Athens, the police tried to stop him and he accelerated. As a result, he was taken for a fugitive terrorist and the ensuing car chase turned chaotic, borderline burlesque. When the policemen asked for back-up, several other units (including off-duty policemen) appeared without a central command and without any supervision and shot at Mr. Makaratzis’ car. At some point, the car finally stopped in a gas station and the police continued to fire at it (even though gas pumps were nearby).

Mr. Makaratzis’ actions were unlawful and did endanger the security of civilians. During the chase, he hit two different cars, thus endangering and actually injuring the two drivers. However, though he was not actually killed, the Court found violations to his right to life in the actions of the police.

For the purposes of this chapter, the main violation to his right to life came from the total lack of a legal and administrative infrastructure of law enforcement compliant with the right to life. The fact that, upon request for back-up, all police converged chaotically to the scene without a discernible command and hierarchy, speaks volumes. Off-duty police officers without uniform and following no specific orders mingled with duty officers, all shooting at the car. This indicated to the Court

²⁸ MAKARATZIS v. Greece, no. 50385/99 [GC], ECHR-2004, p. 27, §57

that the basic obligations of the State in relation to Article 2 were not fulfilled. The Court concluded:

“71. In the light of the above, the Court considers that as far as their positive obligation under the first sentence of Article 2 § 1 to put in place an adequate legislative and administrative framework was concerned, the Greek authorities had not, at the relevant time, done all that could be reasonably expected of them to afford to citizens, and in particular to those, such as the applicant, against whom potentially lethal force was used, the level of safeguards required and to avoid real and immediate risk to life which they knew was liable to arise, albeit only exceptionally, in hot-pursuit police operations (see, mutatis mutandis, Osman v. United Kingdom, cited above, p. 3160, § 116 in fine).

72. Accordingly, the applicant has been the victim of a violation of Article 2 of the Convention on this ground. In view of this conclusion, it is not necessary to examine the life-threatening conduct of the police under the second paragraph of Article 2.”²⁹(Emphasis added)

It is important to emphasize that the obligation of the State to put into place a normative and administrative infrastructure is not a mere rhetorical one. For the State to be compliant with this requirement, it must show that it not only had legislation (including the necessary detailed rules of engagement and training manuals), but that those are actually followed and applied in the daily actions of its law enforcement personnel. Having the necessary rules, but passing oral or even tacit rules to the contrary, would be a violation. The Makaratzis case seems to make this perfectly clear; rules must not only exist but they must also be followed.

²⁹ Ibid, p. 30, §§71-72

2. The obligation not to deprive anyone of his life intentionally.

The second part of paragraph 1, along with paragraph 2 of Article 2, creates a set of obligations and exceptions for the State related to the substantive part of the right to life.

“1. ... No one shall be deprived of his life intentionally...”

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

a. in defence of any person from unlawful violence;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. in action lawfully taken for the purpose of quelling a riot or insurrection.”³⁰ (Emphasis added)

In this few short lines there is a world of interpretative obligations. What limits does “intentionally” bring? At which point in a law enforcement action does the obligation start and when does it end for the State?

Those are some of the questions the case law has dealt with.

2.1. “Intentionally”

The word “intentionally” needs to be understood in its context because it poses a particular problem. If we take it at face value, the State would only be liable for killings that are proven to be deliberate. That would open the door for abuses, since it would be quite easy for the State to claim that the outcome was not its intention.

³⁰ European Convention on the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Rome, 4.XI.1950

That was clear in McCann, because according to the State, the operation that led to the killing of the three suspects was designed to apprehend them, and the force used was necessary to that end, taking into account the possibility that any one of the suspects could have triggered a bomb in a public place. The applicants alleged that from the way the operation was mounted, there were no other possible outcome save for the death of the three and that the British authorities knew this. The Court agreed that the operation left very little, if any, room for other possibilities; nevertheless, it did not accept a conspiracy theory in which the State calculated the outcome.

According to the Court, the organization of the operation had several flaws that led to a situation where the death of McCann and the others was inevitable. However, that was not intentional, but the Court still concluded that there was a violation of Article 2, stating:

*“148. The Court considers that the exceptions delineated in paragraph 2 (art. 2-2) indicate that this provision (art. 2-2) extends to, **but is not concerned exclusively with, intentional killing.** As the Commission has pointed out, the text of Article 2 (art. 2), read as a whole, demonstrates that paragraph 2 (art. 2-2) does not primarily define instances where it is permitted intentionally to kill an individual, **but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life.**”³¹*

When reading Article 2 in the light of this interpretation, it is very clear what the Court is conveying. In its first paragraph, the Article is prohibiting intentional killing of any other kind, besides a lawful death penalty. After Protocol 13, the prohibition became absolute. On the other hand, paragraph 2 deals with any other use of force that may lead to deprivation of life. The wording of the paragraph makes it clear that the convention is not only concerned with the actual taking of life, but with the use of force that may lead to it. We will see this aspect in further detail later. The setting of the three exceptions makes it clear that the paragraph is not concerned with

³¹ McCANN and Others v. the United Kingdom [GC], no. 18984/91, ECHR-1995, §148

the intention behind the use of force. Intentional deprivation of life has already been dealt with and proscribed in the first part. This paragraph is dealing with unintentional outcomes. When can the State use an amount of force that may lead unintentionally to killing? That is the question this paragraph seems to answer. That is what the Court is saying in the passage above.

Thus, the Court is not only concerned with premeditated action of the State. The problem, as we are going to see, is that if the Court is to be concerned with every instance where force is used that may result in deprivation of life, the standards and limits set in Article 2 must be strictly construed, otherwise the whole construction loses its meaning. Therefore, one of the most important first tasks is to define the scope of the Article itself.

This passage of McCann resounds in several others cases (in fact, in almost every case related to Article 2) and leads Aoláin to state:

“Article 2 deemed to apply both to situations where it is permitted to intentionally kill an individual, and to situations where death may be an unintended outcome of State action.”³²

2.2. “Absolute necessity”

Again, we are faced with a term that must be understood. The interpretation of this term had a wide range of implications. The most important is that it straightens the jacket on State actions. By defining that the taking of life must happen only when “absolutely necessary” it gives little room for interpretation on the contrary. The State now has the burden of proving that his actions were right to life compliant. It also leads to a “strict scrutiny” of State’s actions.

According to Hendin:

“Further the Court remarked that the term ‘absolutely necessary’ implies a high standard that must be met, implying that a

³² AOLÁIN, Op. Cit., p. 576

very real test will be cast back to the State in question.”³³(Emphasis added)

This simple expression affects the interpretation of the entire Article especially the prism through which we see the listed exceptions. As an example of that we can return to *Kakoulli v. Turkey*:

*“108. Accordingly, and with reference to Article 2 § 2 (b) of the Convention, the legitimate aim of **effecting a lawful arrest can only justify putting human life at risk in circumstances of absolute necessity.**”*³⁴(Emphasis added)

As will be recalled from that case, Mr. Kakoulli was shot dead by Turkish soldiers when he was trying to escape back to Greek territory and posed no threat to life or limb. The soldiers, nevertheless, shot him twice, and then went on to shoot him dead when he was already wounded. This particular display of force seems to show more than mere disregard for life, but actual intention to kill, and it is far from compliant with the standard of “absolute necessity”.

The repercussions do not stop there; the standard of “absolute necessity” also affects the obligations of the State long before law enforcement actions are carried out. According to the Court, the State is required to train all its law enforcement personnel to understand and assess in practical situations in the field whether there is “absolute necessity” to use lethal force or not. The case is again *Kakoulli v. Turkey*:

*“110. Furthermore, 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”*³⁵ (Emphasis added)

³³ HENDIN, Op. Cit., p. 78

³⁴ KAKOULLI v. Turkey, no. 38595/97, ECHR-2005, §108

³⁵ Ibid, §110

This passage also highlights what was discussed before as to the obligation to put an effective legal and administrative framework in place and must be understood in relation to it. It is a clear obligation of the State to put into place an environment that is conducive to increased respect for the right to life. As stated earlier, rules must be in place and the law enforcement personnel must be prepared to apply them constantly without exceptions. In *Kakoulli v. Turkey*, the Turkish soldier who killed Mr. Kakoulli was clearly unprepared to assess if the situation required the use of deadly force. Such an untrained soldier should not be put on border patrol if the State really believes such an area is volatile and violent.

This topic of the training and the “absolute necessity” is seen directly or indirectly in several cases and it is back in *McCann* that we find the most direct and specific statement of the Court about it.

“212. Although detailed investigation at the inquest into the training received by the soldiers was prevented by the public interest certificates which had been issued ... **it is not clear whether they had been trained or instructed to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest.**

Their reflex action in this vital respect lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects, **and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to their attention and which emphasised the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement ...**

This failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation.”³⁶(Emphasis added)

The conclusion here is that the term “Absolutely Necessary” has far-reaching repercussions as to the meaning of the right to life. The real extent of these repercussions is not yet determined. The Court, as seen above, had the opportunity to deliberate on some of them, but the boundaries are still far from being fully explored.

2.3. The boundaries of the obligation

One of the important questions in the topic of the substantial obligation of the State is when that obligation begins and when it ends. As we have seen, the beginning of the obligation can be traced as far back as the training of agents. However, the point where most of the jurisprudence has encountered problems is in relation to the preparation and organization of State law enforcement actions.

As we have seen, it is on McCann that most jurisprudence is based. In this case, the Court stated:

“150. In keeping with the importance of this provision (art. 2) in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances **including such matters as the planning and control of the actions under examination.**”³⁷
(Emphasis added)

These words resound in several other cases such as Makaratzis v. Greece:

“59. In view of the foregoing, in keeping with the importance of Article 2 in a democratic society, the Court must subject allegations

³⁶ McCANN and Others v. the United Kingdom [GC], no. 18984/91, ECHR-1995, §212

³⁷Ibid, §150

of breach of this provision to the most careful scrutiny, **taking into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.**³⁸ (*Emphasis added*)

Another good example is *Ergi v. Turkey*. Mrs. Havva Ergi's brother complained that Turkey violated his sister's right to life when they killed her during an ambush to arrest PKK members near the applicant's village. The facts of the case are not clear and both the Court and the Commission had to accept that there was not sufficient evidence that the State had actually killed Mrs. Ergi.

Nevertheless, when analysing the facts of the case and the allegations of the Defendant State both the Court and the Commission found Turkey to be in breach of Article 2 for the organization and preparation of the action. According to the Court the State lacked due respect for the right to life of the inhabitants of the village when it set up an ambush against the PKK without assessing with the necessary care the risk for the villagers of a cross fire. It is interesting that in its conclusion, the Court said:

“In the light of the above considerations, the Court agrees with the Commission that the responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.

