Andrea Carcano

Notable Cases of the European Court of Human Rights on the Right to Life

G. Giappichelli Editore

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Materials and Analysis

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Theo van Doesburg, *Contra-Compositie XIII* (1925-26), oil on canvas, Peggy Guggenheim Collection, Venice.

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To All the Medical Workers Who Fought
for the Lives of Coronavirus Patients

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Foreword
(What happened after the smile left his face)

I do believe that a course on the protection of human rights at the international level can provide law students with a highly formative training. Some messages can be transmitted. First, the State cannot avail itself of any means to reach its objectives, since there are limits which are inherent to human dignity and are imposed by law and morality.[1] Second, certain treaties have established the judiciary machinery that allows the individual to bring an action against the State and obtain redress, if a breach of human rights has occurred. The fact that, unfortunately, this kind of treaties do not always exist or are not always applicable can only confirm the strict link between the substantive and the procedural aspects of human rights protection.

Since 1998 a course on "international protection of human rights" is being offered in the University of Milano-Bicocca. Until 2007 it was taught by Carlo Russo (1920-2007), a former judge of the European Court of Human Rights, who was extremely effective, also for the clarity of his mind and speech, in involving the audience in the cause of human rights enhancement.[2] The teaching of human rights was subsequently offered in two different courses, one in Italian and the other in English, the latter for the benefit of foreign students and those national students who wanted to engage themselves in a more challenging exercise from the linguistic point of view. I remember that Andrea Carcano and myself – as we were both in charge of the English course – made forecasts about the number of attending students and that the conceptual categories evoked in this regard were those of "nullity", "unity" or "plurality". Fi-

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[1] "Without question, the State has the right and duty to guarantee its security. It is also indisputable that all societies suffer some deficiencies in their legal orders. However, regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action" (INTER-AMERICAN COURT OF HUMAN RIGHTS, judgment of 20 January 1989, *Godínez Cruz v. Honduras*, para. 162).

[2] His teaching is reflected in RUSSO & QUAINI, La Convenzione europea dei diritti dell'uomo e la giurisprudenza della Corte di Strasburgo, 2nd ed., Milano, 2006.

nally we were happy enough to get "plurality" (which, in fact, refers to any number above one).

Convinced that numbers are not the most important aspect of life, we also planned a publication devoted to the human rights cases addressed in the classes. The outcome is the present book. It focuses on the right to life and aims at acquainting the reader with the events and the legal elaboration that mark a number of seminal judgments rendered by the European Court of Human Rights on the right to life. It also includes a critical analysis of the judicial developments linked to those judgments.

* * *

Even in the short space reserved to a foreword, I cannot refrain from putting forward a few remarks that show how interesting are some of the cases discussed in this book.

As regards the right to life, the applicable rule of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950)[3] is Art. 2. While apparently absolute and included by Art. 15 in the so-called hard-core of the Convention to which no derogation is admissible, Art. 2 allows for three exceptions, namely the death penalty,[4] the lethal use of force[5] and lawful acts of war.[6]

Where lethal use of force is being discussed, the description of the relevant facts becomes particularly important in order to seize the relationship between the rule and the exception. For instance, this is the way in which, on 6 March 1988, Mr. Daniel McCann (1957-1988) and Ms. Mairéad Farrell (1957-1988) approached the end of their life (judgment by the European Court of Human Rights of 27 September 1995 in the case *McCann and others v. the United Kingdom*):[7]

> "Soldiers *A* and *B* continued north up Winston Churchill Avenue [in Gibraltar] after McCann and Farrell, walking at a brisk pace to close the distance. McCann

[3] Commonly called European Convention on Human Rights (hereinafter: Convention).

[4] Second sentence of para. 1 of Art. 2.

[5] Art. 2, para. 2.

[6] Art. 15, para. 2. The right of the State to kill people as a result of "lawful acts of war" can logically be seen as an exception to an exception (human rights provided for in the Convention can be derogated; exceptionally, no derogation is allowed to the right to life as set forth in Art. 2 of the Convention; exceptionally, the right to life can be derogated if people are killed as a result of lawful acts of war). However, it should be noticed that Art. 2 already has in itself two derogations (death penalty and lethal use of force).

[7] For a comprehensive recollection of all the relevant facts, see Chap. 5, paras. from A to D.

was walking on the right of Farrell on the inside of the pavement. He was wearing white trousers and a white shirt, without any jacket. Farrell was dressed in a skirt and jacket and was carrying a large handbag.

When Soldier *A* was approximately ten metres (though maybe closer) behind McCann on the inside of the pavement, McCann looked back over his left shoulder. McCann appeared to look directly at *A* and the smile left his face, as if he had a realisation of who *A* was and that he was a threat.

Soldier *A* drew his pistol, intending to shout a warning to stop at the same time, though he was uncertain if the words actually came out. McCann's hand moved suddenly and aggressively across the front of his body. *A* thought that he was going for the button to detonate the bomb and opened fire. He shot one round into McCann's back from a distance of three metres (though maybe it may have been closer). Out of the corner of his eye, *A* saw a movement by Farrell. Farrell had been walking on the left of McCann on the side of the pavement next to the road. *A* saw her make a half turn to the right towards McCann, grabbing for her handbag which was under her left arm. *A* thought that she was also going for a button and shot one round into her back. He did not disagree when it was put to him that the forensic evidence suggested that he may have shot from a distance of three feet. Then *A* turned back to McCann and shot him once more in the body and twice in the head. *A* was not aware of *B* opening fire as this was happening. He fired a total of five shots.

Soldier *B* was approaching directly behind Farrell on the road side of the pavement. He was watching her. When they were three to four metres away and closing, he saw in his peripheral vision that McCann turned his head to look over his shoulder. He heard what he presumed was a shout from *A* which he thought was the start of the arrest process. At almost the same instant, there was firing to his right. Simultaneously, Farrell made a sharp movement to her right, drawing the bag which she had under her left arm across her body. He could not see her hands or the bag and feared that she was going for the button. He opened fire on Farrell. He deemed that McCann was in a threatening position and was unable to see his hands and switched fire to McCann. Then he turned back to Farrell and continued firing until he was certain that she was no longer a threat, namely, her hands away from her body. He fired a total of seven shots".[8]

The third and last member of the group of people suspected of a terrorist attack by way of a car bomb was Mr. Sean Savage (1965-1988):

"After the three suspects had split up at the junction, Soldier *D* crossed the road and followed Savage who was heading towards the Landport tunnel. Savage

[8] Paras. 60-62 of the judgment. The paragraphs are based on the evidence provided by soldiers *A* and *B* at the inquest made by the Gibraltar Coroner. The European Commission of Human Rights found that "Ms Farrell and Mr McCann were shot by Soldiers A and B at close range after the two suspects had made what appeared to the soldiers to be threatening movements. They were shot as they fell to the ground but not when they were lying on the ground" (para. 132). The Court took the Commission's establishment of the facts and findings to be an accurate and reliable account of the facts underlying the case (para. 169).

was wearing jeans, shirt and a jacket. Soldier *C* was briefly held up on the other side of the road by traffic on the busy road but was catching up as *D* closed in on Savage. *D* intended to arrest by getting slightly closer, drawing his pistol and shouting 'Stop. Police. Hands up'. When *D* was about three metres away, he felt that he needed to get closer because there were too many people about and there was a lady directly in line. Before *D* could get closer however, he heard gunfire to the rear. At the same time, *C* shouted 'Stop'. Savage spun round and his arm went down towards his right hand hip area. *D* believed that Savage was going for a detonator. He used one hand to push the lady out of line and opened fire from about two to three metres away. *D* fired nine rounds at rapid rate, initially aiming into the centre of Savage's body, with the last two at his head. Savage corkscrewed as he fell. *D* acknowledged that it was possible that Savage's head was inches away from the ground as he finished firing. He kept firing until Savage was motionless on the ground and his hands were away from his body.

Soldier *C* recalled following after Savage, slightly behind *D*. Savage was about eight feet from the entrance to the tunnel but maybe more. *C*'s intention was to move forward to make arrest when he heard shots to his left rear from the direction in which Farrell and McCann had headed. Savage spun round. *C* shouted 'Stop' and drew his pistol. Savage moved his right arm down to the area of his jacket pocket and adopted a threatening and aggressive stance. *C* opened fire since he feared Savage was about to detonate the bomb. He saw something bulky in Savage's right hand pocket which he believed to be a detonator button. He was about five to six feet from Savage. He fired six times as Savage spiralled down, aiming at the mass of his body. One shot went into his neck and another into his head as he fell. *C* continued firing until he was sure that Savage had gone down and was no longer in a position to initiate a device.[9]

Mr. McCann was hit by five bullets, Ms. Farrell by eight and Mr. Savage by sixteen.

At this point, on the basis of the knowledge of what happened after "the smile left the face" of Mr. McCann, the task of the lawyer begins, that is the framing of the facts into the logical scheme set forth by a legal provision. According to Art. 2, para. 2, of the Convention, the deprivation of life shall not be regarded as inflicted in contravention with the right to life when it results from the use of force which is no more than absolutely necessary in defence of any person from unlawful violence or in order to effect a lawful arrest. The question is whether the relevant facts fit the rule (an instance of violation of

[9] Paras. 78-79 of the judgment. The paragraphs are based on the evidence provided by soldiers *C* and *D* at the inquest made by the Gibraltar Coroner. The European Commission of Human Rights found that "there was insufficient material to rebut the version of the shooting given by Soldiers C and D. Mr Savage was shot at close range until he hit the ground and probably in the instant as or after he hit the ground" (para. 132). The Court took the Commission's establishment of the facts and findings to be an accurate and reliable account of the facts underlying the case (para. 169).

the right of the human being to life) or the exception (an instance where the State has the right to deprive a human being of his/her life). As the Court said, the British authorities, who had been informed that there would be a terrorist attack in Gibraltar, were presented with a fundamental dilemma that had the right to life as its core:

> "On the one hand, they were required to have regard to their duty to protect the lives of the people in Gibraltar including their own military personnel and, on the other, to have minimum resort to the use of lethal force against those suspected of posing this threat in the light of the obligations flowing from both domestic and international law".[10]

In the specific case, additional, but not irrelevant, facts come into play when trying to give an answer to the dilemma. It is true that "soldiers A to D opened fire with the purpose of preventing the threat of detonation of a car bomb in the centre of Gibraltar by suspects who were known to them to be terrorists with a history of previous involvement with explosives".[11] But it is also true that, on 6 March 1988, after the shooting, the bodies of the three suspects were searched and no weapons or detonating devices were discovered on them.[12] An explosive device, which was not primed or connected, was later found concealed in the spare-wheel compartment of a car hired by the three people killed. It was believed that the device was set to explode at the time of the military parade to be held two days later, on 8 March.[13] Moreover, it appears that the three suspects could have been arrested at the border by a special surveillance team immediately on their arrival in Gibraltar, with less danger to the population of Gibraltar and their own lives. Why were they not prevented from entering the city if they were believed to be on a bombing mission? All this makes the picture of the facts and the lawyer's task (is the rule or the exception applicable?) more complex.

Another case where the facts display all their pervasive influence on legal questions is *Soering v. the United Kingdom*, decided by the European Court of Human Rights on 7 July 1989. Here the facts disclose a series of paradoxes in the legal fabric of the Convention.

In March 1985, Mr. Jens Soering (1966-living) killed the parents of his girlfriend. The victims, who opposed to the relationship, were found dead as the result of multiple and massive stab and slash wounds to the neck, throat

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[10] Para. 192.

[11] As found by the Commission (para. 132).

[12] Para. 93.

[13] Paras. 99 and 100.

and body. The homicide was committed in Virginia, United States of America, but Mr. Soering, who fled abroad, was arrested in the United Kingdom. Relying on the European Convention on Human Rights, he tried to prevent his extradition for trial in the United States, a country which is not a party the Convention.

From the judgment we are informed that, according to a medical report, Mr. Soering was an immature and inexperienced young man who had lost his personal identity in a symbiotic relationship with his girlfriend – a powerful, persuaded and disturbed young woman. He is said to have entered into a syndrome referred to as *folie à deux*, that is a state of mind where one partner is suggestible to the extent that he or she believes in the psychotic delusions of the other.[14] Why this kind of personal details, however relevant from the psychiatric point of view, are of interest also for determining the scope of application of the Convention?

The answer can be found inside one ring of the chain of hypothetical periods that characterize the Soering case. If Mr. Soering had been extradited to the United States, he would have been accused of capital murder. If he had been extradited and found guilty, the American court could have taken mental insanity at the time of the offence as a mitigating factor at the sentencing stage. If he had been extradited, found guilty and not considered mentally insane, he could have run the risk of being convicted to the death penalty. If he had been extradited, found guilty, not considered mentally insane and convicted to the death penalty, he could have run the risk of being subjected to inhuman or degrading treatment due to the "death row phenomenon", in violation of Art. 3 (prohibition of torture) of the European Convention on Human Rights.

The Court chose not to break the chain of hypothetical periods and basically concluded that contributing through an extradition to a hypothetical "death row phenomenon" inflicted by a non-party State would amount to a violation of Art. 3 by a State party. This is not written in Art. 3 of the Convention,[15] but fully corresponds to its object and purpose.

The hypothetical periods displayed by the *Soering* case are the consequence of a number of logical paradoxes that mark the way in which the right to life is addressed by the Convention.

The first paradox is that a question substantively relating to the right to life was skilfully transformed by the applicant into a question relating to another human right.

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[14] Para. 21 of the judgment.

[15] It is however written in Art. 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 1984).