Thus, even though it has not been established beyond reasonable doubt that the bullet which killed Havva Ergi had been fired by the security forces, the Court must consider whether the security forces' operation had been planned and conducted in such a

³⁸ MAKARATZIS v. Greece, no. 50385/99 [GC], ECHR-2004, §59

way as to avoid or minimise, to the greatest extent possible, any risk to the lives of the villagers, including from the fire-power of the PKK members caught in the ambush. ³⁹ (Emphasis added)

In an important remark on this obligation the Court said in the same paragraph:

“In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, **including such matters as the planning and control of the actions under examination.**”⁴⁰ (Emphasis added)

The message the Court is sending to States is that whenever an operation is likely to lead to killing, the State must undertake a very strict examination of the facts and, therefore, must always bear in mind its obligations to uphold the right to life of potential victims. Errors in judgment and lack of or erroneous information sent to agents in the field can raise issues of responsibility.⁴¹

Shoot-to-kill policies are another source of liability for the State. The Court tackled this issue specifically in McCann and concluded that the recourse to a shoot-to-kill policy was one of the reasons for condemning the State for violations of McCann, Sauvage and Farrell’s right to life. The Court said:

“211. However, the failure to make provision for a margin of error must also be **considered in combination with the training of the soldiers to continue shooting once they opened fire until the suspect was dead.** ... Against this background, the authorities were

³⁹ ERGI v. Turkey, no. 23818/94, ECHR-1998, §79

⁴⁰ Ibid, §79

⁴¹ AOLAIN, Op. Cit. p. 577

bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill.”

The Court emphasized that the use of military personnel trained to shoot-to-kill without hesitation and to do so until the target is killed is not in principle compliant with the State’s obligations under Article 2.

Finally, as to the moment when the obligation of the State in relation to the right to life ceases, we can safely say that this never occurs. From the preparation of the action through to the actual implementation and arrest, the obligation continues to be valid. It is also still in force when suspects are in custody. Since Protocol 13 entered into force, the State has no more right to take life outside the scope of Article 2 and the exceptions set out in its second paragraph. Therefore, while the State has an individual under its control, his or her life is under its responsibility and anything that happens to that individual becomes the *prima facie* responsibility of the State.

2.4. Exceptions to the Obligation

Article 2 contemplates 3 exceptions to the prohibition on taking life. These are:

“a. in defence of any person from unlawful violence;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. in action lawfully taken for the purpose of quelling a riot or insurrection.”⁴²

Each of these will be examined in light of the above analysis.

⁴² European Convention on the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Rome, 4.XI.1950, Article 2

2.4.1. In defence of any person from unlawful violence;

Self-defence and defence of others is the classic exception to the use of force, even deadly use of force. Nevertheless, it is important to point out that while the criterion for this exception is usually proportionality, in the case of the use of lethal force, the bar is raised to absolute necessity. As seen above, “absolute necessity” is a theme that permeates the right to life, affecting almost all instances of its interpretation. This is yet another example.

2.4.2. To effect a lawful arrest or to prevent the escape of a person lawfully detained;

The Court pronounced on this issue in *Kakoulli v. Turkey*:

“108. Accordingly, and with reference to Article 2 § 2 (b) of the Convention, the legitimate aim of **effecting a lawful arrest can only justify putting human life at risk in circumstances of absolute necessity**. The Court considers 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”⁴³

Again, Mr. Kakoulli was killed while trying to escape back to Greek soil (or at least that was the government allegation). The Turkish soldiers shot at him to prevent his escape. According to the soldier that shot at Mr. Kakoulli, he was aiming at the legs, but he failed to explain why he did so since Mr. Kakoulli did not pose an immediate threat. There was no need to kill Mr. Kakoulli to prevent his escape. The soldier also failed to explain why, since he was aiming at the legs, the three shots were found in Mr. Kakoulli’s upper body. The third bullet, that proved fatal, was shot several minutes afterwards when Mr. Kakoulli was either crouching or laying down. The Court reasonably found that it was unnecessary to shoot at him.

⁴³ KAKOULLI v. Turkey, no. 38595/97, ECHR-2005, §108

It is interesting at this point to note that the Court not only applied the criterion of “absolute necessity”, but also defined in broad terms situations to which, in principle, it cannot apply. In this case, the Court stated that to pursue the aim of a lawful arrest, State agents must only apply deadly force in case of absolute necessity. The Court also stated that this is not the case when the suspect does not pose a threat to life or limb and is not suspected of a violent crime. In other words, an unarmed person suspected of minor violations (such as trespassing the border) cannot be shot at just because he is about to escape and there are no other means to stop him.

2.4.3. In action lawfully taken for the purpose of quelling a riot or insurrection.

This is the most difficult exception to analyse. First, there are very few cases (McShane v. The United Kingdom⁴⁴ and Stewart v. the United Kingdom⁴⁵). Second, in situations of public disturbances where public order is at stake, it is difficult to ascertain if the actions of the State were compliant with Article 2. The McShane case poses such a problem. During a riot in Northern Ireland back in 1996, Dermot McShane fell underneath a large piece of hoarding, which was being used as a shield from the plastic batons of the police, at the moment where an armoured vehicle was being used to clear the obstacles. Mr. McShane was killed when the APC (Armoured Personnel Carrier) ran over the hoarding he was hiding behind.

At first glance, the use of an armoured vehicle does not relate directly to the use of lethal force, especially because it was not used to attack people but to clear away obstacles. Nevertheless, the Court found that the use of such vehicles during a public disturbance could raise questions as to the right to life:

“... Nor is the term “use of force” applicable only to the use of weapons or physical violence. **It extends, without distortion of the language of the provision, to the use of an army vehicle to break down and dismantle barricades ...** Where however a soldier is **given**

⁴⁴ McSHANE v. The United Kingdom, no. 43290/98, ECHR-2002

⁴⁵ STEWART v. the United Kingdom, no. 10044/82, ECHR-1984

orders to use a heavy armoured vehicle, during a riot, to clear away a barricade in the close vicinity of civilians who are using it either as cover or a shelter, this must be regarded as part of an operation by the security forces for which State responsibility under Article 2 of the Convention may potentially arise.”⁴⁶(*Emphasis added*)

As a circumstance precluding wrongfulness, the use of force to quell a riot can be difficult. It is clear that the Court set out to limit as much as possible any action of the State that leads to or could potentially lead to the taking of life.

The Court is not satisfied any more with arguments of necessity, national security, or lack of intention by the State. It expects from the State behaviour compliant with the standards established under the Convention and it also interprets those standards in the most stringent way.

It is also important to point out that the Court accepts the need to use deadly force to quell a riot but expects it to be used only when absolutely necessary. To quote Hendin:

“The Court further noted that while the use of force is permitted under Article 2 (2) (c) to deal with riots, that nevertheless there ‘must be a balance struck between the aim pursued, and the means employed to achieve it.’”⁴⁷

2.4.4. Conclusion

The exceptions listed above tend to follow the logic of upholding the right to life. While they may be exceptions to this right in relation to a particular individual, they exist to uphold someone else’s right to life. For instance, in the self-defence or defence of others, the use of lethal force is necessary to prevent an innocent’s right to life being infringed. It makes sense that the State must have a prerogative to shoot at

⁴⁶ Ibid, §101

⁴⁷ HENDIN, Op.Cit., p. 87

someone who is presenting such clear and present danger either to the agent of the State or to other innocent people.

In the case of lawful arrest, the State must have some level of discretion to detain someone when that person either poses an immediate danger or is suspected (either because of a previous conviction or because of the circumstances) to have committed a serious crime. In other words, the force must be used by the State to prevent a dangerous criminal that may pose a serious threat to others, from escaping. Although human rights do not usually accept pre-emptive action, especially when dealing with the use of deadly force, this exception is an acceptance of a reasonable reality. The State cannot be expected to let a dangerous fugitive get away when it may have the means to stop him. This is especially true when dealing with an already convicted fugitive.

The case of the use of lethal force for the quelling of a riot also serves a purpose. In cases of public disturbances, the lives of many are at risk: those of the policemen, the rioters and innocent by-standers. Restoring peace and security is one of the obligations of the State. It must be understood here that the use of force in all cases must not aim at taking life, and death should occur only as a regrettable outcome. That is especially true in this last exception where force is being used almost randomly against a group of people without specific discrimination. It is impossible in such situations to define which rioters pose a threat and which do not. It is also impossible to differentiate between a rioter and an innocent bystander. Therefore, although the use of force is permitted, it must be used with considerable restraint and control in order to minimize fatalities.

As we can see, although the right to life accepts exceptions, those must be interpreted as narrowly as possible and they must relate to other values as important as life itself. In other words, if the State is to be allowed to take life it must be to protect life (either a specific one or the law and order necessary to uphold the general public's right to life.)

3. The Obligation to Investigate and Prosecute (Procedural Obligation)

As mentioned above, it is in McCann that the Court developed the doctrine of the procedural obligation. The logic is that the enhanced scrutiny due to a right to life case and the elevated importance of that right (together with the general obligation of the State under Article 1) means that in any situation where there is a violation of this right, the State has a positive duty to investigate effectively and, if necessary, punish the guilty agents. As Hendin said:

“Reading together the two Articles the Court found that, by implication, there is a duty upon the State to conduct effective official investigations when individuals have been killed with the use of force involving, either directly or indirectly, agents of the State”⁴⁸

In other words, every time State agents kill someone there must be a thorough and effective investigation capable of actually determining the facts and punishing the guilty whenever possible. This obligation is imposed not only when someone is actually killed by law enforcement personnel, but in all cases where there is a violation of the right to life (even if no death occurs).

“The Court commenced by recalling that a legal prohibition on arbitrary killing would be **meaningless** if there existed no procedure for reviewing the lawfulness of the use of force by States. Thus, the obligations of Article 2 of the Convention allied with the State’s general duty under article 1 **mandate that a State must carry out and effective official investigation when an agent of a State is involved in the exercise of lethal force.**”⁴⁹

The Court takes this obligation as seriously as the substantive obligation, and in several cases where the substantive right was found not to have been breached, the State was still found to have violated Article 2 for failure to comply with the high

⁴⁸ HENDIN, Op.Cit, p. 78

⁴⁹ AOLÁIN, Op. Cit. p. 578

standards set by the Court under this doctrine. An example of how seriously this procedural obligation is being taken is the case of *Kaya v. Turkey*.

In this case, the applicant's brother, Mr. Abdülmenaf Kaya, was found dead and riddled with bullets in circumstances that are disputed and controversial at best. The disputed facts and the lack of evidence led both the Commission and the Court to determine that there was not enough evidence to declare a substantive violation of the right to life of the deceased. Nevertheless, the same lack of evidence was the basis for the Court to determine that there was a breach of Article 2 on the procedural obligation.

The ECtHR Stated:

*“86. The Court recalls at the outset that the general legal prohibition on arbitrary killing by agents of the State contained in Article 2 of the Convention would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State (see the above-mentioned *McCann and Others* judgment, p. 48, § 161).*

87. The Court observes that the procedural protection of the right to life inherent in Article 2 of the Convention secures the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public

*scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances.*⁵⁰

And concluded:

“91. The Court notes that loss of life is a tragic and frequent occurrence in view of the security situation in south-east Turkey (see the above-mentioned Aydın judgment, p. 1873, § 14). However, neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces, more so in cases such as the present where the circumstances are in many respects unclear.

92. Having regard to the above considerations the Court, like the Commission, concludes that the authorities failed to carry out an effective investigation into the circumstances surrounding the death of the applicant’s brother. There has accordingly been a violation of Article 2 of the Convention in that respect”⁵¹

This doctrine was further developed in *Shanaghan v. The United Kingdom*⁵². In this case, Patrick Shanaghan, was the victim of constant harassment by RUC (Royal Ulster Constabulary) officers and he even alleged torture. After documents containing, among other things, a photomontage of him had disappeared in suspicious circumstances from a police car, he was targeted for killing by loyalists and received warnings to that effect from the RUC itself. A masked man killed him some days later while he was driving his car.

Again, in this case, the ECtHR did not have enough evidence in relation to a substantive breach of Article 2 but concluded that there were a number of procedural shortcomings:

⁵⁰ KAYA V. Turkey, no. 22729/93, ECHR-1998, §§86-87

⁵¹ Ibid, §§91-92

⁵² SHANAGHAN V. the United Kingdom, no. 37715/97, ECHR-2001

“122. The Court finds that the proceedings for investigating the use of lethal force have been shown in this case to disclose the following shortcomings:

– no prompt or effective investigation into the allegations of collusion in the death of Patrick Shanaghan has been shown to have been carried out;

– a lack of independence of the police officers investigating the incident from the security force personnel alleged to have been implicated in collusion with the loyalist paramilitaries who carried out the shooting;

– a lack of public scrutiny, and information to the victim's family, of the reasons for the decision of the DPP not to prosecute in respect of alleged collusion;

– the scope of examination of the inquest excluded the concerns of collusion by security force personnel in the targeting and killing of Patrick Shanaghan;

– the inquest procedure did not allow for any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which might have been disclosed;

– the non-disclosure of statements prior to the appearance of the witnesses at the inquest prejudiced the ability of the applicant to participate in the inquest;

– the inquest proceedings did not commence promptly.”⁵³

The conclusions of the Court in this case led Aoláin to state:

⁵³ Ibid, §122

“Moreover, the Shanaghan decision seems to demand that the process of State investigation for all deaths (no matter whom the perpetrator) must be Article 2 compliant. This widens the Scope of application for the doctrine of procedural protection contained in Article 2 immeasurably.”⁵⁴

3.1. The Purpose of the Procedural Obligation

Hendin, in his article, analysed the evolution of the interpretation of Article 2 in the jurisprudence of the ECtHR and he points out in relation to the purpose of the procedural obligation:

*“The Court then made clear that the general prohibition of the taking of life by the State would be without effect if there were no avenue to review the actions of the authorities in question.”*⁵⁵

This conclusion affected all cases on the right to life after McCann. In *Hugh Jordan v. the United Kingdom*, for example, Mr. Pearse Jordan was stopped by a couple of police cars and then shot dead by one of the policemen. Four civilians witnessed the action, and said that Mr. Jordan was killed while unarmed and posing no threat to the officers. According to the witnesses, there was no warning given.

As the Court pointed out, it was not disputed in this case that Pearse Jordan was killed by a police officer⁵⁶ and therefore the case fell “squarely within the ambit of Article 2.” The Court went on to conclude that there were several shortcomings in the investigation, finding that there was a violation of the procedural obligation under Article 2. It is important to highlight here that, in this case as in several others after McCann, the Court stated the main purpose of this procedural obligation:

“The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right

⁵⁴ AOLÁIN, Op. Cit. p. 586

⁵⁵ HENDIN, Op. Cit., p. 78

⁵⁶ HUGH JORDAN v. The United Kingdom, no. 24746/94, ECHR-2001, p. 27, §110

to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.”⁵⁷

As we can see, the main objective of this doctrine is to increase even further the effectiveness of Article 2 within the State. The procedural obligation, thus plays an important role together with the obligation to have a legal framework of protection in defending the right to life.

This is a clear, simple and effective way to give Article 2 a practical implementation. It does not suffice, for the Court, to state that the right to life must only be infringed in cases of “absolute necessity”. It does not suffice to obligate the State to create a legal and administrative framework. In order to fulfil its duties, the State must also investigate violations thoroughly and within clear standards, subject to the Court’s scrutiny.

“The fundamental principle from which all others follow in the judgement is that the right to life is a basic value of a democratic society. The Court resolutely stated that when life is taken by the State the circumstances must be closely examined and strictly limited.”⁵⁸

It is also important to note that the Court believes that whenever the State fails to give good reasons (through serious investigation) for its actions, especially in dubious situations, public confidence in the legal institutions suffers.

To borrow Hendin’s conclusion on the subject:

“However of far greater significance is the comments by the Court that the prohibitions contained in Article 2 would be ineffective if there was no mechanism or procedure in place to review the lawfulness of the (entire) conduct of the authorities”⁵⁹

⁵⁷ Ibid, p. 27, §105

⁵⁸ AOLAÍN, Op. Cit., p. 581

⁵⁹ HENDIN, Op. Cit., p. 78

Now that we understand the purpose and limits of this procedural obligation we must turn to its specific features and detailed consequences.

3.2. An Obligation of means not end

The Court does not expect the State to be omniscient and to succeed in determining all the facts in all cases. That would be an impossible burden and would undermine the credibility of the obligation as a whole. Therefore, in several cases such as the *Şirin Yilmazi v. Turkey* quoted below, the Court stated that this procedural obligation is not of results but of means. In other words, the State has to show that it did everything in its power, following the standards established by the Court, to investigate and prosecute all cases in which the right to life is involved.

“78. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances ... and to the identification and punishment of those responsible ... **This is not an obligation of result, but of means.** *The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence, and where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death ... Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.*”⁶⁰ *(Emphasis added)*

This passage is seen in most of the cases on the right to life following *McCann*. What the Court is saying is that the procedural obligation must be interpreted very strictly, but it cannot place an unbearable burden on the State. The obligation of the State is to demonstrate that everything possible was done to unveil the circumstances behind the use of deadly force and if necessary bring the

⁶⁰ *ŞİRİN YILMAZI v. Turkey*, no. 35875/97, ECHR-2004, §78

responsible persons to justice. The State cannot be reasonably expected to always have a positive outcome. This would only create scapegoats or would simply undermine the obligation as a whole.

3.3. Effective and independent investigation

3.3.1. Effectiveness

Being an obligation of means and not ends the criteria to define if the State did or did not comply becomes more complex. If results were expected they would be themselves proof of compliance, however, since they are not demanded, standards and rules must be applied to give the State transparent guidelines, and the Court clear and objective criteria to determine if they were fulfilled.

in his Article, Hendin highlights the reaction of the Court to an investigation that has not produced any results after five years:

“The Court did not mince any words when it found that the investigations started immediately after the shootings, some five years earlier, had yielded no tangible result with the conclusions that the failure of the investigation (notwithstanding the political climate in the area) would only lead to an exacerbation of a ‘climate of impunity and insecurity’.”⁶¹

It is important to note the connection the Court makes between the investigation and the “climate of impunity and insecurity”, clearly pointing out that an effective investigation is crucial for the maintenance of peace and security, as well as confidence of the people in the rule of law.

Therefore, the first requirement in the procedural obligation is that of an effective investigation. According to the Court in *Şirin Yilmazi v. Turkey*, such investigations must be capable of determining the circumstances surrounding the case and leading to the identification and punishment of those responsible.

⁶¹ HENDIN, Op. Cit., p. 93

“74. The investigation must be **capable, firstly, of ascertaining the circumstances in which the incident took place and, secondly, of leading to the identification and punishment of those responsible**. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony and forensic evidence. A requirement of promptness and reasonable expedition is implicit in this context. Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required standard of effectiveness”⁶²

In this case, shrapnel from artillery fire killed the wife of the applicant, Mrs. Sariye Ylmaz, outside her door when she was trying to prevent her husband from going out in the middle of a gun battle between forces of the PKK and the Turkish Government. The Court, once more, was faced with a case where, for lack of evidence, it could not make a positive conclusion as to the substantive obligation. It was impossible to determine if Mrs. Ylmaz was killed by the State or the PKK and under what circumstances. Nevertheless, again it was in the failings of the investigation that the Court concluded that Turkey fell short of its obligation under Article 2.

To rely on those shortcomings, the Court pointed out the need for the State to present an effective investigation. It is important to remark that although the Court gives some clues as to what kind of investigation is expected, it does not consider it within its duties to determine the specific model to be used. The Court pointed out below, and repeated in several cases, that whatever model of investigation a State decides to apply, it has to follow some basic standards and must be able to ascertain the circumstances of the case that lead to the identification of the responsible persons.

That means that not only the internal investigatory, administrative and judicial systems must be compliant with the right to life, but also the actual investigations. In

⁶² MAKARATZIS v. Greece, no. 50385/99 [GC], ECHR-2004, p. 31, §74

other words, the State may fail in its duty either for having bad investigative, administrative, or judicial standards or, even if those are up to standards, the State may still violate Article 2 in specific investigations.

3.3.2. Independent

In addition to being effective, investigations must also be independent. That means that they must be able to produce results and they should not be tainted or biased by dubious connections between those investigating and those under investigation.

Since the agents under investigation and the ones investigating and prosecuting them are both from the State, this standard of independence is very important to guarantee that the final outcome of the investigation will be truthful and will have a direct impact on the effectiveness of the investigation.

Enquiry agents must not have any ties to the law enforcement personnel involved in the cases. It must be stressed that this does not only refer to personal ties but also to institutional ties. In other words, the State is under an obligation to create a separate and independent institution capable of carrying out the investigations without having any connections to the ones under their jurisdiction.

“In addition, investigations into the loss of life must be fully independent and effective. By the term ‘independence’ the Court means that there must be hierarchical, institutional and practical independence between those responsible for the death and those investigating the incident.”⁶³ (*Emphasis added*)

3.3.3. Evidence (Forensic, eye witness testimony, autopsy)

Forensic evidence, along with eye witness testimony and post-mortem procedures, are basic evidence and are very important to any case involving the right to life. The Court takes such evidence seriously as one of the important steps a State

⁶³ AOLÁIN, Op. Cit, p. 581

must take to secure compliance with the Article 2 procedural obligation. The basic set of standards on these issues, especially on autopsy, is the Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions adopted by the United Nations in 1991 and its annexed Model Autopsy Protocol.