The second paradox is that para. 1 of Art. 2, which apparently was drafted to protect the "right to life", in fact protects the right of the State to wildly kill people by convicting them to the death penalty (and this is the reason why Mr. Soering had no better choice than resorting to Art. 3). It is sufficient to read the provision,[16] to discover that the State can kill by the death penalty people who are guilty of slight offences, who have no right to make an appeal, who were under 18 years of age when the crime was committed, who are mentally insane, who are pregnant.

The third paradox is that the European Court of Human Rights took the opportunity to start a process that led it to the final result of depriving of any effect that same paradoxical provision that, under the label of "right to life", protects the right of the State to wildly kill people.

The first step was made in the *Soering* judgment, where the Court remarked that *de facto* the death penalty no longer existed in time of peace in the States parties to the Convention and that an established practice within them could give rise to an amendment of the Convention. However, the Court, not departing from a strictly legal approach, added that, to construe Art. 3 in harmony with Art. 2, para. 1, the former could not be interpreted as generally prohibiting the death penalty [17] (this is to say, implicitly, that there must be at least one manner to kill a human being without inflicting on the victim an inhuman or degrading treatment).

The second step was made by the judgment of 12 May 2005 on the *Öcalan v. Turkey* case. The Court (Grand Chamber) observed that, since the *Soering* case was decided, the legal position as regards the death penalty had undergone a considerable evolution among the States parties to the Convention and that such a marked development could be taken as signalling their agreement to abrogate, or at the very least to modify, the second sentence of Article 2, para. 1.[18] However, the Court did not take a definite position on whether Art. 2 was to be construed as still permitting the death penalty.[19] It took advantage of the loop-hole that Mr. Öcalan had not been granted a fair trial to reach the conclusion that the implementation of the death penalty in such a circumstance was not permitted by Art. 2.[20]

The third and final step was made by the Court in the judgment of 2 March

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[16] 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".

[17] See, implicitly, paras. 103 and 104 of the judgment.

[18] Para. 163 of the judgment.

[19] Para. 165.

[20] Para. 166.

2010 on the *Al-Saadoon and Mufdhi v. the United Kingdom* case. Against a background of constant evolution towards the complete *de facto* and *de iure* abolition of the death penalty within the member States of the Council of Europe,[21] the Court concluded that the words "inhuman or degrading treatment or punishment" in Art. 3 could be interpreted as including the death penalty and that Art. 2 had been amended through subsequent practice so as to prohibit the death penalty in all circumstances.[22]

It thus appears that the Court "amended" the Convention by deleting altogether one sentence written in its Art. 2, para. 1. The legal justification for doing what in principle a court cannot do is the figure of termination of a treaty provision through subsequent practice, which in fact cannot be found in the Convention on the Law of Treaties (Vienna, 1969).[23] Probably, termination as a consequence of a fundamental change of circumstances[24] or even invalidity as a consequence of an error[25] would have been more convincing grounds under the Vienna Convention for reaching the result of deleting the sentence in question. The Court could have found that the circumstance of the inclusion of the death penalty among the sanctions in the criminal legislation of many European States, which was an essential basis for the drafting of Art. 2, para. 1, at the time of adoption of the Convention, did not exist anymore due to changes in national legislation, as also reflected by the adoption of Protocols Nos. 6[26] and 13[27] to the Convention. Even better, the Court could have found that the assumption that there must be at least one manner to kill a human being without inflicting on the victim an inhuman or degrading treatment had been discovered as being an error of fact.

However, there should be no need to enter into paradoxes and legal intricacies where the right to life is at stake. It is instead important to remark that, by a process that started with the *Soering* judgment, the Court reached a simple conclusion that was forgotten at the time when the Convention was adopted. The killer cannot be killed by the State, because the State cannot put itself at the same level as the killer.

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[21] Para. 116 of the judgment.

[22] Para. 120.

[23] Hereinafter: Vienna Convention. Subsequent practice in the application of a treaty provision can be taken into account for the purpose of its interpretation (Art. 31, para. 3, *b*, Vienna Convention), but not for the purpose of its termination.

[24] Art. 62 of the Vienna Convention.

[25] Art. 48 of the Vienna Convention.

[26] Protocol No. 6 concerning the abolition of the death penalty (Strasbourg, 1983).

[27] Protocol No. 13 concerning the abolition of the death penalty in all circumstances (Vilnius, 2002).

To be precise, there is another paradox within the *Soering* case. The Court addressed the argument that, in the case of people convicted in the United States to the capital punishment, the lapse of time awaiting death is largely due to the prisoner's attempts to take advantage of all means of appeal available under the applicable legislation one after the other. Can someone complain about the duration of a period of time that has become too lengthy because of his or her own behaviour? Yes, he or she can – did the Court answer – where the right to life is at stake, as it is part of human nature that a person clings to life by exploiting to the full all existing safeguards.[28]

The innovating aspects that are evident in the *Soering* case go all in the direction of strengthening the protection of human rights. It is disappointing to remark how the same European Court of Human Right did subscribe a decision that, besides being completely wrong from the legal point of view, goes in the opposite direction of restricting the protection of the human right to life granted by the Convention. This is the decision of 12 December 2001 on the admissibility of the application in the case *Banković and others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*.

The seventeen respondent States belong to the North Atlantic Treaty Organization (NATO), an international organization that effected from 24 March to 8 June 1999 air strikes against Yugoslavia.[29] On 23 April 1999 a missile launched from an aircraft engaged in the NATO air strikes hit the television and radio station in Belgrade. Two of the four floors of the building collapsed. Sixteen civilians were killed and another sixteen were seriously injured. Most of the six applicants – Vlastimir and Borka Banković, Živana Stojanović, Mirjana Stoimenovski, Dragana Koksimović and Dragan Suković – were relatives of the people killed.[30]

The legality of such an action by the bombing States is highly questionable under international law of war, as the Belgrade station was not involved in military activities and the attack was justified by NATO as a way to enforce the request to broadcast its own propaganda programmes (have you ever heard of a belligerent State that broadcasts for its population the propaganda programmes of the enemy?):

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[28] Para. 106.

[29] Even though this has no direct relationship with the occurrence of human rights violations, it can be added that force was used in this case without any authorization by the Security Council of the United Nations and, consequently, in violation of the Charter of the United Nations (San Francisco, 1945) and the North Atlantic Treaty (Washington, 1949) itself.

[30] As it was not possible to identify the nationality of the aircraft that launched the missile, the applicants brought the case against all the States parties to the Convention involved in the air strikes, which they considered as severally liable for the attacks against Yugoslavia.

> "More controversially, however, the bombing was also justified on the basis of the propaganda purpose to which it was employed (…) In a statement of 8 April 1999, NATO also indicated that the TV studios would be targeted unless they broadcast 6 hours per day of Western media reports: 'If President Milosevic would provide equal time for Western news broadcasts in its programmes without censorship 3 hours a day between noon and 1800 and 3 hours a day between 1800 and midnight, then his TV could be an acceptable instrument of public information'.
>
> NATO intentionally bombed the Radio and TV station and the persons killed or injured were civilians. The questions are: was the station a legitimate military objective and; if it was, were the civilian casualties disproportionate to the military advantage gained by the attack?".[31]

The European Court of Human Rights based its decision on Art. 1 of the Convention, according to which the States parties shall secure to everyone within their "jurisdiction" the rights and freedoms defined in it, and on the fact that Yugoslavia was not a party to the Convention. The Court read the word "jurisdiction" as if it were the word "territory".[32] It found that the Convention has the special character as a "constitutional instrument of European public order", presenting an "essentially regional vocation":

> "In short, the Convention is a multi-lateral treaty operating (…) in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY [= Federal Republic of Yugoslavia] clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States".[33]

In short, the Court tells us that what would be a breach of the Convention if committed by a State party in its own territory – for example, to arbitrarily kill or to torture – is not anymore a breach if committed by the same State in the territory of a non-party State. How the European Court of Human Rights could have subscribed such an unbelievable conclusion is wholly mysterious. It may be true that in international law the notion of "jurisdiction" is often territorial. But this is not the case for human rights treaties, which regulate the relationship between State agents and an individual. Their provisions must be interpreted in the light of the object and purpose of this category of treaties,[34]

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[31] Paras. 74 and 75 of the Final Report submitted to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia.

[32] Nobody knows what the abstract word "jurisdiction" means in fact. But, whatever it means, it must be something different from "territory".

[33] Para. 80 of the decision.

[34] As required by Art. 31, para. 1, of the Vienna Convention.

which are intended to apply everywhere agents of States parties happen to act in a way that could affect an individual. The "jurisdiction" of a State party is dependent on the act done by its agents and not on the place where the act is done. As far as human rights are concerned, a person is under the "jurisdiction" of a State if he or she is subject to the authority and control of its agents. Such "jurisdiction" is neither territorial, nor extra-territorial. It has to be understood as authority and control, irrespective of territory.

In the *Banković* decision, a court specifically established for the protection of human rights was not able to read a human rights treaty according to its very nature. It preferred too restrictive an interpretation which is in itself contrary to the object and purpose of this category of treaties, that is to protect the weaker party in the relationship between a State and an individual. If the Court had considered the jurisprudence of other international human rights bodies – but it chose not to do so –, it would have found, for instance, that the Inter-American Commission of Human Rights made the following remarks in the report of 29 September 1999 on the case *Coard and others v. United States*:

> "(...) Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extra-territorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control".[35]

Without explicitly recognizing its previous mistake, the European Court of Human Rights itself was ready to contradict in subsequent cases the untenable assumption that the Convention applies only to the territories of States parties. For instance, it did so in the decision of 30 June 2009 on the admissibility of the application in the *Al-Saadoon and Mufdhi v. the United Kingdom* case and in the judgment of 7 July 2011 on the *Al-Skeini and others v. the United Kingdom* case, where it affirmed the "jurisdiction" of the respondent State for acts committed in Iraq.

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[35] Para. 37 of the report. The remark was made with regard to Art. 1, para. 1, of the American Convention on Human Rights (San José, 1969). The principle that human rights treaties apply to every person who is "within the power and effective control" of a State party was confirmed, as regards Art. 2, para. 1, of the 1966 Covenant on Civil and Political Rights (New York, 1966), by the Human Rights Committee in General Comment No. 31 of 29 March 2004 (para. 10 of the comment).

Yet the name of the last bomb launched on the radio and television people in Belgrade is “jurisdiction”.

* * *

For our shared course on international human rights law Andrea Carcano and myself selected cases relating to two human rights, namely the right to life and the prohibition of torture. There is an evident link between these two fundamental rights, not only because of Soering-like instances, but also because torture can too often be followed by an arbitrary killing. However, the prohibition of torture has its own peculiarities, starting from the point that, unlike the right to life, it is a truly absolute human right, which allows for no exception whatsoever. Especially cases related to torture show what is a promising way to approach human rights: not to contemplate abstract concepts, such as values or common heritage of ideals, which are devoid of any useful meaning, but to describe the relevant facts, which prove how the so-called sovereign States can engage themselves in the most disgusting behaviours.

The original idea was to include in this publication cases on both the above mentioned human rights. While I was delayed by a number of events, Andrea Carcano was able to complete his task, relating to the right to life, within the expected time. He has now moved to the University of Modena and there is no reason to delay a publication that reflects the spirit of our common teaching and, in my view, provides a strong contribution to the effective training of any students interested in human rights protection.

Milan, 2 June 2020

Tullio Scovazzi

Table of Abbreviations

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
ADHR	American Declaration of the Rights and Duties of Man
AJIL	*American Journal of International Law*
CAU	Cambridge University Press
CEJIL	Centre for Justice and International Law
CJIL	*Chinese Journal of International Law*
CPA	Coalition Provisional Authority
CRC	Convention on the Rights of the Child
CETS	Council of Europe Treaty Series
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECommHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
EJIL	*European Journal of International Law*
FRY	Federal Republic of Yugoslavia
G8	The Group of Eight (an inter-governmental political forum composed of most industrialized nations)
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
IACommHR	Inter-American Commission on Human Rights
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICLQ	*International and Comparative Law Quarterly*
ICTY	International Criminal Tribunal for the Former Yugoslavia
IJHR	*International Journal of Human Rights*
IRA	Irish Republican Army
IRRC	*International Review of the Red Cross*
KFOR	Kosovo Force
NATO	North Atlantic Treaty Organization
OUP	Oxford University Press
SAS	Special Air Service

SOFA	Status of Forces Agreement
UN	United Nations
UNMIK	United Nations Interim Administration in Kosovo
UK	United Kingdom
US	United States
UDHR	Universal Declaration of Human Rights
UNTS	United Nations Treaty Series

Table of Cases

International Court of Justice

Chapter 1
Introduction to the Human Right to Life

1.1. *Normative and Comparative Framework*

The human right to life concerns the entitlement of any individual to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death.[1] The importance of this right is nowadays undisputed. It is regarded as inviolable and most precious for its own sake as a right that is inherent in every human being and as a prerequisite for the enjoyment of all other human rights. It is referred to as the 'supreme' right[2] and the 'fountain from which all human rights spring'.[3] No public entity may strip one's person of this right.

Given the 'pre-eminence of respect for human life as a fundamental value',[4] the protective standards surrounding the right to life have gradually developed to become stringent; they impose multifaceted obligations upon States. States are to refrain from the intentional use of force or other actions potentially endangering life and are to actively put in place measures to prevent illegitimate interference with or threats to the right to life, and to prosecute those responsible for any acts breaching it.[5] These obligations include the duty on States to guarantee 'the right to a dignified existence'.[6]

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[1] UN Human Rights Committee, 'General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (2018) UN Doc CCPR/C/GC/36 (General Comment No. 36), para. 2.

[2] Ibid.

[3] UNCHR, 'Summary or Arbitrary Executions: Report by the Special Rapporteur' (1983) UN Doc E/CN.4/1983/16, para. 22.

[4] *Nachova and Others v Bulgaria*, App nos 43577/98 and 43579/98 (ECtHR [GC] 6 July 2005) para. 97. See also, among others, *McCann and Others v United Kingdom*, App no 18984/91 (ECtHR [GC] 27 September 1995); *Andronicou and Constantinou v Cyprus*, App no 25052/94 (ECtHR 9 October 1997) para. 171; *Salman v Turkey*, App no 21986/93 (ECtHR [GC] 27 June 2000) para. 97; *McKerr v the United Kingdom*, App no 28883/95 (ECtHR 4 May 2001) para. 108.

[5] See, among others, Alison Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights* (Hart 2004) 7-43.

[6] See General Comment No. 36 (n 1) para. 3. Note that the interpretation of the right to life as

Albeit seemingly self-evident, because no community can flourish if its members live under the threat of death, these truths are not a truism, but a point of achievement. Their affirmation required placing a set of obligations on States towards individuals under their jurisdiction – a gradual process that unfolded over time and, to some extent, continues today through both the practice of States and judicial interpretation.

While norms proscribing murder by individuals as a crime have existed in virtually every legal system since time immemorial – think for instance of the Ten Commandments – the same cannot be said regarding the prosecution of acts carried out by public officials or individuals contracted by a State. In a not-so-distant past, for instance, politically motivated assassinations of one's opponents were frequent. In the aftermath of World War II, however, States, no doubt under the memory of what had happened before and during that tragic conflict, undertook what Christian Tomuschat calls the 'Great Leap Forward'.[7] On the belief that human beings could no longer be considered to be placed, by law, exclusively under the jurisdiction of their home State, the international community engaged in a process of codifying human rights regarded as inherent in any human person. As such, these rights had an existence independent of the policies of one's State and were directly opposable by individuals against any State breaching them.[8] The human right to life was, of course, among these.

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including the positive right to a dignified existence has not, as yet, been discussed by the ECtHR, which quite conversely has stated that Article 2 'is unconcerned with issues [having] to do with the quality of living or what a person chooses to do with his or her life'. See *Vo v France*, App no 53924/00 (ECtHR [GC] 8 July 2004) para 39. By contrast, the IACtHR has done so in *Judgment in the Case of the "Street Children" (Villagran-Morales et al) v Guatemala*, IACtHR Series C No 63, IHRL 1446 (IACtHR 19 November 1999), para. 144 (see the entire text in Appendix I). The *Villagrán Morales et al*. case concerned a number of violent crimes committed against 'street children' by security forces working for the State of Guatemala. Starting from the premise that the 'fundamental nature of the right to life' entailed that 'restrictive approaches to it are inadmissible', the IACtHR held that the right to life included also the right to 'not be prevented from having access to the conditions that guarantee a dignified existence'. Stressing 'the particular gravity' of a State 'having applied or tolerated a systematic practice of violence against at risk children in its territory', the IACtHR held that the right to life was also violated when a State prevents a child from developing his or her 'project of life' and 'full and harmonious development of their personality' which should be encouraged by the public authorities. In a Joint Concurring Opinion, Judges A.A. Cançade and A. Abreu-Burelli, para. 4 (in Appendix I), further clarified that: 'The duty of the State to take positive measures *is stressed* precisely in relation to the protection of life of vulnerable and defenseless persons, in situation of risk, such as the children in the streets. The arbitrary deprivation of life is not limited, thus, to the illicit act of homicide; it extends itself likewise to the deprivation of the right to live with dignity. This outlook conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, as well as economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights'.

[7] Christian Tomuschat, *Human Rights, Between Idealism and Realism* (3rd ed., OUP 2014) 27-29.

[8] See Robert Kolb, 'Human Rights Law and International Humanitarian Law between 1945 and the Aftermath of the Teheran Conference of 1968', in Robert Kolb and Gloria Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013) 35-52.

Article 3 of the UDHR proclaims in no uncertain terms that: 'Everyone has the right to life, liberty and security of person'.[9] Article 6(1) of the ICCPR provides that 'Every human being has the inherent right to life' and Article 4 of the ACHPR states that 'Every human being shall be entitled to respect for his life and the integrity of his person'.[10] Similarly, Article 4 of the ACHR affirms that 'Every person has the right to have his life respected'.[11] Article 6(1) of the Convention on the Rights of the Child (1989) adds that 'States Parties recognize that every child has the inherent right to life'.[12] The existence of this right places the States party to these instruments under the obligation to respect and to ensure the right to life, to give effect to it through legislative and other measures, and to provide effective remedies and reparation to all victims whose right to life has been violated.

For the ECtHR, Article 2 of the ECHR stipulating the right to life is one of the most fundamental provisions of the ECHR, which, together with the prohibition of torture in Article 3, entails 'one of the basic values of the democratic societies making up the Council of Europe'.[13] Article 4 of the ACHR indicates that the right to life begins 'in general, from the moment of conception', not from birth.[14] Other treaties take a more prudent approach, refraining from stipulating a specific position on this point and leaving it for the case law to eventually deal with the issue of whether life begins before birth.[15]

All that said, to appropriately gauge the importance and recognition that the human right to life enjoys, it is equally necessary to single out the complexity of the concept of the right to life beyond the veil of appearance. Unlike the prohibition of torture – which works like an on/off switch whereby one action breaches it and the opposite affirms it – the right to life, as it has been codified, is of a 'relative' rather than an 'absolute' character. The prohibition of torture applies under any circumstance, even in a 'ticking-bomb scenario' where human life may be in immediate danger and recourse to torture could uncover information that would save countless lives. While torture is always prohibited, the right to life prohibits only the arbitrary or intentional taking of life. This peculiarity is reflected in the wording employed in principal human

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[9] See text of Article 3 UDHR in Appendix A.

[10] See text of Article 6(1) ICCPR and Article 4 ACHPR in Appendices E and H, respectively.

[11] See text of Article 4 ACHR in Appendix G.

[12] Article 6(1) of the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

[13] *McCann and Others v the United Kingdom* (n 4) (n 4) para. 147. See also *Soering v the United Kingdom*, App no 14038/88 (ECtHR 7 July 1989) para. 88.

[14] See Appendix G.

[15] For more on this subject and specifically the approach adopted by the ECtHR see below, Chapter 3.4.

rights instruments. Article 6 of the ICCPR provides that 'No one shall be arbitrarily deprived of his life'. Very similar wording can be found in Article 6 of the ACHR and Article 4 of the ACHPR. They all accept the possibility that someone may be deprived of his or her life, provided it is not arbitrary, namely that it is provided for by the law in force in a given country. [16]

Likewise, Article 2 of the ECHR, while affirming a general right to life, provides significant exceptions to it. These are the imposition of the death penalty (though now abolished) [17] and the authorisation to State agents to use lethal force 'which is no more than absolutely necessary' in three exceptional cases: (i) 'in defence of any person from unlawful violence', (ii) to effect a 'lawful arrest or to prevent the escape of a person lawfully detained', and (iii) 'for the purpose of quelling a riot or insurrection'.[18] Within the parameters of these legitimate exceptions and non-arbitrariness, the protective regime surrounding the right to life could therefore be conceptualised as being more concerned with ensuring that the use of force is proportionate to the pursued aim and accompanied by appropriate preventive and investigative measures, thereby moving from a perspective of absolute non-interference to a degree of monitored relativity.

As such, recognising the relativity of the right to life is not to downplay its value. It is rather to realise the need for legislators to carve out exceptions and limits to the enjoyment of one's individual right to life on account of the exigencies of public interest, which a State is there to protect and guarantee. At the same time, this realisation cannot become an excuse for State conduct as, notwithstanding that it should be acting in the name of public interest, the State itself may be impermissibly breaching the human rights of its inhabitants. It remains paradoxically true, however, that in situations where taking someone's life is the only way to save that of others, use of lethal force may be the only way to protect, affirm and enforce the right to life. Therefore, as some of the cases discussed in this book show, the question is often not, or not only, whether one's right to life is adequately protected, but instead whose in-

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[16] The UN Human Rights Committee's General Comment No. 36 aptly clarifies that a deprivation of life may also be arbitrary in some specific instances even if provided by law. It states that 'Deprivation of life is, as a rule, arbitrary if it is inconsistent with international law or domestic law. A deprivation of life may, nevertheless, be authorized by domestic law and still be arbitrary. The notion of "arbitrariness" is not to be fully equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law as well as elements of reasonableness, necessity, and proportionality' (footnotes omitted). See General Comment No. 36 (n 1) para. 12.

[17] On Article 2(1) ECHR and the death penalty see the analysis in Section 4.1.2. of Chapter 4.

[18] On Article 2(2) ECHR see the analysis in Section 5.2. of Chapter 5. See also the text of Article 2 in Appendix B.

dividual right to life in a given circumstance should be protected or prioritised if the concrete circumstances require making such a difficult, if not tragic, choice.

In some cases, the choice might be straightforward. Imagine the case of the police using force against an individual who intends to, or is about to, open fire on crowds of people, to save those people's lives. In other examples, which probably represent the majority of actual cases, it is difficult – on the basis of the information available to State agents – to appropriately appraise the extent of the threat and thus gauge whether, when and how much force can legitimately be used. Nonetheless, while there is a need for understanding what may be described as the inescapable relativity of legal norms and their being influenced by the context in which they apply, a degree of strictness is equally required when interpreting them, given the fundamental value of life and the great possibility of abuses and excesses threatening it. Nobody's right to life can be taken lightly.

How can a reasonable balance be struck between the quest for public security and the protection of individuals' rights? The answer is by no means easy, though human rights instruments and related jurisprudence provide a rather detailed framework. The cases discussed in this book show that the definition of what the right to life entails in a given context may turn, in no small measure, on the outcome of an inherently interpretative process, and on the accuracy, sense of fairness and balance used by all those concerned to appraise situations involving the use of force.

1.2. *Application in Armed Conflict and Interplay with International Humanitarian Law*

1.2.1. *Application*

When a State faces extraordinary threats such as war, or other public emergencies 'threatening the life of nation', for instance large-scale terrorist attacks, which could require massive displays of force to be repelled. It may thus become necessary to interpret that State's human rights obligations more flexibly than in routine security operations to enable it to comply effectively with its primary duty of protecting the people within its territory. Major international human rights treaties recognise this reality. They contain norms that enable a State to derogate unilaterally, although exceptionally and temporarily, from some of its obligations under the given treaty. [19] As

[19] UN Human Rights Committee, 'CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency' (2001) UN Doc CCPR/C/21/Rev.1/Add.11, para. 2.

such, Article 4(1) of the ICCPR allows derogations in case of 'public emergency that threatens the life of the nation'; Article 27(1) of the ACHR permits it 'In time of war, public danger, or other emergency that threatens the independence or security of a State Party'; and Article 15(1) of the ECHR does so 'In time of war or other public emergency threatening the life of the nation'. An exception in this regard is the African Charter on Human and Peoples' Rights whose drafters, for historical and political reasons, chose not to insert any derogation clause. [20]

The recognition that exceptional challenges may entail taking exceptional measures does not mean that these otherwise legitimate aims can be pursued through just any unbounded means available. It is the hallmark of the civility of a State as a community pledging allegiance to the rule of law and recognising the inherent and inalienable nature of human rights to respect those rights even in the face of major threats and inhumane behaviour. Accordingly, each of the mentioned human rights treaties makes clear that there are certain obligations from which no derogation is possible. The right to life, for example, is expressly qualified as non-derogable in most of the relevant treaties. [21]

Both the ACHR and the ECHR (but not the ICCPR) state that derogation may occur not only in times of 'public emergency', but also in times of 'war', that is, during both international and non-international armed conflicts. The express reference to war in both the ACHR and the ECHR presupposes that these treaties are applicable also in times of war, as otherwise there would be nothing to derogate from. Hence, scholars have argued that on this basis alone these instruments continue to apply also in armed conflict situations. This interpretation stands to reason, yet it should not be taken as settling such a complex and debated issue.

It may be objected, in fact, that an issue of such relevance as the applicability of a given treaty to a context (such as wartime) different from that for which it was primarily created (peacetime) should have been expressly codified in that instrument. Unlike IHL, the law specifically created to balance

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[20] See, among others, Fatsah Ouguergouz, 'L'absence de clause de dérogation dans certains traités relatifs aux droits de l'homme: les reponses du droit international general' (1994) 98 Revue générale de droit international public 289-336; Laurent Sermet, 'The absence of a derogation clause the African Charter on Human and Peoples' Rights: a critical discussion' (2007) 7 African Human Rights Law Journal 142-161.

[21] See to this effect Article 4(2) of the ICCPR and Article 27(2) of the ACHR. It should be noted that the right to life under the ECHR is only partially non-derogable, as Article 15(2) of the ECHR allows derogation from Article 2 'in respect of deaths resulting from lawful acts of war'. As of writing, however, no State has ever sought to derogate from its Article 2 obligations under this provision. See, among others, Daniel Bethlehem, 'When is an Act of War Lawful?', in Lawrence Early et al (eds.), *The Right to Life under Article 2 of the European Convention on Human Rights: Twenty Years of Legal Developments since McCann v. United Kingdom* (Wolf Legal Publishers 2016) 234.

humanitarian concerns and military necessity during wartime, human rights law is concerned with the different temporal and factual scenario of the relationship between a State and the individuals subject to its jurisdiction. In the case of the right to life, for instance, IHL allows the use of lethal force against combatants involved in an armed conflict and the targeting of military objectives, which may result in civilian casualties (though the number of such casualties must be limited to that justifiable under proportionality calculations). By contrast, human rights law, as discussed above, tolerates the taking of human life only in very exceptional circumstances in pursuance of specific strictly construed ends.[22]

Yet, over time, although not without resistance, which still continues today,[23] the pendulum of international law has swung in favour of the applicability of human rights law, including the right to life, in times of armed conflict and belligerent occupation. This is the result of an interpretative process carried out under the auspices of several international institutions, such as the United Nations,[24] including the Security Council,[25] the General Assem-

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[22] For more on this issue see, among others, Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 International Review of the Red Cross 501, 525-527; Rob McLaughlin, 'The Law of Armed Conflict and International Human Rights Law: Some Paradigmatic Differences and Operational Implications' (2010) 13 Yearbook of International Humanitarian Law 213-243; Gerd Oberleitner, *Human Rights in Armed Conflict* (CUP 2015); Clare Ovey, 'Application of the ECHR during International Armed Conflicts', in Katja S. Ziegler et al (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015); Françoise J. Hampson, 'Article 2 of the Convention and military operations during armed conflict', in Lawrence Early et al (eds), *The Right to Life under Article 2 of the European Convention on Human Rights: Twenty Years of Legal Developments since McCann v. United Kingdom* (Wolf Legal Publishers 2016); Larissa Van Den Herik and Helen Duffy, 'Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches', in Carla M. Buckley et al (eds), *Towards Convergence in International Human Rights Law* (Martinus Nijhoff 2017); Ian Park, *The Right to Life in Armed Conflict* (OUP 2018).