As seen in the judgment in *Gül v. Turkey*, the Court is very stringent about investigative procedures. In this case, the applicant's son, Mr. Mehmet Gül, was shot dead in his house by police forces outside his door. The police opened fire at the door without taking into account who might be behind it. The facts of the case were disputed, but both the Commission and the Court found the allegations of the police officers unreliable and even incredible. Once again, criticism of the investigation proved pivotal in this case and much of the criticism related to the evidence gathering and forensics. The Court noted on the subject:

“89. ... Notwithstanding the seriousness of the incident however and the necessity to gather and record the evidence which would establish what had happened, there were a number of significant omissions. There was no attempt to find the bullet allegedly fired by Mehmet Gül at the police officers, which was their primary justification for shooting him. There was no proper recording of the alleged finding of two guns and a spent cartridge inside the flat, which was also relied on by the police in justifying their actions. The references in the police statements on this point were vague and inconsistent, rendering it impossible to identify which officer had found each weapon. No photograph was taken of the weapons at the alleged location. While a test was carried out on the Browning weapon to show that it had been recently fired, there was no testing of Mehmet Gül's hands for traces that would link him with the gun. Nor was the gun tested for prints. The failure of the autopsy examination to record fully the injuries on Mehmet Gül's body hampered an assessment of the extent to which he was caught in the gunfire, and his position and distance relative to the door, which could have cast further light on the circumstances in which he was killed. The Government submitted that further examination was not necessary since the cause of death was

clear. The purpose of a post mortem examination however is also to elucidate the circumstances surrounding the death, including a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings...⁶⁴

In a more general tone in *Şirin Yilmazi v. Turkey*, the Court emphasized the importance of procedures and evidence.

“78. ... The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence, and where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death”⁶⁵

3.3.4. Conclusion

The general conclusion we can take about the obligation to investigate is that it is a logical corollary of the respect and importance the Court is gradually imposing in relation to the right to life.

“Primarily though not exclusively, investigations must be able to produce outcomes. Outcomes are requirements of accountability in the criminal sphere. Thus an independent investigation must not only establish the facts concerning a death but must be able to determine whether the use of force was justified in the circumstances.”⁶⁶

If one expects this right to be taken seriously by States, it is not enough to declare it; one must also create practical and effective means of guaranteeing compliance and that means making a system that leaves little room for the State to hide, lie or falsify information.

⁶⁴ *GÜL v. Turkey*, no. 22676/93, ECHR-2000, §89

⁶⁵ *ŞİRİN YILMAZI v. Turkey*, no. 35875/97, ECHR-2004, §78

⁶⁶ *AOLÁIN*, Op. Cit, p. 581

Forcing the State to investigate all violations of the right under strict international standards is a way for the Court to enforce compliance. That is why in most cases on the right to life the State has been able, one way or another, to escape conviction under the substantive obligation (mostly for lack of evidence) but still was found to be in violation of Article 2 for its procedural obligations. Turkey has been caught in this trap along with the United Kingdom. It is important to highlight that from the point of view of consequences there is no difference between a violation of one or another kind; both are violations of the same Article.

3.4. Criminal Procedures

Mckerr is an interesting case to assess the importance of criminal procedures in the scope of Article 2. In this case, three IRA operatives, including the applicant's father, Mr. Gervaise McKerr, were killed by special agents of the RUC after passing through a roadblock and while unarmed. Their car was riddled with 109 shots. The controversial point about this case lies in the criminal prosecution of the RUC officers responsible for the shooting and their acquittal. The remarks of the Judge were at the time controversial at best and led many to believe that he condoned shoot-to-kill policies. The Court began its analysis of the role of criminal procedures in the case by pointing out:

“134. In the normal course of events, a criminal trial, with an adversarial procedure before an independent and impartial judge, must be regarded as furnishing the strongest safeguards of an effective procedure for the finding of facts and the attribution of criminal responsibility.”⁶⁷

Nevertheless, the Court went on to ponder:

⁶⁷ McKERR v. The United Kingdom, no. 28883/95, ECHR-2001, §134

“137. The Court considers that there may be circumstances where issues arise that have not, or cannot, be addressed in a criminal trial and that Article 2 may require wider examination.”⁶⁸

After that, the Court went on to examine the shortcomings of the police inquiry.

The conclusions of the Court are important to understand the context in which a criminal trial may play an important role in Article 2 compliance.

These two passages illustrate that a criminal trial is important as a final means of attributing criminal responsibility and the finding of facts. Nevertheless, since a criminal prosecution only focuses on the criminal responsibility of the individuals at trial, it falls short of the requisites of Article 2 if taken alone. In other words, a serious inquest following all the necessary requisites studied before the trial would be expected to produce a reasonable conclusion. On the other hand, after a faulty inquest and investigation the trial may only serve to either create scapegoats or to bury the truth.

As noted above, the investigation must be able to ascertain all the facts including responsibilities at all levels of the chain of command, as well as the facts of the action since its inception. By prosecuting only the policemen with the guns that carry out the actual shooting, the real responsibility may be ignored. Such was the case in McKerr and also in McCann, where the law enforcement personnel following “intelligence” from others, were put in a situation where they had little or no alternative than to pull the trigger.

Therefore, it is important to put criminal procedures in their place. They may be an important and necessary outcome of an inquest, especially if the inquest does not have a prosecutorial side to it, but they may also be, for the purposes of the procedural obligation under Article 2, unnecessary. In the end, all will depend on the specific model of inquest taken in the case under review.

⁶⁸ Ibid, §137

It is important nevertheless, to note that even in the absence of criminal judicial proceedings, the State is still under an obligation to publicly prosecute the suspects in some form (if the evidence permits). The reason for that is the rightful concern of the Court that one of the objectives of the procedural obligation is to reassure the population of the existence of the rule of law.

“The applicant was however not informed of why the shooting was regarded as not disclosing a criminal offence or as not meriting a prosecution of the officer concerned. **There was no reasoned decision available to reassure a concerned public that the rule of law had been respected.** This cannot be regarded as compatible with the requirements of Article 2, unless that information was forthcoming in some other way. This however is not the case.”⁶⁹ (*Emphasis added*)

The Court in McKerr could not have put it better:

“159. It is not for this Court to specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents. While **reference has been made, for example, to the Scottish model of inquiry conducted by a judge of criminal jurisdiction, there is no reason to assume that this may be the only method available. Nor can it be said that there should be one unified procedure satisfying all requirements.** If the aims of fact-finding, criminal investigation and prosecution are carried out by or shared between several authorities, as in Northern Ireland, the Court considers that the requirements of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, the various procedures provide for the necessary safeguards in an

⁶⁹ HUGH JORDAN v. The United Kingdom, no. 24746/94, ECHR-2001, §124

accessible and effective manner. **In the present case, the available procedures have not struck the right balance.**⁷⁰ (*Emphasis Added*)

As we can see, criminal procedures are not a pre-requisite under the procedural obligation in Article 2, but they may fulfil an important role at the end of the inquest better than any other form of public prosecution, especially because the prosecutorial character is better placed to that end.

3.5. Civil procedures

Referring to *Jordan, Shanaghan, McKerr* and *Kelly*, Aoláin states:

“All four cases outlined the inadequacies of civil compensation to the next-of-kin as a meaningful stand alone remedy for violation of the right to life by agents of the State.”⁷¹

As we can see, the Court treats the questions of the importance of civil procedures or the possibility of substituting criminal ones, swiftly and conclusively. Civil procedures do not meet the proper requisites of criminal judicial proceedings because they must be commenced by the next-of-kin and they do not seek to identify and punish the guilty. Civil proceedings, thus, are not accepted in principle as fulfilling the requisites of the procedural obligations under Article 2.

To use the words of the Court in *Shanaghan v. the United Kingdom*:

“121. As found above (see paragraph 96), civil proceedings would provide a judicial fact finding forum, with the attendant safeguards and the possibility of obtaining findings of unlawfulness and damages. It is however a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of any alleged perpetrator. As such, it cannot be taken into account in the assessment of the State's

⁷⁰ *McKERR v. The United Kingdom*, no. 28883/95, ECHR-2001, §159

⁷¹ *AOLÁIN*, Op. Cit, p. 580

compliance with its procedural obligations under Article 2 of the Convention.”⁷²

3.6. Obligation of the State to the next-of-kin

The Court, finally, had to deal with the obligation of the State to the next of kin. Normally, the place of the next of kin in the criminal process is a little better than the general public. The judicial process in criminal cases is usually a relationship between the State and the accused. That happens because it is believed that crimes are of general interest to the community and the accused must be prosecuted by the State both to avoid inaction by the next-of-kin and to ensure that the community as a whole is satisfied with the results in a form of public catharsis.

In the jurisprudence of the Court relating to the right to life, this need for the State to act independently of the next-of-kin is recognised, though the participation of the next-of-kin is also regarded as important.

In the McCann case, the Court considered that participation of the next-of-kin’s legal representative was enough, but in later cases, it accepted the need for further participation for Article 2 to be fulfilled.

“133. As regards access to documents, until recently the applicant was not able to obtain copies of any witness statements until the witness concerned was giving evidence. This was also the position in the **McCann case, where the Court considered that this had not substantially hampered the ability of the families’ lawyers to question the witnesses** ... The promptness and thoroughness of the inquest in the McCann case left the Court in no doubt that the important facts relating to the events had been examined with the active participation of the applicants’ experienced legal representative. The non-access by the next-of-kin to the documents did not, in that context, contribute any significant handicap. **However, since that**

⁷² SHANAGHAN V. the United Kingdom, no. 37715/97, ECHR-2001, §121

case, the Court has laid more emphasis on the importance of involving the next of kin of a deceased in the procedure and providing them with information.”⁷³ (*Emphasis Added*)

The conclusion of Aoláin on the topic is very expressive of what the Court said:

“Contrary to the practice of many States, including the United Kingdom, the next-of-kin are placed centre stage to the legal drama. In this way, the legal process revolves around them and responds to their needs and rights, and does not define them as peripheral to a drama of accountability between the State and the persons responsible for the death. It is evident that the court views the protection of the legitimate interests of the next-of-kin as a driving aspect to the workings of all accountability mechanisms.”⁷⁴

Again, the main objective of this move by the Court seems to be creating another mechanism to ensure compliance by the State. By giving more importance to the participation of the next-of-kin in the process, the Court hopes to leave even less room for the State to manoeuvre. The State does not only owe an explanation of events to a generic public that most of the time is not really aware or following closely the proceedings, but it must also demonstrate to a usually very attentive next-of-kin a set-by-step compliance with the standards of investigation.

⁷³ HUGH JORDAN v. The United Kingdom, no. 24746/94, ECHR-2001, §133

⁷⁴ AOLÁIN, Op. Cit, p. 584

Jean Charles de Menezes – The case

Now that we saw what are the limits and obligations imposed so far by the ECtHR on the subject of the right to life and the use of deadly force, we can go back to Jean Charles de Menezes case and try to analyse it from this point of view.

Before we start, we must bear in mind that since this case has not yet been taken to Strasbourg and the results of its investigation have been kept secret, we have almost no official document or account of the incident and must rely on the news reports.

It is also worth noting that the case itself has been surrounded by scandals and there is especially strong evidence of an attempt by the Metropolitan Police to “bury” the case.

It all started on 22 July 2005, the day after the failed attempt of another bombing in the London underground. The police, following a lead, were surveilling a block of flats in Scotia Road searching for one of the terrorists from the previous day.

At around 9:30 a.m, Mr. de Menezes went out of his flat in number 17 to work and was seen by the surveillance officer. According to leaked information, the officer could not make a positive identification or turn on the surveillance equipment because at the time he was “relieving” himself.