[23] See, among others, Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003) 37 Israel Law Review 17-118; Michael J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 AJIL 119-141; Nigel Rodley, 'The Extra-Territorial Reach and Applicability in Armed Conflict of the International Covenant on Civil and Political Rights: A Rejoinder to Dennis and Surena' (2009) 5 European Human Rights Law Review 628-636. On the American position concerning the applicability of ICCPR in times of armed conflict see the detailed analysis contained in Office of the Legal Adviser of the United States Department of State, 'Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights' (United States Department of State 19 October 2010) <www.justsecurity.org/wp-content/uploads/2014/03/state-department-iccpr-memo.pdf> accessed 30 December 2019.

[24] See United Nations, 'Final Act of the Teheran Conference on Human Rights' (1968) UN Doc A/CONF.32/41 5 (including Resolution I of the Teheran International Conference on Human Rights on 'Respect for and implementation of human rights in occupied territories'); Report of the United Nations Secretary General, 'Respect for Human Rights in Armed Conflicts' (1969) UN Doc A/7720 (Report of the Secretary-General), para. 16.

[25] As early as 1967, in Resolution 237 adopted in connection with the Six-Day War, the Security

bly [26] and the Human Rights Committee, [27] as well as regional bodies such as the Inter-American Commission on Human Rights. [28]

Within this process, the practice of the ICJ, the principal judicial organ of the UN, has been pivotal. In the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, the ICJ found that the protection offered by human rights conventions does not cease in case of armed conflict. It held 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'. The ICJ further stressed that 'Respect for the right to life is not, however, such a provision' and therefore 'In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities'. [29]

In the subsequent *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, the ICJ reiterated its earlier conclusion and made clear 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'. [30] Moreover, in its judgment *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo (DRC) v. Uganda)*, the ICJ found that Uganda was an 'occupying Power' in Ituri, a province in the territory of the Democratic Republic of the Congo, and that as such Uganda had the duty to secure respect for the applicable rules of international human rights law and international humanitarian law,

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Council stressed that 'essential and inalienable human rights should be respected even during the vicissitudes of war'. See UNSC Res 237 (14 June 1967) UN Doc S/RES/237 preamble. See also UNSC Res 366 (17 December 1974) UN Doc S/RES/366; UNSC Res 605 (22 December 1987) UN Doc S/RES/605; Report of the Secretary-General (n 24) para. 16.

[26] Under the spell of the United Nations Teheran International Conference on Human Rights, the General Assembly also passed Resolution 2443 calling for the respect for human rights in occupied territories. See UNGA Res 2443 (19 December 1968) UN Doc A/RES/2443.

[27] See, among others, UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Israel' (2003) UN Doc CCPR/CO/78/ISR; UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Israel' (1998) UN Doc CCPR/C/79/Add.93; UN Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/ADD.13 para. 10.

[28] See, among others, *Coard et al v United States*, Case 10.951, Inter-American Commission on Human Rights Report No. 109/99 (29 September 1999).

[29] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, (*Nuclear Weapons* Advisory Opinion) para. 25.

[30] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (*Wall* Advisory Opinion) para. 106.

to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.[31]

The ECtHR has adhered to the jurisprudence of the ICJ on the continued applicability of human rights law during armed conflict. In some earlier cases, the ECtHR did not explicitly address the applicability of the ECHR in conflict situations. For instance in cases arising from the military occupation of Northern Cyprus by Turkey or the conflict in Chechnya within the Russian Federation, the ECtHR appears to have rather proceeded on the assumption that the ECHR continued to apply without stating it *claris verbis*.[32] It is only recently in *Al-Skeini and Others v the United Kingdom* that the ECtHR, after a lengthy recollection of the international practice and in particular that of the ICJ, stated that 'the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict'.[33]

In *Hassan v the United Kingdom*, the ECtHR subsequently and in even more express terms rejected the State's argument that Article 5 of the ECHR would not apply in the case because the detention of Hassan, a prisoner of the UK in occupied Iraq, took place during a conflict situation. The ECtHR rather held that 'consistently with the case-law of the International Court of Justice … even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law'.[34] As such, it appears that the co-applicability of human rights and humanitarian law are considered inescapable also within the ECHR system. The remaining issue then becomes how these two concurrently regulating bodies of law interact in practice.

1.2.2. *Interplay*

Once it is accepted that human rights law and IHL apply in the same context, it becomes necessary to devise rules of coordination to govern their relation-

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[31] In *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* (Judgment) [2005] ICJ Rep 168 (*Armed Activities*) para. 179, the ICJ 'having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account'.

[32] See also, among others, Larissa Van Den Herik and Helen Duffy, 'Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches', in Carla M. Buckley et al (eds.), *Towards Convergence in International Human Rights Law* (Martinus Nijhoff 2017) 389.

[33] *Al-Skeini and Others v the United Kingdom*, App no 55721/07 (ECtHR [GC] 7 July 2011) para. 164. See also the Grand Chamber's analysis of the ICJ jurisprudence in ibid, paras. 90-91.

[34] *Hassan v the United Kingdom*, App no 29750/09 (ECtHR [GC] 16 September 2014) para. 104.

ship. This problem does not arise when, although operating in the same context, the two bodies of law apply concomitantly and in parallel to different factual situations or different categories of individuals. The problem of coordination similarly has no practical significance where both human rights law and humanitarian law converge, for instance by prohibiting the same conduct, such as in the case of torture, as the respective norms of the two regimes are merely reinforcing each other.

Instead, doubts arise when the two regimes cross paths by governing the same conduct in different terms through diverging norms. This may occur not only during effective armed conflict, but also in the context of belligerent occupation, a phase of international armed conflict where the governance of a territory is exercised through military and effective control by an occupying State.[35] In such a scenario, the relationship at stake is that between occupants (most often military personnel) and occupied (most often civilian population). An occupying power is, for instance, entitled to restrict one's liberty through the internment of individuals without charges, and by restricting or suspending freedom of association, movement and expression of the occupied population, even though these conducts would constitute clear human rights violations if carried out in peacetime.[36]

The general rule of coordination that emerges from the interpretative practice of the ICJ is that of *lex specialis*. This term has been used by the ICJ to accord preference to the application of the body of law expressly devised to regulate a given factual scenario. In wartime, this would be IHL; in peacetime, it would be human rights law. As made clear by the ICJ in the *Nuclear Weapons* Advisory Opinion, 'the test of what is an arbitrary deprivation of life, 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'.[37] Thus whether a particular loss of life through, for instance, the use of a certain weapon in warfare is to be considered 'arbitrary' within the meaning of Article 6 of the ICCPR must be decided by reference to the law applicable in armed conflict and not deduced from the terms of the ICCPR itself.[38] This means that the ICJ has defined a mechanism of coordination among norms of

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[35] On the concept of occupation from an international law perspective see the comprehensive analysis undertaken in Adam Roberts, 'What is a Military Occupation?' (1984) 55 BYIL 249-305.

[36] On the relationship between international humanitarian law and human rights law in times of belligerent occupation see Adam Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 AJIL 580, 586-595; Robert Kolb and Sylvain Vité, *Le droit de l'occupation militaire: Perspectives historiques et enjeux juridiques actuels* (Bruylant 2009) 303-336; Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd ed., CUP 2019) 77-98.

[37] *Nuclear Weapons* Advisory Opinion (n 29) para. 25.

[38] Ibid.

different origins that, quite logically, postulates the prevalence of humanitarian law norms over those of human rights law in times of war.[39]

Moreover, in the *Wall* Advisory Opinion, the ICJ noted that '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'.[40] It consequently found that to answer the questions placed before it, it had to take into consideration 'both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[41] This approach was further reiterated in the *Armed Activities* case.[42]

The practice of the ECtHR has not expressly challenged the *lex specialis* technique, but has also developed its own distinct approach to the question of the relationship between human rights law and IHL within the ECHR framework. In the abovementioned *Hassan* case, the Grand Chamber was asked to determine the legality of security internment during an occupation situation under Article 5 of the ECHR. Article 5(1) provides that 'No one shall be arbitrarily deprived of their liberty' except on one of the six permissible grounds of detention enumerated in the provision. These permissible grounds are worded exhaustively, and have also been interpreted restrictively in earlier cases relating to security internment.[43] This proved problematic for States involved in armed conflict situations where both the taking of prisoners of war and the security detention of civilians are permitted by IHL,[44] as these prac-

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[39] For further commentary on the *lex specialis* rule in this context see, among others, Lawrence Hill-Cawthorne, 'Reconciling International Humanitarian Law and Human Rights Law', in Mads Andenas and Eirik Bjorge E (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (CUP 2015); Silvia Borelli, 'The (Mis)-Use of General Principles of Law: Lex Specialis and the Relationship between International Human Rights Law and the Laws of Armed Conflict', in Laura Pineschi (ed), *General Principles of Law – The Role of the Judiciary* (Springer 2015); Cedric De Koker and Tom Ruys 'Foregoing Lex Specialis? Exclusivist v, Symbiotic Approaches to the Concurrent Application of International Humanitarian and Human Rights Law' (2016) 1 Revue Belge de Droit International 240-287; Marko Milanovic, 'The Lost Origins of Lex Specialis', in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016).

[40] *Wall* Advisory Opinion (n 30) para. 106.

[41] Ibid.

[42] *Armed Activities* (n 31) para. 216.

[43] See, among others, *A and Others v United Kingdom*, App no 3455/05 (ECtHR [GC] 19 February 2009) para. 171; *Al-Jedda v United Kingdom*, App no 27021/08 (ECtHR [GC] 7 July 2011) para. 100; *Lawless v Ireland (no 3)*, App no 332/57 (ECtHR 1 July 1961) paras. 13-14; *Ireland v United Kingdom*, App no 5310/71 (ECtHR 18 January 1978) para. 194.

[44] See, in particular, Articles 12 and 21 of the Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) 75 UNTS 135; and Articles 42 and 78 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 75 UNTS 287.

tices are not included within the exceptions listed in Article 5(1).[45] For similar reasons, *Hassan* also raised issues under the procedural detention safeguards of Article 5(4).

In contrast to its earlier case law,[46] the Grand Chamber did not rule security internment to be incompatible with the exhaustive detention grounds of Article 5 absent valid derogation. Rather, it held that during international armed conflict situations, the ECHR had to be interpreted harmoniously with other applicable international law, including humanitarian law. It therefore held that because the taking of prisoners of war and the security detention of civilians were 'accepted features of international humanitarian law', Article 5 should be 'accommodated, as far as possible', to allow these practices during international armed conflict.[47] For the Grand Chamber, this accommodation was possible, if not required, based on its 'constant practice' of interpreting the ECHR in light of the 1969 Vienna Convention on the Law of Treaties.[48] It particularly referred to Article 31(3)(c) of the VCLT, which requires the interpretation of a treaty to give consideration to 'any relevant rules of international law applicable in the relations between the parties'.[49] In light of this, the Grand Chamber stressed that 'the Convention must be interpreted in harmony with other rules of international law of which it forms part', particularly international humanitarian law as 'The four Geneva Conventions of 1949, intended to mitigate the horrors of war, were drafted in parallel to the ECHR and enjoy universal ratification'.[50] Such harmonious interpretation was also required by the need to interpret the ECHR consistently with the approach delineated by the ICJ, particularly in the *Wall* Advisory Opinion and *Armed Activities*.[51]

The Grand Chamber reinforced this reasoning by recalling its judgment in *Varnava and Others v Turkey*, where it had held that Article 2 of the ECHR should 'be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which

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[45] *Hassan v the United Kingdom* (n 34) para. 97.

[46] See *Al-Jedda v the United Kingdom* (n 43) para. 99.

[47] *Hassan v United Kingdom* (n 34) para. 104.

[48] Ibid, para. 100. On the use of the 1969 Vienna Convention on the Law of Treaties by the ECtHR see, in particular, *Golder v United Kingdom*, App no 4451/70 (ECtHR 21 February 1975) para. 29; *Al-Adsani v United Kingdom*, App no 35763/97 (ECtHR [GC] 21 November 2001) para. 55; *Hirsi Jamaa and Others v Italy*, App no 27765/09 (ECtHR [GC] 23 February 2012) paras, 170-171. For further analysis and references see also Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention on Human Rights* (7th ed., OUP 2017) 66-80.

[49] Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention' (2005) 54 ICLQ 279-320.

[50] *Hassan v the United Kingdom* (n 34) para. 102.