Following this officer’s suspicions, the Metropolitan Police headquarters, codenamed “Gold Command”, decided to continue pursuit. Mr. de Menezes went on to Brixton Station by bus followed by several police officers in plain clothes. Since the station was closed, he reboarded the bus and continued to Stockwell. There was so far no positive identification and the meagre evidence published by the media seems to indicate that there was no identification and at some point the officers in the field along with the command centre just assumed Jean Charles was the terrorist and that he was about to commit another attempt at bombing the tube.

Following this assumption, “Gold Command” told the officers that Mr. de Menezes should be prevented from boarding the train.

The following facts were disputed at the time but it seems there is a consensus (admitted tacitly even by the police) that Mr. de Menezes entered Stockwell calmly, passed the barriers with his oyster card and stopped to pick up a free newspaper. Only when half way down the stairs and after spotting the train in the station, he ran to catch it (normal behaviour for anyone wanting to arrive on time).

A minute later, the firearms officers arrived at the scene. One of the surveillance officers identified Mr. de Menezes to them and when he raised one the officer restrained him while the firearms personnel came and shot him 7 times in the head and one in the shoulder. He died instantly. Witnesses at the scene said there was no warning shout and evidence shows that 11 fires were shot in that carriage.

Investigations that should have started immediately were delayed several days and a very different account was given initially, stating that Menezes was behaving suspiciously, running and jumping the barriers wearing a “bulgy” jacket that could conceal a bomb.

All these facts were later proven false and an attempt to bar the investigation was later revealed.

The report from the IPCC on the case is still being kept secret and the only formal document on the subject is a CPS Statement in which it made public its decision not to charge any of the officers but to prosecute the Office of the Commissioner of Police for offences under the Health and Safety at Work Act. The Statement says:

“After the most careful consideration I have concluded that there is insufficient evidence to provide a realistic prospect of conviction against any individual police officer.

But I am satisfied that there is sufficient evidence to prosecute the Office of Commissioner of Police for an offence under sections 3 and 33 of the Health and Safety at Work Act 1974 of failing to provide

*for the health, safety and welfare of Jean Charles de Menezes on 22 July 2005.*⁷⁵

As noted above, the case has not reached the ECtHR yet and since the investigation is being kept secret, one can only speculate on aspects of the case, including what the Court may find about this case.

Shoot to kill Policies, organization and action

The first important point is the policy of shoot-to-kill unveiled by this case as well as the organization and the action itself.

In this specific case it became known to the general public that there is a policy of shoot-to-kill in place in England. Codenamed “Operation Kratos” it is supposed to be used against suicide bombers. The specific content of this policy and possible rules of engagement are being kept secret but there is no more reason to doubt that the British police is applying it in some cases.

This will probably be one of the first points to be raised as a possible violation of Mr. de Menezes’ right to life. He was shot without warning and in a way that left no chance whatsoever of survival.

It is interesting that this case resembles in several points the McCann case that opened the door for further scrutiny by the Court on Article 2 violations. Here, as well as back in Gibraltar, the lack of care in the pursuit of better information and accepting several assumptions at face value without challenging them, led to a fatal outcome which could have been easily avoided with more careful scrutiny.

Also, as in McCann, the automatic recourse to firearms seems to play a pivotal role in the outcome. In the present case, it is even more disturbing because, contrary to McCann, where military personnel trained to shoot to kill were being used in an exceptional situation for law enforcement, in this case the person being trained in this fashion was the regular firearms officer. Although this special force is being used for

⁷⁵ “CPS Statement: Charging decision on the fatal shooting of Jean Charles de Menezes” 17 July 2006. http://www.cps.gov.uk/news/pressreleases/146_06.html

counterterrorism purposes such as in McCann, it is important to highlight that it is not a military force. These were police officers trained to apply shoot to kill policies in peacetime, thus under a human rights framework. This case is unfortunately the best example of why shoot to kill policies serve no good purpose and can only lead to tragedy.

The initial part of the surveillance and the lack of a positive identification show a deep lack of due care for the rights of the individual being followed, especially since the officers knew that a shoot to kill policy may be applied to the situation. There is a great probability that the Court will find a violation of Mr. de Menezes' right under Article 2 for this absolute lack of care in identifying the person being pursued.

IPCC Investigation and Report

Again, the lack of information and the secrecy connected to the investigation makes a thorough analysis of it in the light of the ECtHR jurisprudence impossible, but some of the facts lend themselves to analysis.

First, the delay in the start of the investigation. It took almost a week for the IPCC to have access to the tube station, which casts several doubts as to the reliability of the evidence found. As we saw from the case law of the Court, there is an obligation of effectiveness and independence, which implies that the institution making the investigation must have unrestricted access to the evidence.

Second, the lack of information given to the family of Mr. de Menezes seems to fall short of the State obligations we saw previously in the matter.

Third, the leaked information to the effect that the Metropolitan police was obstructing the investigation casts even more doubt on the subject.

It is relevant to point out that the Court considers that one of the main objectives of an investigation to be the reassurance of the public as to the rule of law. The circumstances surrounding this case indicate the contrary..

Finally, the investigation has culminated in a controversial decision by the Crown Prosecution Service (CPS) to only prosecute the Metropolitan Police under a Health and Safety at Work Act.

Since this prosecution cannot lead to the establishment of personal responsibility and there are doubts as to what extent it can actually scrutinize the facts, it falls short of the demands under the jurisprudence of the Court on the Article 2 procedural obligation.

As we can see, with very little evidence and only taking into account facts that are not being disputed, there were several potential failings of the Metropolitan Police in relation to Jean Charles de Menezes' rights under Article 2.

This case is especially disturbing as it shows that while the Court is advancing rapidly to a more strict approach under Article 2, the State seems to be taking a few steps back in its respect for it.

In McCann, the British Government committed several mistakes in its operation that led to the tragic killing of the suspected terrorists, but it was in several other aspects right that the victims were terrorists and were preparing a major attack. It is also true at the time that the investigation of the case was quite thorough and there was no questions raised on its independence. For those reasons, the Court at the time considered the investigation to be compliant with the right to life.

On the other hand, although the Court became even more stringent as to the obligations of the State in these situations, the operation that led to Mr. De Menezes' demise was even more flawed and incompetent, leading an innocent to be mistaken for a wanted terrorist and shot dead unnecessarily. Moreover, there are several doubts as to the independence and effectiveness of the investigation of the IPCC and the decision of the CPI leads to even more suspicions of a cover-up.

Conclusion

The first point to emphasize at this stage is the relation between the right to life and the use of deadly force by the State. While the former – as its name implies – is a right enforceable and opposable to others, the latter is a prerogative. This may appear as an obvious and inconsequential statement but it does have, as we saw before, several repercussions for human rights and especially for the interpretations given by international courts.

As a right, the right to life must be protected against intrusions and entails obligations by other actors. To legally “infringe” on a right, one must have either a more important right to uphold or it must fall into a specific category of exceptions previously defined and usually limited.

The right to life is specifically considered one of the most important and basic rights, if not the most important. It is also the fundamental one that is absolutely necessary to be able to enjoy most other rights.

This position leaves very little room for exceptions and they must be very strictly defined, as we have seen from the jurisprudence of the European Court. Since there appears to be no other right “above” the right to life in the hierarchy of human rights, the only right opposable to it is itself. In other words, you can only infringe on someone’s right to life in defence of somebody else’s right to life. Therefore, the first exception to this right is self-defence and defence of others.

As for the others exceptions noted above, one can state that either imbued in their respective legal dispositions or interpreted through the jurisprudence, there is a direct connection to the right to life again. For example, while there is permission to employ deadly force in the course of a lawful arrest that appears not to be connected to the right to life, the European Court was careful to interpret that such a permission is only acceptable if the person being arrested either poses a real threat to life and limb of others or is suspected of committing a serious crime.

It is also important to point out that it falls to human rights courts – especially in the case of the ECHR – to define such terms as “arbitrary” or “absolutely

necessary”. They are almost always related to the concept of the use of deadly force and they serve as flexible limits to its scope. By taking their definition from the hands of the State and giving it to Courts and Judges that, by their very nature, have a more humanistic approach, the States themselves (which created the courts in the first place) accepted limitations that will be increasingly tighter. The idea of “pacta sunt servanda” itself becomes more flexible after all the interpretation of its own constitutive instruments falls to the courts. Courts tend to be wary of reliance on what the State intended and rely more on teleological interpretations empowering the rights themselves and not the excuses given by States.

On the other hand, the prerogative of the State to use deadly force is much more limited and constrained. I hope to have shown in this work the limits to this prerogative and how quickly they have evolved in the past ten to twenty years. Up until the eighties, the State had almost discretionary power to use violence, even in peacetime. Although the rules protecting the right to life already existed for some time, the mechanisms to enforce them were not in place.

We cannot pretend at this point that the system to protect this right is fully in place. The truth is that we are far from having a reasonable level of protection for this right against the State, but the point is, with the recent case law of the European Court, the right to life is gaining more and more strength at each new case, while the prerogative of the State is being increasingly limited.

Being a prerogative also means it is not opposable to others. A State may apply lethal force (in the restricted cases studied above) but it cannot obligate others (and here we are thinking of other States) to accept it.

The other point to emphasize is that the State prerogative to use deadly force, as the name implies, is not a prerogative to kill. The only instance where the State can knowingly and intentionally take a life is the death sentence.

As we saw before, the State may use in certain very restricted cases a level of force that may (usually very probably) kill the target. Nevertheless, that does not mean it can apply it with the specific intention to kill. The purpose of this prerogative

given to the State is to prevent someone from infringing others' right to life. If in the process the target is killed this would be an undesirable but necessary outcome.

If there is any doubt about that, we can refer again to McCann where the Court made it clear that the use of deadly force may be necessary, but the State cannot knowingly and intentionally premeditate circumstances where the target's right to life would necessarily be infringed. By extending the scope of its analysis to the preparation and the training of the law enforcement personnel and the organization of the operation, the Court made it clear that the State cannot rely on bad training and organization to create situations where the police will kill lawfully. Therefore, it was a natural conclusion of the case that, despite the fact that the use of force by the soldiers was considered legal the rest of the operation was condemned as a violation of Article 2.

While it is not in the scope of this work to study the death penalty and its consequences in international law, this study must address a couple of points on the subject since capital punishment is the only case where the state has the actual prerogative to take life, knowingly and intentionally.

The first point is that the death penalty has been in constant decline. According to the Amnesty International⁷⁶ since 1990 the number of abolitionist States has increased substantially, with around 40 new countries joining the ranks. In addition, extradition of a person from an abolitionist country to a possible death sentence has long been difficult. Extradition treaties with clauses that allow the abolitionists to deny extradition without assurances have been around since the beginning of the 20th century. The fact is that abolishing the death penalty is not only a change in punishment policies; it is usually an ideological choice pro life. That means that a State that has abolished capital punishment will tend to try to avoid being instrumental in the execution of someone. This ideological choice also explains why there is almost no return to applying the death penalty. The decision to abolish it is not trivial.

⁷⁶ Amnesty International, "United States of America: No return to execution – the US death penalty as a barrier to extradition", AMR 51/171/2001

It is also important to remark, that although in most extradition treaties the clause on the death penalty and the assurances are not obligatory, recent developments are changing that. In the case of *Judge v. Canada*, the author, Mr. Roger Judge, complained to the Human Rights Committee that Canada had violated his right to life by surrendering him to the United States where he faced the death penalty. Mr. Judge had been convicted to death in the State of Philadelphia and managed to escape to Canada where he ended up being arrested for robbery. After his capture, Canada, an abolitionist country, decided to keep him in prison for the remainder of his ten-year sentence for the robbery, at the end of which he was deported immediately to the United States. Canada had the option to stay his deportation and thus force the United States to request extradition. The extradition treaty between Canada and United States would have given Canada the option to request assurances from the US that Mr. Judge would not be executed.

The path of requesting assurances is optional to Canada; it is not its obligation. Nevertheless, the Committee still found Canada to be in breach of his obligations under the CCPR. According to the Committee,:

“For Countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it maybe reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.”⁷⁷

It is also relevant to point out that the ECtHR also had the occasion to address the issue of extradition to face the death penalty. In *Soering v. the United Kingdom*⁷⁸, Mr. Jens Soering, was a German national that participated with his girlfriend, Mrs. Elizabeth Haysom, in the murder of her parents in the State of Virginia in the United States. The couple was arrested in England for cheque fraud and served their sentences there, after which the United States sought extradition. Since Mrs. Haysom

⁷⁷ *Judge v. Canada*, Communication No 829/1998, Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights

⁷⁸ *SOERING v. the United Kingdom*, no. 14038/88, ECHR-1989

was not accused under capital charges in the US she was extradited, while Mr. Soering's case ended up in the ECtHR. In the Court, Mr. Soering alleged that his extradition would be a violation of his rights under several articles but above all article 3, because of the death row phenomenon. The government did seek assurances from the United States government and received them, but the assurances were considered by the British government to be useless as they did not actually assure that the execution would not happen, only that the federal government would represent the interests of the British government in the Virginian Court.

The Court found that the extradition without the required assurances would be a violation of Article 3.

Although this case was not related to Article 2, it is still relevant to point out that it created a precedent against deportation or extradition of people being tried under capital charges without the assurances. The assurances that were once a mere option in the extradition treaty between the UK and the US are now an obligation to the UK government.

These two cases are examples of a recent trend to transform what once was an alternative to abolitionist countries into an obligation for them. For those States in Europe that have decided to abolish capital punishment, it is not an alternative anymore; they must not extradite people to face such punishment. It is also interesting to point out that after additional protocol 13, the death penalty was completely abolished in Europe. All new States must adhere to this protocol and abolish the death penalty and the few States that have not done so (Russia is probably the best example) have been applying a long moratorium in executions.

The several examples of extradition treaties that contain clauses relative to the death penalty⁷⁹, serve to demonstrate that the death penalty is not a right of the State

⁷⁹ A good example is the European Convention on Extradition that dates back to 1957 and States in its article 11

“Article 11 – Capital punishment

If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition **may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out.**” (emphasis added) - European Convention on Extradition, Paris, 13.XII.1957

but merely a prerogative the world has not yet managed to eradicate. The increase in the number of abolitionist States coupled with the broadening of the limitations imposed on them to relinquish prisoners to face capital punishment shows that even this last bastion of State murder is rapidly disappearing. The already mentioned report⁸⁰ of Amnesty International on the consequences for the United States in retaining the death penalty, paints this picture very clearly.

As we can see, the relationship between the right to life and the prerogative of the State to take life is far from clear and even further from stable. There are several issues and bones of contention to be defined or solved.

International law has several standards and rules related to the right to life. The same right affects two different fields of international law and this position is being more and more settled in the apex of the hierarchy of human rights.

On the other hand, in Europe, although there is still a lot to be defined, the relations are much more developed, thanks especially to the work of the European Court of Human Rights.

The case law developed from the eighties onward on the topic of Article 2 and the use of deadly force is still in the forefront of the standards on the issue. The Court is defining the path this right is following and as it appears, it is a path of strengthening the right steadily while circumscribing ever more tightly the State's prerogative to use deadly force.

The creation of the doctrine of procedural obligation is an example of how the Court is innovative and bold in defending the right to life against arbitrary actions of the State. *McCann*, *Hugh Jordan*, *Shanaghan* and many others including several cases against Turkey during a low-level conflict shows that the Court is determined to enforce the right to life.

⁸⁰ Amnesty International, "United States of America: No return to execution – the US death penalty as a barrier to extradition", AMR 51/171/2001

In my opinion, all those evidences point to an increasingly humanistic view of the relation between the State and its citizens. Although there are bumps and set backs in its progress it seems clear to me that the right to life has already found his way to the top of the hierarchy of human rights and has now only to consolidate his position as a *Ius Cogens* norm.

Index

A

- Absolute necessityIII, 16, 26, 27, 28, 32, 33, 41
- Advisory Opinion10, 11, 12, v, viii, ix
- Arbitrary ...9, 10, 11, 12, 16, 19, 37, 38, 46, 61, 65, vi
- Article 2 of the European Convention (see European Convention on Human Rights) 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 32, 34, 35, 37, 38, 39, 40, 41, 42, 45, 46, 49, 50, 51, 52, 53, 57, 58, 59, 62, 64, 65, vi
- Article 6 of the CCPR.....7, 11, iii

C

- Civil Procedures.....III, 52
- Commission of Human Rights.....IV, 13, vii, xi
- Covenant of Civil and Political Rights.....IV, 9, 10, 11, 63, vi, vii, viii
- Criminal ProceduresIII, 49, 50, 51

D

- Deadly Force, Use of I, III, 7, 8, 10, 12, 13, 19, 28, 32, 34, 35, 36, 38, 39, 43, 55, 60, 61, 62, 65
- Death Penalty 15, iii, iv

E

- Effective investigation..... 37, 39, 43, 44, 45
- European Convention on Human Rights...I, III, 7, 13, 15, 21, 24, 64, vi, vii
- European Court of Human Rights . III, IV, 6, 7, 13, 14, 17, 20, 21, 22, 23, 25, 27, 29, 30, 31, 33, 35, 37, 39, 40, 41, 42, 43, 44, 45, 48, 49, 51, 52, 53, 60, 61, 65, iii, v, ix, x, xii
- Expeditious..... 14
- Extrajudicial, summary or arbitrary executions vii

F

- Forensic evidence43, 44, 46, 48
- Fundamental right..... 9

G

- Genocide..... 8, 11, iv, ix

H

- Human Rights ...I, III, IV, 6, 7, 8, 9, 11, 12, 13, 15, 17, 20, 21, 24, 27, 35, 37, 41, 42, 44, 58, 60, 61, 63, 65, iii, iv, v, vi, vii, ix, xi
- Human Rights Committee..... IV, 9, 63, vi
- Humanitarian LawIV, 7, 9, 10, 11, 12, iii, v, vi, xi

| | | | |
|---|---|--|------------------|
| <i>I</i> | | <i>O</i> | |
| Independence | 39, 46, 58, 59, xii | Occupation | 11, iv |
| International Court of Justice IV, 10, 11, 12, iv, viii, ix | | <i>P</i> | |
| International Criminal Court..... | IV | Positive obligation | 23 |
| International Criminal Tribunal for former Yugoslavia..... | IV | Positive right | 10 |
| International Criminal Tribunal for Rwanda IV, viii | | Procedural obligation III, 20, 36, 37, 39, 40, 41, 42, 43, 44, 46, 49, 50, 51, 52, 59, 65 | |
| <i>J</i> | | Prosecutorial review | 45 |
| Jurisprudence 16, 17, 19, 22, 29, 40, 53, 58, 59, 60 | | Public Scrutiny | 38, 40 |
| <i>K</i> | | <i>S</i> | |
| Killing .6, 16, 18, 19, 21, 25, 31, 37, 38, 39, 40, 51, 59, iii, v, xii, xiii, xiv | | See Human Rights Committee..... | IV |
| <i>L</i> | | See War | vi, xi |
| Law Enforcement Model..... | 45, 46, 50, 51 | Shoot-to-kill III, 5, 6, 28, 31, 32, 49, 57, 58, xii, xiii, xiv | |
| Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion | 12, viii | Special Rapporteur..... | vi |
| Legal framework..... | III, 16, 20, 21, 41 | State obligations..... | 58 |
| Life, Right to | I, III, 8, 11, 15, 17, 19, 20, 21, 27, 35, 37, 41, 42, 44, iii, iv, v, vi, vii | State Responsibility | 18, 34 |
| <i>N</i> | | Substantive obligation | 37, 45, 49 |
| Non-derogable..... | 8, 9 | <i>T</i> | |
| Nuclear Weapons..... | 10, 11, 12, iv, v, vi, viii | Torture | 8, 39 |
| | | <i>U</i> | |
| | | United Nations | IV, 46, vi, viii |
| | | United Nations Charter..... | vii |

Universal Declaration of Human Rights .. 13, iv

W

V

War5, 6, 9, 11, 15, 65, iii

Violence.....II, 10, 15, 19, 24, 32, 34, 61, xi

Weberian 10

Bibliography

Books

- AMIS, Marti and JACK, Ian, *The Murderee*, Granta, London, 1988
- BEDDARD, Ralph. *Human Rights and Europe*. 3rd ed., Grotius Publications Limited. UK, 1993
- GASSER, Hans Peter, *International Humanitarian Law*, in HAUG, Hans, “Humanity for All: The International Red Cross and Red Crescent Movement”, Henry Dunant Institute, Bern, 1993
- GÖRAN, Franck. *The Barbaric Punishment. Abolishing the Death Penalty*. Martinus Nijhoff Publishers. The Hague. 2003
- GROSSMAN, Dave. *On Killing: The Psychological Cost of Learning to Kill in War and Society*, Back Bay Books, 1996
- ICRC. *Human rights and the ICRC: international humanitarian law*, ICRC publication 1993
- LEACH, Philip. *Taking a Case to the European Court of Human Rights*. 2a ed. Oxford University Press. New York, 2005
- OKECHUKWU, Sylvanus Ndubisi. *Right to life and the right to live: ethics of international solidarity*. Frankfurt, Germany, 1990.
- MARKS, Susan and CLAPHAM, Andrew. *International human rights lexicon*. Oxford University Press, Oxford, 2005
- NOWAK, Manfred. *Article 6, the right to life, survival and development*. Martinus Nijhoff Publishers, Leiden. 2005
- RAMCHARAM, B. G., *The Right to Life in International Law*, in the series “International Studies in Human Rights”, Martinus Nijhoff Publishers, Lancaster, 1985
- RATNER, Steven R. and ABRAMS, Jason S. *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford University Press, New York, 2001
- SCHABAS, William. *The Abolition of the Death Penalty in International Law*. 3^{er} ed., Cambridge University Press. UK, 2002
- SIEGHART, Paul. *The Lawful Rights of Mankind*. Oxford University Press, Oxford, 1985

SMITH, Rhona K. M. *TextBook on International Human rights*, Oxford University Press, New York, 2005

Collective Contributions

COHEN-JONATHAN Gérard et William SCHABAS. *La peine capitale et le droit international des droits de l'homme*. Université Panthéon-Assas (Paris II), 2001

DOUCET, Ghislaine. *Terrorisme, Victimes et Responsabilité Pénale Internationale*. S.O.S. Calmann-Levy, Ireland, 2003.