[51] Ibid.

play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict'.[52] This rationale applied equally in relation to detention practices under Article 5.[53] Applying this 'holistic' approach to the facts of the *Hassan* case, the Grand Chamber sought then to square the circle between different provisions pulling in different directions. It went on to devise a normative framework seeking to accommodate, or better, reconcile the inconsistencies between human rights norms and IHL in the matter of detention. The main traits of this method of accommodation can be recalled here.

As noted, the Grand Chamber accepted that Article 5 could be interpreted to accommodate wartime deprivation of liberty pursuant to powers under IHL despite the exhaustive language of the provision.[54] Yet, it stressed that for these measures to be considered 'lawful' from the perspective of the ECHR, they should remain 'in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness'.[55] It therefore required that the internment was to 'be subject to periodical review, if possible every six months, by a competent body'.[56] While further conceding that 'it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent "court"' as generally required by Article 5(4), the Grand Chamber insisted that the review procedure should still 'provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness' in order to comply with that provision.[57] Moreover, stressed the Grand Chamber, 'the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals'.[58] This was necessary to ensure that any person interned pursuant to international humanitarian law rules but not in fact falling into one of the categories subject to internment would be released without undue delay, and as such not arbitrarily kept in detention.[59]

In view of the foregoing, it appears that the Grand Chamber sought to find a balance between the divergent norms by, on the one hand, using established ECHR standards to accommodate accepted IHL rules; and, on the other, supplementing those latter rules to ensure respect for the fundamental purpose of

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[52] *Varnava and Others v Turkey*, App nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR [GC] 18 September 2009) para. 185. For a full analysis of this case see below, Chapter 3.5.3.

[53] *Hassan v the United Kingdom* (n 34) para. 102.

[54] Ibid, paras. 103-104.

[55] Ibid, para. 105.

[56] Ibid, para. 106.

[57] Ibid.

[58] Ibid.

[59] Ibid.

Article 5, that is, non-arbitrariness. As such the Grand Chamber was able to remain within its own mandate of interpreting and applying the ECHR, while allowing for a considerable degree of give-and-take between the two co-applicable normative systems in line with the general approach of the ICJ. At the time of writing, *Hassan* remains the leading case on the quest of coordination between human rights law and IHL within the ECHR system. [60]

[60] For further commentary on the *Hassan* case see, among others, Eirik Bjorge, 'What is living and What is Dead in the European Convention on Human Rights? A Comment on Hassan v United Kingdom' (2015) 15 Questions of International Law 23-36; Matthias Lippold, 'Between Humanisation and Humanitarisation? Detention in Armed Conflicts and the European Convention on Human Rights' (2016) 76 Heidelberg Journal of International Law 53-95; Cedric De Koker and Tom Ruys 'Foregoing Lex Specialis? Exclusivist v, Symbiotic Approaches to the Concurrent Application of International Humanitarian and Human Rights Law' (2016) 1 Revue Belge de Droit International 240-287

Chapter 2
The Reach of the ECtHR's Jurisdiction

2.1. *Grounds for the Exercise of Extra-Territorial Jurisdiction*

2.1.1. Banković and Others v Belgium and Others *(2001)*

I. Summary [*]

The applicants – all citizens of the then FRY, a State not party to the ECHR – lodged a complaint against several NATO countries (the UK, Belgium, France, Germany, Greece, Hungary, Italy, Luxembourg, Netherlands, Norway, Poland and Turkey) concerning the bombing of the building of the *Radio Televizije Srbije* ('RTS') in Belgrade by NATO forces on 23 April 1999. The applicants, who are family members of the deceased or who themselves were injured in the bombing, complained that the NATO countries had violated, among others, Article 2 of the ECHR. The respondent Governments replied that the application was inadmissible on jurisdictional grounds.

The Grand Chamber dismissed the application. It found that there was no jurisdictional link between the victims and the NATO countries for the purposes of the ECHR due to the 'extra-territorial' nature of the bombing.

On 30 January 1999, NATO threatened air strikes on the territory of the FRY unless the international demands (see NATO Statements of 28 and 30 January 1999) for a peaceful settlement of the 1998-1999 escalating conflict between the FRY and Kosovar Albanian groups were met. Negotiations between the parties to the conflict took place from 6 to 23 February 1999 in Rambouillet, France and from 15 to 18 March 1999 in Paris. The resulting peace agreement was signed by the Kosovar Albanian delegation but not by the FRY delegation.

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[*] Grand Chamber, *Banković and Others v Belgium and 16 Other States*, App no 52207/99, Inadmissibility Decision of 12 December 2001.

On 23 March 1999, lack of UN Security Council authorisation notwithstanding, the Secretary General of NATO announced the beginning of air strikes against the FRY. The air strikes lasted from 24 March to 8 June 1999. On 23 April 1999, just after approximately 2:00 a.m., a missile launched from a NATO forces aircraft hit one of the three RTS buildings situated in Takovska Street, Belgrade. Two of the four floors of the building collapsed and the master control room, housed on the first floor and staffed mainly by technical staff, was destroyed. As a result, 16 persons were killed and another 16 were seriously injured.

II. Proceedings in Domestic and International Jurisdictions

On 26 April 1999, the FRY deposited with the UN Secretary General its declaration accepting the compulsory jurisdiction of the ICJ. On 29 April 1999, the FRY instituted proceedings before the ICJ against Belgium and nine other States concerning their participation in Operation Allied Force and submitted a request for the indication of provisional measures pursuant to Article 73 of the ICJ's Rules of Court. By order dated 2 June 1999, the ICJ rejected that request and later dismissed the cases on jurisdictional grounds.

In May 1999, the Prosecutor of the ICTY appointed a committee to review numerous communications it had received containing allegations of genocide, crimes against humanity and war crimes perpetrated by NATO forces during Operation Allied Force. That committee, however, did not consider the information received to be grave enough to warrant the opening of an investigation by the ICTY Prosecutor. Accordingly, on 2 June 2000, the Prosecutor informed the UNSC of her decision not to open an investigation.

III. Decision (paras. 54–82)

A. Whether the applicants and their deceased relatives came within the "jurisdiction" of the respondent States within the meaning of Article 1 of the Convention

[...]

3. The Court's assessment

54. The Court notes that the real connection between the applicants and the respondent States is the impugned act which, wherever decided, was performed, or

had effects, outside of the territory of those States ("the extra-territorial act"). It considers that the essential question to be examined therefore is whether the applicants and their deceased relatives were, as a result of that extra-territorial act, capable of falling within the jurisdiction of the respondent States (Drozd and Janousek v. France and Spain, judgment of 26 June 1992, Series A no. 240, § 91, the above-cited Loizidou judgments (*preliminary objections* and *merits*), at § 64 and § 56 respectively, and the *Cyprus v. Turkey* judgment, cited above, at § 80).

(a) The applicable rules of interpretation

55. The Court recalls that the Convention must be interpreted in the light of the rules set out in the Vienna Convention 1969 (Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, § 29).

56. It will, therefore, seek to ascertain the ordinary meaning to be given to the phrase "within their jurisdiction" in its context and in the light of the object and purpose of the Convention (Article 31 § 1 of the Vienna Convention 1969 and, amongst other authorities, Johnston and Others v. Ireland judgment of 18 December 1986, Series A no. 112, § 51). The Court will also consider "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Article 31 § 3 (b) of the Vienna Convention 1969 and the above-cited Loizidou judgment (*preliminary objections*), at § 73).

57. Moreover, Article 31 § 3 (c) indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". More generally, the Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty (the above-cited Loizidou judgment (*merits*), at §§ 43 and 52). The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part (*Al-Adsani v. the United Kingdom*, [GC], no. 35763, § 60, to be reported in ECHR 2001).

58. It is further recalled that the *travaux préparatoires* can also be consulted with a view to confirming any meaning resulting from the application of Article 31 of the Vienna Convention 1969 or to determining the meaning when the interpretation under Article 31 of the Vienna Convention 1969 leaves the meaning "ambiguous or obscure" or leads to a result which is "manifestly absurd or unreasonable" (Article 32). The Court has also noted the ILC commentary on the relationship between the rules of interpretation codified in those Articles 31 and 32 (the text of those Articles and a summary of the ILC commentary is set out above at §§ 16-18 above).

(b) The meaning of the words "within their jurisdiction"

59. As to the "ordinary meaning" of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States (Mann, "*The Doctrine of Jurisdiction in International Law*", RdC, 1964, Vol. 1; Mann, "*The Doctrine of Jurisdiction in International Law, Twenty Years Later*", RdC, 1984, Vol. 1; Bernhardt, *Encyclopaedia of Public International Law*, Edition 1997, Vol. 3, pp. 55-59 "*Jurisdiction of States*" and Edition 1995, Vol. 2, pp. 337-343 "*Extra-territorial Effects of Administrative, Judicial and Legislative Acts*"; Oppenheim's *International Law*, 9th Edition 1992 (Jennings and Watts), Vol. 1, § 137; P.M. Dupuy, *Droit International Public*, 4th Edition 1998, p. 61; and Brownlie, *Principles of International Law*, 5th Edition 1998, pp. 287, 301 and 312-314).

60. Accordingly, for example, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence (Higgins, *Problems and Process* (1994), at p. 73; and Nguyen Quoc Dinh, *Droit International Public*, 6th Edition 1999 (Daillier and Pellet), p. 500). In addition, a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying State in which case it can be found to exercise jurisdiction in that territory, at least in certain respects (Bernhardt, cited above, Vol. 3 at p. 59 and Vol. 2 at pp. 338-340; Oppenheim, cited above, at § 137; P.M. Dupuy, cited above, at pp. 64-65; Brownlie, cited above, at p. 313; Cassese, *International Law*, 2001, p. 89; and, most recently, the "*Report on the Preferential Treatment of National Minorities by their Kin-States*" adopted by the Venice Commission at its 48th Plenary Meeting, Venice, 19-20 October 2001).

61. The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case (see, *mutatis mutandis* and in general, Select Committee of Experts on Extraterritorial Criminal Jurisdiction, European Committee on Crime Problems, Council of Europe, "*Extraterritorial Criminal Jurisdiction*", Report published in 1990, at pp. 8-30).

62. The Court finds State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts similar to the present case. Although there have been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention

(*inter alia*, in the Gulf, in Bosnia and Herzegovina and in the FRY), no State has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of Article 1 of the Convention by making a derogation pursuant to Article 15 of the Convention. The existing derogations were lodged by Turkey and the United Kingdom [1] in respect of certain internal conflicts (in south-east Turkey and Northern Ireland, respectively) and the Court does not find any basis upon which to accept the applicants' suggestion that Article 15 covers all "war" and "public emergency" situations generally, whether obtaining inside or outside the territory of the Contracting State. Indeed, Article 15 itself is to be read subject to the "jurisdiction" limitation enumerated in Article 1 of the Convention.

63. Finally, the Court finds clear confirmation of this essentially territorial notion of jurisdiction in the *travaux préparatoires* which demonstrate that the Expert Intergovernmental Committee replaced the words "all persons residing within their territories" with a reference to persons "within their jurisdiction" with a view to expanding the Convention's application to others who may not reside, in a legal sense, but who are, nevertheless, on the territory of the Contracting States (§ 19 above).

64. It is true that the notion of the Convention being a living instrument to be interpreted in light of present-day conditions is firmly rooted in the Court's case-law. The Court has applied that approach not only to the Convention's substantive provisions (for example, the Soering judgment cited above, at § 102; the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45; the X, Y and Z v. the United Kingdom judgment of 22 April 1997, *Reports* 1997-II; *V. v. the United Kingdom* [GC], no. 24888/94, § 72, ECHR 1999-IX; and *Matthews v. the United Kingdom* [GC], no. 24833/94, § 39, ECHR 1999-I) but more relevantly to its interpretation of former Articles 25 and 46 concerning the recognition by a Contracting State of the competence of the Convention organs (the above-cited Loizidou judgment (*preliminary objections*), at § 71). The Court concluded in the latter judgment that former Articles 25 and 46 of the Convention could not be interpreted solely in accordance with the intentions of their authors expressed more than forty years previously to the extent that, even if it had been established that the restrictions at issue were considered permissible under Articles 25 and 46 when the Convention was adopted by a minority of the then Contracting Parties, such evidence "could not be decisive".

65. However, the scope of Article 1, at issue in the present case, is determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection as opposed to the question, under discussion in the Loizidou case (*prelimi-*

[1] The United Kingdom has withdrawn its derogation as of 26 February 2001, except in relation to Crown Dependencies. Turkey reduced the scope of its derogation by communication to the Secretary General of the Council of Europe dated 5 May 1992.

nary objections), of the competence of the Convention organs to examine a case. In any event, the extracts from the *travaux préparatoires* detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention which cannot be ignored. The Court would emphasise that it is not interpreting Article 1 "solely" in accordance with the *travaux préparatoires* or finding those *travaux* "decisive"; rather this preparatory material constitutes clear confirmatory evidence of the ordinary meaning of Article 1 of the Convention as already identified by the Court (Article 32 of the Vienna Convention 1969).

66. Accordingly, and as the Court stated in the Soering case:

> "Article 1 sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' ('*reconnaître*' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'. Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States.".

(c) Extra-territorial acts recognised as constituting an exercise of jurisdiction

67. In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention.

68. Reference has been made in the Court's case-law, as an example of jurisdiction "not restricted to the national territory" of the respondent State (the Loizidou judgment (*preliminary objections*), at § 62), to situations where the extradition or expulsion of a person by a Contracting State may give rise to an issue under Articles 2 and/or 3 (or, exceptionally, under Articles 5 and or 6) and hence engage the responsibility of that State under the Convention (the above-cited Soering case, at § 91, Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, §§ 69 and 70, and the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, § 103).

However, the Court notes that liability is incurred in such cases by an action of the respondent State concerning a person while he or she is on its territory, clearly within its jurisdiction, and that such cases do not concern the actual exercise of a State's competence or jurisdiction abroad (see also, the above-cited *Al-Adsani judgment, at* § 39).