GOWLLAND-DEBBAS, Vera "The Right to Life and Genocide: the Court and an International Public Policy", in *International Law, the International Court of Justice and Nuclear Weapons*, Philippe Sands and Laurence Boisson de Chazournes (eds.), Cambridge University Press, 1999, pp.315-337.

INSTITUTO DE DERECHOS HUMANOS PEDRO ARRUPE. *Anuario de acción humanitaria y derechos humanos*. Universidad de Deusto, Bilbao, 2004.

MAYENZET, Paul. *Essais sur le concept de 'droit de vivre': en mémoire de Yuogindra Khushalani*. Bruylant, Bruxelles, 1988.

PREMONT, Daniel. Symposium: "The right to life, forty years after the adoption of the Universal Declaration of Human Rights: Evolution of the concept, norms and cases-law" Geneva, 1988.

RAULIN, Arnaud de. *Situation D'Urgence et Droit Fondamentaux*. L'Harmattan, 2006.

UHL, Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation, International Conference Center, Geneva, 1-2 September 2005

Articles

ABOU-EL-WAFA, Ahmed, "Le Devoir de Respecter le Droit a la Vie en Droit International Public", *Revue Egyptienne de Droit International*, Vol. 40, 1984

AMNESTY INTERNATIONAL, *United States of America, No return to execution. The US death penalty as a barrier to extradition*. November 2001

AOLÁIN, Fionnuala Ní. "Truth Telling, Accountability and the Right to Life in Northern Ireland" in *European Human Rights Law Review*, Issue 5, 2002

BINNING, Peter. "Extradition and the Death Penalty". *Commonwealth Law Conference in Melbourne*, Australia in April 2003.

- CASSESE, Antonio. "Current trends in the development of the law of armed conflict", in *Rivista trimestrale di diritto pubblico*, Milan, no 4, 1974, p. 1408-1448
- CASSESE, Antonio. "The current legal regulation of the use of force in Developments in international law", *Dordrecht*, Boston, M. Nijhoff, 1986, p. 536
- CHRISTOPHER, Russel. "Self-Defence and Defence of Others" in *Philosophy and Public Affairs*, Vol. 27, No. 2 (Spring, 1998), pp. 123-141
- CLAPHAM, Andrew. "Creating the High Commissioner for Human Rights: The Outside Story". *EJIL* (1994), pp. 556-568.
- DOSWALD-BECK, Louise and VITÉ, Sylvain. "International Humanitarian Law and Human Rights Law", *International Review of the Red Cross* no 293, April 1993, pp. 94-119
- GEWIRTH, Alan. "There are Absolute Rights" in *The Philosophical Quarterly*, Vol. 32, No. 129 (Oct.,1982), pp. 348-353
- GREENWOOD, Christopher. "The Advisory Opinion on nuclear weapons and the contribution of the International Court to international humanitarian law", *International Review of the Red Cross* no 316, February 1997, pp. 65-75
- HANS-JOACHIM, HEINTZE, "On the relationship between human rights law protection and international humanitarian law", *International Review of the Red Cross* December 2004 Vol. 86 No 856
- HENDIN, Stuart E. "The Evolution of the Right to Life by the European Court of Human Rights", *Baltic Yearbook of International Law*, Vol. 4, 2004, pp. 75-110
- MARTIN, Neil. "Bubbins v. United Kingdom: Civil Remedies and the Right to life." *The Modern Law Review Limited*, 2006.
- MC GUIRK, Noel. "Justice- Lessons from Northern Ireland? *University of Ulster*. Northern Ireland.
- MCCLOSKEY, H. J. "The Right to Life" in *Mind*, New Series, Vol. 84, No. 335 (Jul., 1975), pp. 403-425
- MCDONNELL, Thomas Michael. "Assassination/Targeted Killing of Suspected Terrorist, a violation of international law?". *Peace University School of Law*, 2005.
- ROVER, Cees De. "Police and Security Forces: A new interest for human rights and humanitarian law" in *International Review of the Red Cross* no. 835, September 1999, pp. 637-647
- ROVER, Cees. "To Serve and Protect: Human Rights and Humanitarian Law for Police and Security Forces", *ICRC*, Geneva 1998

RUYS, Tom. "License to kill? State-sponsored assassination under international law." *K.U. Leuven*. Faculty of Law. Institute for international law, working paper No. 76-May 2005.

SANCTIS, Francesco de. "What Duties do States have with Regard to the Rules of Engagement and the Training of Security Forces under Article 2 of the European Convention on Human Rights?", in *the International Journal of Human Rights*, Vol. 10, No. 1, March 2006, pp. 31-44

TWEETIE, June and WARD, Tony. "The Gibraltar Shootings and the Politics of Inquests" in *Journal of Law and Society*, Vol. 16, No. 4 (winter, 1989), pp. 464-476.

UZUN, Aysegül. *The Protection of the Right to life in Turkey*. *University of Bahçesehir*, Istanbul, 2002

WATKIN, Kenneth. "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict" in *The American Journal of International Law*, Vol. 98, No. 1 (Jan., 2004), pp. 1-34

ZEGVELD, Liesbeth. "The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada Case", *International Review of the Red Cross* no 324, September 1998, pp.505-511

UN Documents

General Assembly Documents

General Assembly Resolution 38/75

Universal Declarations on Human Rights

Commission on Human Rights and Human Rights Committee

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth Crime Congress, Havana, 27 August- 7 September 1990

General Comment No. 14: Nuclear Weapons and the Right to Life (Art. 6): 09/11/1984, CCPR General Comment No. 14 (General Comments)

United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Doc. E/ST/CSDHA/12 (1991)

Report of the Special Rapporteur, Philip ALSTON, "CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF DISAPPEARANCES AND

SUMMARY EXECUTIONS: Extrajudicial, summary or arbitrary executions”,
E/CN.4/2006/53, 8 march 2006

CHR resolution 20 (XXXVI), of 29 February 1980

General Comment No. 06: The Right to Life (Art. 6): 30/04/82, CCPR General
Comment No. 06 (General Comments)

CHR resolution 1992/72, 5 March 1992

General Comment No. 29: State of Emergency (Art. 4): 31/08/2001, CCPR General
Comment No. 29 (General Comments)

Canada – CCPR/C/78/D/829/1998 [2003] UNHRC 51 (20 October 2003)

Regional Organizations Documents

American Declaration of the Rights and Duties of Man, Approved by the Ninth
International Conference of American States, Bogotá, Colombia, 1948

EWCA Civ 1609 Case No: C1/2005/0461B. Royal Courts of Justice. Strand, London,
WC2A 2LL, 21 December 2005.

Treaties, Conventions

African Charter on Human and Peoples' Rights

American Convention on Human Rights, Adopted at the Inter-American Specialized
Conference on Human Rights, San José, Costa Rica, 22 November 1969

European Convention for the Protection of Human Rights and Fundamental Freedoms
as Amended by protocol No. 11

European Convention on Extradition. Paris, 13.XII.1957

International Covenant on Civil and Political Rights, adopted and opened for
signature, ratification and accession by General Assembly resolution 2200A (XXI) of
16 December 1966, entry into force 23 March 1976, in accordance with Article 49

Protocol No. 13 to the Convention for the Protection of Human Rights and
Fundamental Freedoms Concerning the abolition of the death penalty in all
circumstances, Vilnius, 3.V.2002

Protocol No. 6 to the Convention for the Protection of Human Rights and
Fundamental Freedoms concerning the abolition of the death penalty, Strasbourg,
28.IV.1983

Cases

Acutan and Amnesty International v Malawi, Communications 64/92, 68/92, 78/92, 7th AAR, Annex

Baboeram, Kamperveen, Riedewald, Leckie, Oemrawsingh, Solansingh, Raham and Hoost v Suriname, UN Docs CCPR/C/24/D/146 & 148 & 154/1983; UN Doc Supp. No. 40 (A140/40) at 187

Commission Nationale des Droit de L'Homme et des Libertes v Chad, Communication 74/92, 9th AAR, annex (1995)

Judge v. Canada, Communication No 829/1998, Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights

Ouédraogo v Burkina Faso, Communication 204/97, ACHPR 29th Sess (2001)

Paton v United Kingdom (1980) 19 DR 244

Prosecutor v Akayesu, Case No. ICTR 96-4-A, Judgement 2 September 1998, Appeal, 1 June 2001

Prosecutor v Dusko Tadic, Case IT 94-1, judgement 7 May 1997, Appeal Chamber 15 July 1999

Prosecutor v Kambanda, Case No. ICTR 97-23-A, Judgement 4 September 1998, Appeal, 19 October 2000

Prosecutor v Nahimana, Barayagwiza and Ngeze, Case No. ICTR 99-52-T, Judgement 3 December 2003

Prosecutor v Radislav Krstic, Case IT 98-33-A, Judgement 2 August 2001, Appeal, 19 April 2004

Prosecutor v Slobodan Milosevic, Case IT 02-54

Prosecutor v Zejnil Delalic, Zdravko Mucic, Hzim Delic and Esad Landzo (the Celebici Judgement), Case IT 96-21-T, 16 November 1998

Trujilo Oroza Case Ser. C, No. 64 (2000)

Velásquez Rodríguez Case, Ser. C, No. 4 (1988)

International Court of Justice

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ, Reports, 2004, p. 136

Legality Of The Threat Or Use Of Nuclear Weapons, Advisory Opinion 8 July 1996 (Reports 1996, p. 226)

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment 27 June 1986 (Reports 1986, p. 14)

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ, Reports, 1951, p.15

European Court of Human Rights

AKKOC v. Turkey, nos. 22947/93 and 22948/93, ECHR-2000

AKKUM AND OTHERS v. Turkey, no. 21894/93, ECHR-2005

AKTAS v. Turkey, no. 24351/94, ECHR-2003

ANGUELOVA v. Bulgaria, no. 38361/97, ECHR-2002

AVSAR v. Turkey, no. 25657/94, ECHR-2001

BAYRAK AND OTHERS v. Turkey, no. 42771/98, ECHR-2006

BUBBINS v. The United Kingdom, no. 50196/99, ECHR-2005

ÇAKICI v. Turkey [GC], no. 23657/94, ECHR-1999

CALVELLI AND CIGLIO v. Italy [GC], no. 32967/96, ECHR-2002

CICEK v. Turkey, no. 25704/94, ECHR-2001

CYPRUS v. Turkey, no. 25781/94, ECHR-2001

DEMIRAY v. Turkey, no. 27308/95, ECHR-2000

DENIZCI AND OTHERS v. Cyprus, nos. 25316/94, 25317/94 and 25318/94, ECHR-2001

ERGI v. Turkey, no. 23818/94, ECHR-1998

ERTAK v. Turkey, no. 20764/92, ECHR-2000

EVANS v. The United Kingdom, no. 6339/05, ECHR- 2006

FINUCANE v. The United Kingdom, no. 29178/95, ECHR-2003

GÜL v. Turkey, no. 22676/93, ECHR-2000

GÜLEC v. Turkey, no. 21593/93, ECHR-1998

HUGH JORDAN v. The United Kingdom, no. 24746/94, ECHR-2001

I. BILGIN v. Turkey, no. 25659/94, ECHR-2001

ILHAN v. Turkey [GC], no. 22277/93, ECHR-2000

KAKOULLI v. Turkey, no. 38595/97, ECHR-2005

KAYA V. Turkey, no. 22729/93, ECHR-1998

KEENAN v. The United Kingdom, no. 27229/95, ECHR-2001
KELLY AND OTHERS v. The United Kingdom, no. 30054/96, ECHR-2001
KILIC v. Turkey, no. 22492/93, ECHR-2000
MAHMUT KAYA v. Turkey, no. 22535/93, ECHR-2000
MAKARATZIS v. Greece, no. 50385/99 [GC], ECHR-2004
MASTROMATTEO v. Italy [GC], no. 37703/97, ECHR-2002
McCANN and Others v. the United Kingdom [GC], no. 18984/91, ECHR-1995
McKERR v. The United Kingdom, no. 28883/95, ECHR-2001
McSHANE v. The United Kingdom, no. 43290/98, ECHR-2002
MENTES AND OTHERS v. Turkey [GC], no. 23186/94, ECHR-1997
NACHOVA AND OTHERS v. Bulgaria [GC], nos. 43577/98 and 43579/98, ECHR-2005
OCALAN v. Turkey [GC], no. 46221/99, ECHR-2005
OGUR v. Turkey [GC], no. 21594/93, ECHR-1999
ONERYILDIZ v. Turkey [GC], no. 48939/99, ECHR-2004
OSMAN v. The United Kingdom [GC], no. 23452/94, ECHR-1998
PAUL AND AUDREY EDWARDS v. The United Kingdom, no. 46477/99, ECHR-2002
PRETTY v. The United Kingdom, no. 2346/02, ECHR-2002
RAMSAHAI and Others v. The Netherlands, no. 52391/99, ECHR-2005
SABUKTEKIN v. Turkey, no. 27243/95, ECHR-2002
SALMAN v. Turkey [GC], no. 21986/93, ECHR-2000
SHAMAYEV AND 12 OTHERS v. Georgia and Russia, no. 36378/02, ECHR-2005
SHANAGHAN v. the United Kingdom, no. 37715/97, ECHR-2001
ŞIRIN YILMAZI v. Turkey, no. 35875/97, ECHR-2004
SLIMANI v. France, no. 57671/00, ECHR-2004
SOERING v. the United Kingdom, no. 14038/88, ECHR-1989
STEWART v. the United Kingdom, no. 10044/82, ECHR-1984
STRELETZ, KESSLER AND KRENZ v. Germany, no. 34044/96;35532/97;44801/98. ECHR-2001
TAHSIN ACAR v. Turkey [GC], no. 26307/95, ECHR-2004
TANIS AND OTHERS v. Turkey, no. 65899/01, ECHR-2005
TANLI v. Turkey, no. 26129/95, ECHR, 2001
TANRIKULU v. Turkey [GC], no. 23763/94, ECHR-1999

TEKIN v. Turkey, no. 22496/93, ECHR-1998
TIMURTAS v. Turkey, no. 23531/94, ECHR-2000
TRUBNIKOV v. RUSSIA, no. 49790/99, ECHR-2005
TÜRKOĞLU v. Turkey, no. 34506/97, ECHR-2005
VELIKOVA v. Bulgaria, no. 41488/98, ECHR-2000
VO v. France [GC], no. 53924/00, ECHR-2004
YASIN ATEŞ v. Turkey, no. 30949/96, ECHR-2005

European Commission of Human Rights

Ursula Balmer-schafroth and nine others against Switzerland report adopted on 18 April 1996

NGO Documents

KELLENBERGER, Jakob. *International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence*, Statement addressed by the President of the International Committee of the Red Cross in the occasion of the 27th Annual Round Table on Current Problems of International Humanitarian Law, International Institute of Humanitarian Law in co-operation with the International Committee of the Red Cross, 4 September 2003

KELLENBERGER, Jakob. *Protection through complementarity of the law*, Official Statement in the 27th Annual Round Table on Current Problems of International Humanitarian Law, San Remo, Italy, 4-6 September, 2003

Report on the 28th International Conference of the Red Cross and Red Crescent, International Humanitarian Law and the Challenges of Contemporary Armed Conflict, International Committee of the Red Cross, Geneva, September 2003

Summary Report of the First Expert Meeting, *Direct Participation in Hostilities under International Humanitarian Law*, Co-organized by the ICRC and the TMC Asser Institute, Geneva, 2 June 2003

Summary Report of the Second Expert Meeting, *Direct Participation in Hostilities under International Humanitarian Law*, Co-organized by the ICRC and the TMC Asser Institute, The Hague, 25 – 26 October 2004

What is the difference between humanitarian law and human rights law?, extract from ICRC publication "International humanitarian law: answers to your questions", October 2002

Web Pages

- WEBER, Max. "Politics as a vocation",
http://www.ne.jp/asahi/moriyuki/abukuma/weber/lecture/politics_vocation.html
- <http://www.ohchr.org/english/issues/executions/index.htm>
- <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/>
- <http://www.justice.gouv.fr/textfond/ddhc.htm>
- http://en.wikipedia.org/wiki/United_States_Declaration_of_Independence
- http://en.wikipedia.org/wiki/Jean_Charles_De_Menezes
- "CPS Statement: Charging decision on the fatal shooting of Jean Charles de Menezes" 17 July 2006.
http://www.cps.gov.uk/news/pressreleases/146_06.html
- Home town buries shot Brazilian", BBC News, 29 July 2005.
- New claims emerge over Menezes death", The Guardian, 17 August 2005.
- Doubt over shoot-to-kill policy", The Independent, 21 August 2005.
- Brazilian "was to be taken alive"", News, 18 August 2005.
- Executed: Anatomy of a police killing", Daily Dispatch, 23 August 2005.
- De Menezes 'shot 11 times during 30 seconds'", Daily Telegraph, 26 August 2005.
- De Menezes "Two bursts of gunfire at Tube death, say witnesses"", Daily Telegraph, 27 August 2005.
- Cusick, James, "A COVER-UP? AND IF SO ... WHY?", Sunday Herald, 21 August 2005.
- London police chief defends handling of shooting", New Zealand Herald, 22 August 2005.

- "Cousin of innocent shooting victim speaks", Life Style Extra, 24 July 2005.
- "Is police anti-terror policy justified?", BBC News, 26 July 2005.
- "Protest in Brazil after shooting", BBC News, 26 July 2005.
- Kingstone, Steve, "Brazilian's death was 'third-world error'", BBC News, 25 July 2005.
- Brazil Report 2004. Amnesty International (2004). Retrieved on 2006-08-01.
- "Shoot to kill is state murder", Socialist Worker, 30 July 2005.
- "'Crucifying the police will achieve nothing'", The Daily Telegraph, 23 August 2005.
- Commissioner's letter to The Home Office. Metropolitan Police Service - Homepage. Retrieved on October 4, 2005.
- "De Menezes lawyers meet IPCC", ITV News, 18 August 2005.
- "Full text: IPCC statement", The Guardian, 18 August 2005.
- "Met 'resisted Tube death probe'", BBC News, August 18, 2005.
- IPCC take over investigation into Stockwell shooting IPCC Press Release (25 July 2005) Accessed on 18 August 2005.
- "Police criticise 'perverse' IPCC", BBC News, May 9, 2006.
- "Mistakes led to tube shooting", ITV, 16 August 2005.
- "Whistleblower suspended", Metro, 21 August 2005.
- "ITN journalist arrested over leak from Stockwell shooting inquiry", The Guardian, January 25, 2006.
- "No charges follow Menezes 'leak'", BBC News, May 5, 2006.
- "Charges Eyed in British Mistaken Shooting", The Guardian, December 10, 2005.
- IPCC Completes Recommendation Report Following Stockwell Investigation. IPCC (March 14, 2006). Retrieved on 2006-05-10.
- "Ten police officers may face charges over Stockwell station killing, says IPCC report", The Guardian, January 20, 2006.
- Dodd, Vikram, "Officer who challenged Met chief may lose job", The Guardian, April 18, 2006. Retrieved on 2006-07-17.
- "Menezes claim sparks libel talks", BBC News, 17 March 2006.
- "Met Police 'regret' Menezes claim", BBC News, 28 March 2006.
- "No charges for Menezes officers", July 17, 2006.
- "Will police now shoot to kill?", BBC News, July 22, 2005.

- ^ MPA: Committees: Reports: 27 Oct 05 (13) "Suicide terrorism". Metropolitan Police Authority (October 27, 2005). Retrieved on 2006-08-26.
- Jon Silverman. "Shooting watershed for UK security", BBC News, July 23, 2005.
- "Debate rages over 'shoot-to-kill'", BBC News, July 24, 2005.
- "Shot man not connected to bombing", BBC News, July 23, 2005.
- The Jean Charles de Menezes Family Campaign. Justice4jean.com. Retrieved on 25 August 2005.
- De Menezes Family Campaign Launch And Rally. The Londonist (October 7, 2005). Retrieved on 17 July 2006.
- Philip Johnston. "'Marxists have hijacked family's quest for justice'", The Daily Telegraph, August 24, 2005.
- "Galloway adviser is helping Brazilian campaign", The Times, 24 August 2005.
- "Brazilian officials in UK for answers on killing", The Guardian, 23 August 2005.
- "Shoot-to-kill without warning", The Sunday Times, 31 July 2005.
- "Police shoot man at underground station", Reuters, 22 July 2005.; & "Man shot dead by police on Tube", BBC News, 22 July 2005.
- Choonara, Joseph, "Inconsistencies fuel claim of police disinformation over Jean Charles de Menezes", Socialist Worker, 27 August 2005.
- "Doubts grow over facts of Tube shooting", The Scotsman, 31 July 2005.
- "Row over 'blank' CCTV tapes at station", The Guardian, 23 August 2005.
- "Tube CCTV: Was there a cover-up?", Daily Mail, 23 August 2005.
- "Unenviable choices on suicide bombers", Financial Times, 26 July 2005.
- "Police shot Brazilian eight times", BBC News, 25 July 2005.
- Gibson, Jano, "Day Jean Charles's luck turned lethal", Sydney Morning Herald, 25 July 2005.
- Health and Safety at Work etc Act 1974. Her Majesty's Stationery Office (1991). Retrieved on 2006-07-18.