69. In addition, a further example noted at paragraph 62 of the Loizidou judgment (*preliminary objections*) was the Drozd and Janousek case where, citing a number of admissibility decisions by the Commission, the Court accepted that the responsibility of Contracting Parties (France and Spain) could, in principle, be engaged because of acts of their authorities (judges) which produced effects or were performed outside their own territory (the above-cited Drozd and Janousek judgment, at § 91). In that case, the impugned acts could not, in the circumstanc-

es, be attributed to the respondent States because the judges in question were not acting in their capacity as French or Spanish judges and as the Andorran courts functioned independently of the respondent States.

70. Moreover, in that first Loizidou judgment (*preliminary objections*), the Court found that, bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party was capable of being engaged when as a consequence of military action (lawful or unlawful) it exercised effective control of an area outside its national territory. The obligation to secure, in such an area, the Convention rights and freedoms was found to derive from the fact of such control whether it was exercised directly, through the respondent State's armed forces, or through a subordinate local administration. The Court concluded that the acts of which the applicant complained were capable of falling within Turkish jurisdiction within the meaning of Article 1 of the Convention.

On the merits, the Court found that it was not necessary to determine whether Turkey actually exercised detailed control over the policies and actions of the authorities of the "Turkish Republic of Northern Cyprus" ("TRNC"). It was obvious from the large number of troops engaged in active duties in northern Cyprus that Turkey's army exercised "effective overall control over that part of the island". Such control, according to the relevant test and in the circumstances of the case, was found to entail the responsibility of Turkey for the policies and actions of the "TRNC". The Court concluded that those affected by such policies or actions therefore came within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention. Turkey's obligation to secure the rights and freedoms set out in the Convention was found therefore to extend to northern Cyprus.

In its subsequent *Cyprus v. Turkey* judgment (cited above), the Court added that since Turkey had such "effective control", its responsibility could not be confined to the acts of its own agents therein but was engaged by the acts of the local administration which survived by virtue of Turkish support. Turkey's "jurisdiction" under Article 1 was therefore considered to extend to securing the entire range of substantive Convention rights in northern Cyprus.

71. In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.

72. In line with this approach, the Court has recently found that the participation of a State in the defence of proceedings against it in another State does not, without more, amount to an exercise of extra-territorial jurisdiction (*McElhinney v. Ireland and the United Kingdom* (dec.), no. 31253/96, p. 7, 9 February 2000, unpublished). The Court said:

> "In so far as the applicant complains under Article 6 ... about the stance taken by the Government of the United Kingdom in the Irish proceedings, the Court does not consider it necessary to address in the abstract the question of whether the actions of a Government as a litigant before the courts of another Contracting State can engage their responsibility under Article 6 ... The Court considers that, in the particular circumstances of the case, the fact that the United Kingdom Government raised the defence of sovereign immunity before the Irish courts, where the applicant had decided to sue, does not suffice to bring him within the jurisdiction of the United Kingdom within the meaning of Article 1 of the Convention.".

73. Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.

(d) Were the present applicants therefore capable of coming within the "jurisdiction" of the respondent States?

74. The applicants maintain that the bombing of RTS by the respondent States constitutes yet a further example of an extra-territorial act which can be accommodated by the notion of "jurisdiction" in Article 1 of the Convention, and are thereby proposing a further specification of the ordinary meaning of the term "jurisdiction" in Article 1 of the Convention. The Court must be satisfied that equally exceptional circumstances exist in the present case which could amount to the extra-territorial exercise of jurisdiction by a Contracting State.

75. In the first place, the applicants suggest a specific application of the "effective control" criteria developed in the northern Cyprus cases. They claim that the positive obligation under Article 1 extends to securing the Convention rights in a manner proportionate to the level of control exercised in any given extra-territorial situation. The Governments contend that this amounts to a "cause-and-effect" notion of jurisdiction not contemplated by or appropriate to Article 1 of the Convention. The Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.

The Court is inclined to agree with the Governments' submission that the text of Article 1 does not accommodate such an approach to "jurisdiction". Admittedly, the applicants accept that jurisdiction, and any consequent State Convention responsibility, would be limited in the circumstances to the commission and consequences of that particular act. However, the Court is of the view that the wording of Article 1 does not provide any support for the applicants' suggestion that

the positive obligation in Article 1 to secure "the rights and freedoms defined in Section I of this Convention" can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question and, it considers its view in this respect supported by the text of Article 19 of the Convention. Indeed the applicants' approach does not explain the application of the words "within their jurisdiction" in Article 1 and it even goes so far as to render those words superfluous and devoid of any purpose. Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949 (see § 25 above).

Furthermore, the applicants' notion of jurisdiction equates the determination of whether an individual falls within the jurisdiction of a Contracting State with the question of whether that person can be considered to be a victim of a violation of rights guaranteed by the Convention. These are separate and distinct admissibility conditions, each of which has to be satisfied in the afore-mentioned order, before an individual can invoke the Convention provisions against a Contracting State.

76. Secondly, the applicants' alternative suggestion is that the limited scope of the airspace control only circumscribed the scope of the respondent States' positive obligation to protect the applicants and did not exclude it. The Court finds this to be essentially the same argument as their principal proposition and rejects it for the same reasons.

77. Thirdly, the applicants make a further alternative argument in favour of the respondent States' jurisdiction based on a comparison with the Soering case (cited above). The Court does not find this convincing given the fundamental differences between that case and the present as already noted at paragraph 68 above.

78. Fourthly, the Court does not find it necessary to pronounce on the specific meaning to be attributed in various contexts to the allegedly similar jurisdiction provisions in the international instruments to which the applicants refer because it is not convinced by the applicants' specific submissions in these respects (see § 48 above). It notes that Article 2 of the American Declaration on the Rights and Duties of Man 1948 referred to in the above-cited *Coard* Report of the Inter-American Commission of Human Rights (§ 23 above), contains no explicit limitation of jurisdiction. In addition, and as to Article 2 § 1 the CCPR 1966 (§ 26 above), as early as 1950 the drafters had definitively and specifically confined its territorial scope and it is difficult to suggest that exceptional recognition by the Human Rights Committee of certain instances of extra-territorial jurisdiction (and the applicants give one example only) displaces in any way the territorial jurisdiction expressly conferred by that Article of the CCPR 1966 or explains the precise meaning of "jurisdiction" in Article 1 of its Optional Protocol 1966 (§ 27 above). While the text of Article 1 of the American Convention on Human Rights 1978 (§ 24 above) contains a jurisdiction condition similar to Article 1 of the European Convention, no relevant case-law on the former provision was cited before this Court by the applicants.

79. Fifthly and more generally, the applicants maintain that any failure to ac-

cept that they fell within the jurisdiction of the respondent States would defeat the *ordre public* mission of the Convention and leave a regrettable vacuum in the Convention system of human rights' protection.

80. The Court's obligation, in this respect, is to have regard to the special character of the Convention as a constitutional instrument of *European* public order for the protection of individual human beings and its role, as set out in Article 19 of the Convention, is to ensure the observance of *the engagements undertaken* by the Contracting Parties (the above-cited Loizidou judgment (*preliminary objections*), at § 93). It is therefore difficult to contend that a failure to accept the extra-territorial jurisdiction of the respondent States would fall foul of the Convention's *ordre public* objective, which itself underlines the essentially regional vocation of the Convention system, or of Article 19 of the Convention which does not shed any particular light on the territorial ambit of that system.

It is true that, in its above-cited *Cyprus v. Turkey* judgment (at § 78), the Court was conscious of the need to avoid "a regrettable vacuum in the system of human-rights protection" in northern Cyprus. However, and as noted by the Governments, that comment related to an entirely different situation to the present: the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey's "effective control" of the territory and by the accompanying inability of the Cypriot Government, as a Contracting State, to fulfil the obligations it had undertaken under the Convention.

In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention,[2] in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.

81. Finally, the applicants relied, in particular, on the admissibility decisions of the Court in the above-cited *Issa* and *Öcalan* cases. It is true that the Court has declared both of these cases admissible and that they include certain complaints about alleged actions by Turkish agents outside Turkish territory. However, in neither of those cases was the issue of jurisdiction raised by the respondent Government or addressed in the admissibility decisions and in any event the merits of those cases remain to be decided. Similarly, no jurisdiction objection is recorded in the decision leading to the inadmissibility of the *Xhavara* case to which the ap-

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

plicants also referred (cited above); at any rate, the applicants do not dispute the Governments' evidence about the sharing by prior written agreement of jurisdiction between Albania and Italy. The *Ilascu* case, also referred to by the applicants and cited above, concerns allegations that Russian forces control part of the territory of Moldova, an issue to be decided definitively on the merits of that case. Accordingly, these cases do not provide any support for the applicants' interpretation of the jurisdiction of Contracting States within the meaning of Article 1 of the Convention.

4. The Court's conclusion

82. The Court is not therefore persuaded that there was any jurisdictional link between the persons who were victims of the act complained of and the respondent States. Accordingly, it is not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question.

IV. Questions for the Students

Question 1

In the present case, the Grand Chamber is called to determine whether the application is admissible. To do so it needs to satisfy itself that it has jurisdiction under Article 1 of the ECHR. The question is whether the '*espace juridique*' of the ECHR is capable of being extended beyond the territory of the Contracting States. The Grand Chamber responds in the affirmative, but clarifies that the exercise of extra-territorial jurisdiction by a Contracting State is to be considered as only exceptional, as limited to the few, specific instances the ECtHR has identified in its practice. Accordingly, it denies having jurisdiction in the case at hand by distinguishing it from earlier case-law. At paragraph 71, the Grand Chamber puts it thus:

> In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.

Reflect now on the concept of 'effective control' and the ways such control can be exercised (and maintained). Would you recognise the possibility that

effective control over a territory be obtained (and maintained) in ways other than 'boots on the ground'?

Question 2

The applicants suggest a gradual approach, whereby the existence of jurisdiction and applicability of the ECHR under Article 1 would not necessarily turn on whether a Contracting State exercised effective control *per se*; but would rather depend more gradually on the degree of control it exercised, allowing the ECtHR to assign relevance even to lower degrees of 'control' than effective control. In this view, whenever States strike a target outside their territory, they would be accountable for the particular ECHR rights within their control in the situation in question. By contrast, the Governments believe that this would amount to a 'cause-and-effect' notion of jurisdiction, not contemplated by or appropriate to Article 1 of the ECHR.

The Grand Chamber rejects the applicants' submission as impermissibly enlarging the concept of 'jurisdiction' under the ECHR. It would have been 'tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt' would fall within 'the jurisdiction of that State for the purpose of Article 1 of the Convention'.

Reflect on the reasoning of the Grand Chamber as set out in paragraph 75 cited above. What the Grand Chamber does not seem to clarify is the relationship between 'jurisdiction' and 'control'. What is the notion of jurisdiction adopted by the Grand Chamber? What is the difference between the notion of 'jurisdiction' embraced by the Grand Chamber and the notion of jurisdiction as 'control' suggested by the applicants? Could there be cases, in your view, in which there is jurisdiction but not control or vice versa?

Question 3

Read again paragraph 80 of the above-cited decision. For the Grand Chamber, the ECHR is a multilateral treaty operating in an essentially regional context and notably in 'the legal space (*espace juridique*) of the Contracting States', which did not cover the FRY. According to the Grand Chamber:

> The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention'.

One could agree that it is certainly desirable to widen the protection of human

rights as much as possible. In this passage, however, the Grand Chamber advises us that there must be limits to such an expansion; one such limit being 'territorial'. Does the Grand Chamber persuade you in so holding?

2.1.2. Al-Skeini and Others v the United Kingdom *(2011)*

I. Summary [*]

This case concerns the killing by British forces of six Iraqis in occupied Iraq in 2003. The applicants, Mr Mazin Gatteh Al-Skeini, Ms Fattema Zabun Dahesh, Mr Hameed Abdul Rida Awaid Kareem, Mr Fadil Fayay Muzban, Mr Jabbar Kareem Ali and Colonel Daoud Mousa are close relatives of the victims. Although the deaths occurred outside the territory of the UK, the applicants argued that there was a jurisdictional link between the UK and the deceased and therefore the UK would be responsible for complying with the ECHR in Iraq, even though it was on foreign territory. On this basis, the they also complained that the UK authorities had failed to comply with their obligation to undertake an effective investigation into the deaths of their relatives under Article 2(1) of the ECHR. The UK Government rejected all these arguments – except those made by the sixth applicant. The UK Government accepted that his case fell within its jurisdiction because the applicant's son had died while in the custody of the British army.

The Grand Chamber ruled in favour of the applicants finding that their relatives fell within the jurisdiction of the UK despite the extra-territorial context. It further found that the UK authorities' failure to adequately and effectively investigate the deaths amounted to a breach of the procedural aspect of Article 2.

A. The Role of the UK in Iraq at the Time of the Incidents

On 20 March 2003, undeterred by the absence of UN Security Council authorisation, the US and the UK invaded Iraq. By 9 April 2003, US and UK troops had gained control of most parts of Baghdad. Major combat operations in Iraq were declared complete on 1 May 2003. On 22 May 2003, the UNSC adopted Resolution 1483 which recognised the US and the UK as occupying powers, acting under a unified command, the Coalition Provisional Authority ('CPA').

[*] Grand Chamber, *Al-Skeini and Others v the United Kingdom*, App no 55721/07, Judgment of 7 July 2011.

From its establishment on 16 April 2003 and until it was replaced by an Iraqi administration in the end of June 2004, the CPA was the *de facto* government of Iraq. Acting under the CPA's umbrella, the UK was tasked with maintaining order and security, and supporting local governance in the Iraqi provinces of Basra, Maysan, Thi Qar and Al-Muthanna.

B. The Six Incidents

This case concerns six different incidents, one for each applicant. The first applicant was the brother of Hazim Al-Skeini, who was shot dead by Sergeant A in the Al-Majidiyah area of Basra. On the evening of 4 August 2003, various members of the Al-Skeini family had gathered for a funeral ceremony at a house in the Al-Majidiyah area. In accordance with local customs, guns were discharged at the funeral. The celebratory shots attracted the attention of the British patrol led by Sergeant A. The patrol thus sought to get closer to gauge what was happening. As the patrol got closer to where the gunfire came from, they found two Iraqi men – one of whom was the applicant's brother – in the street. Sergeant A saw that one of the two men was armed and was pointing the gun in his direction. Believing that his life and those of the other soldiers in the patrol were at an immediate risk, Sergeant A, without giving any verbal warning, opened fire on the two men, causing their immediate death.

The following day, Sergeant A produced a written statement describing the incident. The Commanding Officer of his battalion, Colonel G, took the view that the incident fell within the rules of engagement on the use of force by British troops and wrote a report to that effect. Colonel G sent the report to the Brigade, where it was considered by Brigadier Moore, who was satisfied that the actions of Sergeant A fell within the rules of engagement, and so did not order any further investigation. To compensate for the loss, the dead men's tribe received a charitable donation of 2,500 USD from the British Army Goodwill Payment Committee.

The second applicant was the widow of Muhammad Salim, who was shot and fatally wounded by Sergeant C shortly after midnight on 6 November 2003. On 5 November 2003, Muhammad Salim went to visit his brother-in-law at the latter's home in Basra. At about 11.30 p.m., British soldiers broke down the front door of that house and shot Muhammad Salim in the hall of the house. The British soldiers took him to the hospital, where he died.

According to the British account of the incident, the patrol had received information from one of their interpreters that a group of armed men had entered the house. After the patrol failed to gain entry by knocking, they broke down the door. Sergeant C entered the house and cleared the first room. As he entered the second room, he heard automatic gunfire from within the house. When he moved forward into the next room by the bottom of the stairs, two

men armed with long-barrelled weapons rushed down the stairs towards him. Believing that his life was in immediate danger and that, therefore, there was no time to give any verbal warning, Colonel G shot the man in front, who was the second applicant's husband.

On 6 November 2003, the Company Commander produced a report of the incident. Having considered the report, Colonel G determined that the incident fell within the rules of engagement. This conclusion was reviewed by Brigadier General Jones, who agreed with it. The applicant received 2,000 USD from the British Army Goodwill Payment Committee.

The third applicant was the widower of Hannan Mahaibas Sadde Shmailawi, who was shot and fatally wounded on 10 November 2003 at the Institute of Education in the Al-Maqaal area of Basra where the couple lived with their family. On 10 November 2003, Hannan Shmailawi and her family were sitting around the dinner table when there was a sudden burst of machine-gunfire from outside the building. Bullets hit the applicant's wife and one of their children. Although both were taken to the hospital, only the child recovered. According to the British account of the incident, the applicant's wife was shot during a firefight between a British patrol and a number of unknown gunmen. The Company Commander produced a report concerning the incident. After he had considered the report, Colonel G came to the conclusion that the incident fell within the rules of engagement and did not require any further investigation. He duly produced a report to that effect, which he then forwarded to the Brigade. The report was considered by Brigadier Jones, who also came to the conclusion that the incident fell within the rules of engagement and required no further investigation.

The fourth applicant was the brother of Waleed Fayay Muzban, who was shot and fatally injured by Lance Corporal S in the Al-Maqaal area of Basra on 24 August 2003. In his witness statement, the applicant stated that his brother was returning home from work at about 8:30 p.m. on the evening in question, driving a minibus along a street called Souq Hitteen. He declared that 'for no apparent reasons' the minibus 'came under a barrage of bullets', as a result of which Waleed Muzban was mortally wounded.

According to the account of the involved British soldier, Lance Corporal S, a member of his patrol grew suspicious of the minibus because it had curtains over its windows and was being driven towards the patrol at a slow speed with its headlights dipped. When the vehicle stopped, Lance Corporal S approached the driver's door and greeted the driver (the fourth applicant's brother), who reacted in an aggressive manner and then accelerated away, swerving in the direction of various other members of the patrol. Lance Corporal S believed that his team was about to be fired at by the driver and others in the vehicle. He therefore opened fire with five aimed shots. As the vehicle sped off, Lance Corporal S fired another two shots at it. After a short interval, the vehicle

stopped. The driver got out and shouted at the British soldiers. He was ordered to lie on the ground. Subsequently, the driver was found to have three bullet wounds in his back and hip. He was given first aid and then taken to the Czech military hospital, where he died.

The Special Investigation Branch commenced an investigation on 29 August 2003. Colonel G reported to Brigadier Moore that he was satisfied that Lance Corporal S believed he was acting lawfully within the rules of engagement and Brigadier Moore agreed with the assessment. On 17 September 2003, Colonel G wrote to the Special Investigation Branch asking them to terminate the investigation, as requested by Brigadier Moore. On 23 September 2003, the investigation was terminated.

The deceased's family received 1,400 USD from the British Army Goodwill Payment Committee and a further 3,000 USD in compensation for the minibus. Following the fourth applicant's claim for judicial review, the Special Investigation Branch reopened the investigation on 7 June 2004 and completed it on 3 December 2004.

In February 2005, Lance Corporal S's Commanding Officer referred the case to the Army Prosecuting Authority. The Army Attorney General, however, determined that prosecution was not warranted. This was because he believed that there was no realistic prospect of convicting Lance Corporal S for not having acted in self-defence due to the unavailability of witnesses that could testify against him. The only known witnesses of this incident, in fact, were the British soldiers whom Lance Corporal S had sought to protect by opening fire first.

The fifth applicant was the father of Ahmed Jabbar Kareem Ali, who died on 8 May 2003 at age 15. On 8 May 2003, the applicant's son did not return home as expected at 1:30 p.m. The following morning, A, a young Iraqi, contacted the applicant and reported that the previous day some British soldiers had arrested him along with the applicant's son and two others, beaten them up, and eventually forced them into the waters of the Shatt Al-Arab river. The applicant found his son's body in the water on 10 May 2003. Some days after his son's funeral, Special Investigation Branch officers informed the father that an investigation would commence. In August 2005, he was further informed that four soldiers had been charged with manslaughter and that a trial would take place in the UK. The accused were, however, acquitted. The father also brought civil proceedings for damages in respect of his son's death against the Ministry of Defence. On 15 December 2008, the claim was settled by the payment of 115,000 GBP. On 20 February 2009, Major General Cubbitt apologised to the father on behalf of the British army for its role in his son's death.

The sixth applicant was a Colonel in the Basra police force. His son, Baha Mousa, died while in the custody of the British army, three days after having

been arrested by soldiers on 14 September 2003 at the Ibn Al-Haitham Hotel in Basra, where he had been working as a receptionist. According to another hotel employee, upon their arrival at the British base the Iraqi detainees were hooded, forced to maintain stress positions, denied food and water, and kicked and beaten. During the detention, Baha Mousa was taken into another room, from where he could be heard screaming and moaning.

On 15 September 2003, Brigadier Moore, who had taken part in the operation during which the hotel employees had been arrested, was told of Baha Mousa's death. The Special Investigation Branch investigated the death. Baha Mousa was found to have ninety-three identifiable injuries on his body and to have died of asphyxiation. The investigation report was distributed to the unit's chain of command.

On 19 July 2005, seven British soldiers were charged with criminal offences in connection with Baha Mousa's death. On 19 September 2006, at the start of the court martial, one of the soldiers pleaded guilty to the charge of the war crime of inhumane treatment, but not guilty to the charge of manslaughter. On 14 February 2007, charges were dropped against four of the seven soldiers and, on 13 March 2007, the other two soldiers were acquitted. On 30 April 2007, the first soldier was convicted of inhumane treatment and sentenced to one year's imprisonment and dismissal from the army. The applicant later brought civil proceedings against the Ministry of Defence, which concluded in July 2008 by the formal and public acknowledgement of liability and the payment to the applicant of 575,000 GBP in compensation.

II. Proceedings in Domestic and International Jurisdictions

The applicants brought a claim against the UK Secretary of State concerning the refusal to effectively investigate the deaths of their relatives and to provide adequate remedies. On 13 June 2007, the House of Lords by majority found (except for the sixth applicant's case) that the UK did not have jurisdiction over the killings of the applicants' relatives because the crimes were committed outside the UK's territory. It was instead unnecessary for the House of Lords to examine the case of the death of the sixth applicant's son as the Secretary of State had accepted that it fell within the UK's jurisdiction. The ensuing application before the ECtHR was first allocated to the Fourth Section, which on 19 January 2010 decided to relinquish jurisdiction in favour of the Grand Chamber.

III. Judgment (paras. 130–149)

(b) The Court's assessment

(i) General principles relevant to jurisdiction under Article 1 of the Convention

130. Article 1 of the Convention reads as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.".

As provided by this Article, the engagement undertaken by a Contracting State is confined to "securing" ("*reconnaître*" in the French text) the listed rights and freedoms to persons within its own "jurisdiction" (see *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161, and *Banković and Others*, cited above, § 66). "Jurisdiction" under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Ilaşcu and Others*, cited above, § 311).

(α) The territorial principle

131. A State's jurisdictional competence under Article 1 is primarily territorial (see *Soering*, cited above, § 86; *Banković and Others*, cited above, §§ 61 and 67; and *Ilaşcu and Others*, cited above, § 312). Jurisdiction is presumed to be exercised normally throughout the State's territory (see *Ilaşcu and Others*, cited above, § 312, and *Assanidze v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004II). Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases (see *Banković and Others*, cited above, § 67).

132. To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts.

(β) State agent authority and control

133. The Court has recognised in its case-law that, as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory (see

Drozd and Janousek, cited above, § 91; *Loizidou* (preliminary objections), cited above, § 62; *Loizidou v. Turkey* (merits), 18 December 1996, § 52, *Reports of Judgments and Decisions* 1996VI; and *Banković and Others*, cited above, § 69). The statement of principle, as it appears in *Drozd and Janousek* and the other cases just cited, is very broad: the Court states merely that the Contracting Party's responsibility "can be involved" in these circumstances. It is necessary to examine the Court's case-law to identify the defining principles.

134. Firstly, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others (see *Banković and Others*, cited above, § 73; see also *X. v. Germany*, no. 1611/62, Commission decision of 25 September 1965, Yearbook 8, p. 158; *X. v. the United Kingdom*, no. 7547/76, Commission decision of 15 December 1977, DR 12, p. 73; and *M. v. Denmark*, no. 17392/90, Commission decision of 14 October 1992, DR 73, p. 193).

135. Secondly, the Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (see *Banković and Others*, cited above, § 71). Thus, where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State (see *Drozd and Janousek*, cited above; *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, 14 May 2002; and *X. and Y. v. Switzerland*, nos. 7289/75 and 7349/76, Commission decision of 14 July 1977, DR 9, p. 57).

136. In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad. For example, in *Öcalan* (cited above, § 91), the Court held that "directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory". In *Issa and Others* (cited above), the Court indicated that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the soldiers' authority and control over them. In *Al-Saadoon and Mufdhi v. the United Kingdom* ((dec.), no. 61498/08, §§ 86-89, 30 June 2009), the Court held that two Iraqi nationals detained in British-controlled military prisons in Iraq

fell within the jurisdiction of the United Kingdom, since the United Kingdom exercised total and exclusive control over the prisons and the individuals detained in them. Finally, in *Medvedyev and Others v. France* ([GC], no. 3394/03, § 67, ECHR 2010), the Court held that the applicants were within French jurisdiction for the purposes of Article 1 of the Convention by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters. The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.

137. It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored" (compare *Banković and Others*, cited above, § 75).

(γ) Effective control over an area

138. Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (see *Loizidou* (preliminary objections), cited above, § 62; *Cyprus v. Turkey*, cited above, § 76; *Banković and Others*, cited above, § 70; *Ilaşcu and Others*, cited above, §§ 314-16; and *Loizidou* (merits), cited above, § 52). Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (see *Cyprus v. Turkey*, cited above, §§ 76-77).

139. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area (see *Loizidou* (merits), cited above, §§ 16 and 56, and *Ilaşcu and Others*, cited above, § 387). Other indicators may also be rele-

vant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (see *Ilaşcu and Others*, cited above, §§ 388-94).

140. The "effective control" principle of jurisdiction set out above does not replace the system of declarations under Article 56 of the Convention (formerly Article 63) which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, "with due regard ... to local requirements", to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term "jurisdiction" in Article 1. The situations covered by the "effective control" principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible (see *Loizidou* (preliminary objections), cited above, §§ 86-89, and *Quark Fishing Ltd*, cited above).

(δ) The legal space ("espace juridique") of the Convention

141. The Convention is a constitutional instrument of European public order (see *Loizidou* (preliminary objections), cited above, § 75). It does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States (see *Soering*, cited above, § 86).

142. The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a "vacuum" of protection within the "legal space of the Convention" (see *Cyprus v. Turkey*, cited above, § 78, and *Banković and Others*, cited above, § 80). However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States. The Court has not in its case-law applied any such restriction (see, among other examples, *Öcalan*; *Issa and Others*; *AlSaadoon and Mufdhi*; and *Medvedyev and Others*, all cited above).

(ii) Application of these principles to the facts of the case

143. In determining whether the United Kingdom had jurisdiction over any of the applicants' relatives when they died, the Court takes as its starting-point that,

on 20 March 2003, the United Kingdom together with the United States of America and their Coalition partners, through their armed forces, entered Iraq with the aim of displacing the Ba'ath regime then in power. This aim was achieved by 1 May 2003, when major combat operations were declared to be complete and the United States of America and the United Kingdom became Occupying Powers within the meaning of Article 42 of the Hague Regulations (see paragraph 89 above).

144. As explained in the letter dated 8 May 2003 sent jointly by the Permanent Representatives of the United Kingdom and the United States of America to the President of the United Nations Security Council (see paragraph 11 above), the United States of America and the United Kingdom, having displaced the previous regime, created the CPA "to exercise powers of government temporarily". One of the powers of government specifically referred to in the letter of 8 May 2003 to be exercised by the United States of America and the United Kingdom through the CPA was the provision of security in Iraq, including the maintenance of civil law and order. The letter further stated that "[t]he United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall, *inter alia*, provide for security in and for the provisional administration of Iraq, including by ... assuming immediate control of Iraqi institutions responsible for military and security matters".

145. In its first legislative act, CPA Regulation No. 1 of 16 May 2003, the CPA declared that it would "exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability" (see paragraph 12 above).

146. The contents of the letter of 8 May 2003 were noted by the Security Council in Resolution 1483, adopted on 22 May 2003. This Resolution gave further recognition to the security role which had been assumed by the United States of America and the United Kingdom when, in paragraph 4, it called upon the Occupying Powers "to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability" (see paragraph 14 above).

147. During this period, the United Kingdom had command of the military division Multinational Division (South-East), which included the province of Al-Basra, where the applicants' relatives died. From 1 May 2003 onwards the British forces in Al-Basra took responsibility for maintaining security and supporting the civil administration. Among the United Kingdom's security tasks were patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations (see paragraph 21 above).

148. In July 2003 the Governing Council of Iraq was established. The CPA remained in power, although it was required to consult with the Governing Council (see paragraph 15 above). In Resolution 1511, adopted on 16 October 2003,

the United Nations Security Council underscored the temporary nature of the exercise by the CPA of the authorities and responsibilities set out in Resolution 1483. It also authorised "a Multinational Force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq" (see paragraph 16 above). United Nations Security Council Resolution 1546, adopted on 8 June 2004, endorsed "the formation of a sovereign interim government of Iraq ... which will assume full responsibility and authority by 30 June 2004 for governing Iraq" (see paragraph 18 above). In the event, the occupation came to an end on 28 June 2004, when full authority for governing Iraq passed to the interim Iraqi government from the CPA, which then ceased to exist (see paragraph 19 above).

(iii) Conclusion as regards jurisdiction

149. It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the interim Iraqi government, the United Kingdom (together with the United States of America) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in south-east Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.

IV. Questions for the Students

Question 1

The Grand Chamber found 'State agent authority and control' to be one of the grounds on which jurisdiction under Article 1 of the ECHR can be established. The decisive factor in order to recognise the existence of this ground for extraterritorial jurisdiction is 'the exercise of physical power and control over the person in question'. Examples in the present case include the deaths caused by the acts of State authorities (British soldiers) while carrying out security operations (as regards the first, second, fourth, fifth and sixth applicants' relatives). Examples also include the deaths that occurred in the course of security operations due to an exchange of fire joined by State authorities (such as in the case of the third applicant's wife).

Compare this ground of jurisdiction with the other grounds of jurisdiction that the Grand Chamber spells out. How would you define the concept of 'ju-

risdiction' that overall emerges from the *Al-Skeini* case? How different is this concept of 'jurisdiction' from that of 'control', in light of this case?

Question 2

Reflect on the consequences of the 'expansive' notion of jurisdiction elaborated by the Grand Chamber. It could be argued that the Grand Chamber sought to extend human rights protections granted by the ECHR to a higher number of cases in order to prevent loopholes and to shield potential victims of conduct imputable to States party to the ECHR. As a result of this case, jurisdiction has therefore ceased to be predominantly linked to the existence of control over a territory (territorial or extraterritorial jurisdiction). Do you find the Grand Chamber's enlargement of the notion of 'jurisdiction' fair, or is it impermissibly biased in favour of the victims?

Question 3

Compare the approach in *Al-Skeini* and the approach in *Banković* in terms of the criteria for establishing the existence of jurisdiction and the reasoning of the two Grand Chambers. To what extent can it be said that the concept of 'jurisdiction' defined in *Al-Skeini* is different from that adopted in *Banković*? Would you find that the earlier approach in *Banković* has now been reversed? Is it possible to say that the Grand Chamber in *Banković* might have reached a different conclusion had it taken the approach adopted in *Al-Skeini*?

2.2. *The Rise of Jurisdiction as 'State Agent Authority and Control'*

Article 1 of the ECHR provides that States Parties 'shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.[3] The existence of jurisdiction is a 'necessary condition for the ECtHR to hold a State party responsible for acts or omissions that are attributable to it under the norms of State responsibility'.[4]

Note in this regard that the concept of attribution and that of jurisdiction are analytically and legally distinct. The former is a logical precondition for the exercise of the latter. Attribution concerns the determination of whether a

[3] See text in Appendix C.

[4] *Ilaşcu and Others v Moldova and Russia*, App no 48787/99 (ECtHR [GC] 8 July 2004) para. 311.

given conduct can be attributed to a State.[5] While in some cases a given conduct may be clearly attributable (imputable) to a State as its agents are directly involved, in others the question of to whom a given conduct should be attributed may be more difficult to ascertain. This is the case, for instance, when State troops are acting under the framework of an international organisation's mandate.[6] Jurisdiction, by contrast, determines when the conduct of or attributed to a State party falls within the remit of the ECHR, so that the ECtHR can exercise jurisdiction (*ius dicere*) on the legality of that conduct under the ECHR.

Several important cases concerning Article 2 of the ECHR have focused on clarifying the meaning of jurisdiction within Article 1. As discussed further below, the result of these developments is that it would be superficial to understand the concept of 'jurisdiction' in Article 1 as a mere synonym of that used in domestic jurisdictions or in public international law. Certainly, jurisdiction used in Article 1 of the ECHR echoes the term's meaning in public international law;[7] yet its meaning within the ECHR framework has taken on a

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[5] See in this regard *Ilaşcu and Others v Moldova and Russia*, App no 48787/99 (ECtHR [GC] 8 July 2004) para. 311; *Al-Skeini and Others v the United Kingdom*, App no 55721/07 (ECtHR [GC] 7 July 2011) para. 130; *Catan and Others v the United Kingdom*, App nos 43370/04, 18454/06 and 8252/05 (ECtHR [GC] 19 October 2012) para. 103.

[6] See *Behrami and Behrami* v *France* and *Saramati v France, Germany and Norway*, App nos 71412/01 and 78166/01 (ECtHR Admissibility Decision [GC] 2 May 2007). In *Behrami and Saramati*, the Grand Chamber declined jurisdiction over the respondent States' actions in the context of NATO and UN missions in Kosovo 1999. The Grand Chamber found that the actions examined in the case were 'in principle, attributable to the UN' rather than to the States whose agents in fact carried them out. This was namely because the missions remained under the ultimate authority and control of the UN, thereby presumably precluding the responsibility of the participating States. Given that the UN was not party to the ECHR, the Grand Chamber thus declared the complaints inadmissible due to lack of jurisdiction *ratione personae*, even though the examined conduct could arguably have satisfied one of the extraterritorial grounds for jurisdiction if attributed to the individual States. See namely ibid, paras. 140-152. The Grand Chamber's reasoning was not without controversy and is contrasted by the later judgment in *Al-Jedda v the United Kingdom*, App no 27021/08 (ECtHR [GC] 7 July 2011) where the Grand Chamber held the UK responsible for the conduct of British forces under Article 5 of the ECHR notwithstanding they were a component of a UN-authorised Multinational Force in Iraq. For further commentary on *Behrami and Saramati* see also, among others, Aurel Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: the Behrami and Saramati Cases' (2008) 8 Human Rights Law Review 151-170; Heike Krieger, 'A Credibility Gap: The Behrami and Saramati Decision of the European Court of Human Rights' (2009) 13 Journal of International Peacekeeping 159-180.

[7] See *Gentilhomme, Schaff-Benhadji and Zerouki v France*, App nos 48205/99, 48207/99 and 48209/99 (ECtHR 14 May 2002) para. 20; *Banković and Others v Belgium and Others*, App no 52207/99 (ECtHR [GC] 12 December 2001) paras. 59-61; and *Assanidzé v Georgia*, App no 71503/01 (ECtHR [GC] 8 April 2004) para. 137. On the concept of jurisdiction in public international law see the comprehensive analysis made in Christopher Staker, 'Jurisdiction', in Malcolm Evans (ed), *International Law* (OUP 2018 5th ed) 289-315.

life of its own by growing into a sort of *sui generis* concept. Achieving a thorough understanding of that concept requires going beyond standard definitions and studying holistically the interpretations of Article 1 operated, case by case, by the ECtHR.

The above-cited section of the *Al-Skeini* case indicates, in no uncertain terms, that four guiding principles for determining the existence of jurisdiction in a given case have emerged in the practice of the ECtHR. First, a State's jurisdictional competence under Article 1 is primarily territorial, in the sense that it applies to the entire territory of a State within the meaning of international law (principle α). On the other hand, this competence can also, in exceptional cases, emerge extraterritorially. The ECtHR has conceptualised extraterritorial jurisdiction to be triggered in two situations, namely in case of 'State Agent Authority and Control' over individuals (principle ß); or when a State is exercising 'authority and control over a territory' (principle γ).[8] As a fourth principle, the Grand Chamber has stressed that the ECHR applies exclusively within the *espace juridique* of the States parties to the Council of Europe (principle δ). This means that the ECHR should not be construed as an instrument to 'govern the actions of States not Parties to it', nor as 'a means of requiring the Contracting States to impose Convention standards on other States'.[9]

In the *Al-Skeini* case, the ECtHR found that it had jurisdiction over certain conduct of UK forces in Iraq under the second ground for extraterritorial jurisdiction discussed in the judgment, that is, under principle ß. It did so independently of the acknowledged fact that the UK forces were occupying Iraq and thus jurisdiction could arguably have been found on the distinct ground of principle γ (effective control over an area). In so doing, the ECtHR made clear that the exercise of authority and control over persons triggers jurisdiction also in a territory beyond the territory of the States parties and independently from the exercise of extraterritorial jurisdiction *ratione loci*. Subsequent cases have adhered to the same rationale.

In *Jaloud v the Netherlands*, the applicant claimed that the investigation into the death of his son was inadequate and that, therefore, the Netherlands was in breach of its procedural obligations under Article 2 of the ECHR. The applicant's son, Azhar Sabah Jaloud, had been killed by Dutch military personnel at a vehicle checkpoint in the town of Ar Rumaytah, Iraq in the early hours of 21 April 2004. The checkpoint was manned by personnel of the Iraqi Civil Defence Corps. After 2:00 a.m., a car had slowed down at the checkpoint and

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[8] *Al-Skeini and Others v the United Kingdom*, App no 55721/07 (ECtHR [GC] 7 July 2011) paras. 131-138.

[9] *Soering v the United Kingdom*, App no 14038/88 (ECtHR 7 July 1989) para. 86.

fired shots at the personnel guarding the checkpoint.[10] Nobody was hit and the car disappeared into the night.[11] The Iraqi personnel called for the help of the Dutch military who were in charge of the security of the area under the operational control of the UK, the occupying power in that area of Iraq.[12] Shortly thereafter, a patrol of six Dutch soldiers arrived at the checkpoint.[13] A car approached the checkpoint at speed and hit one of the several barrels that had been set out in the middle of the road.[14] Shots were fired at the car. The applicant's son, who was sitting in the passenger seat of the car, was killed.[15] It was not determined who had fired the fatal shots.[16]

When discussing whether it had jurisdiction under Article 1, the Grand Chamber adhered to the approach in *Al-Skeini* by citing in their entirety the above-mentioned jurisdictional principles encapsulated in that judgment.[17] The Grand Chamber noted that the Netherlands had assumed responsibility for providing security in a part of Iraq in accordance with UNSC Resolution 1483 and retained full command over its contingent there.[18] It was for this reason – to contribute to creating conditions of security in Iraq as requested under UNSC Resolution 1483 – that the Dutch personnel were present at the checkpoint where Jaloud met his death while trying to pass through. The Grand Chamber determined that the checkpoint was ultimately under the command and direct supervision of a Netherlands Royal Army Officer.[19]

Although the wording used is somewhat convoluted, giving rise to debates among scholars,[20] the Grand Chamber did not find that it had territorial jurisdiction because of exercise of control over the territory in question, or the checkpoint itself. It held, in an express reference to the ß-principle of jurisdiction, that the Netherlands exercised jurisdiction because Jaloud had passed through a checkpoint set up 'for the purpose of asserting authority and control over persons passing through' it.[21] It therefore found that the death of Jaloud

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[10] *Jaloud v the Netherlands*, App no 47708/08 (ECtHR [GC] 20 November 2014) para. 10.

[11] Ibid.

[12] Ibid, paras. 53-56.

[13] Ibid, para. 11.

[14] Ibid, para. 12.

[15] Ibid, para. 13.

[16] Ibid, para. 16.

[17] Ibid, para. 139.

[18] Ibid, paras. 57 and 152.

[19] Ibid, para. 152.

[20] See generally in this regard Ian Park, *The Right to Life in Armed Conflict* (OUP 2018) 76-83; Stuart Wallace, *The Application of the European Convention on Human Rights to Military Operations* (CUP 2019) 59-62.

[21] *Jaloud v the Netherlands* (n 10) para. 152.

had occurred within the jurisdiction of the Netherlands.[22]

A similar approach was adopted in *Hassan v the United Kingdom*, a case focusing on detention in an extraterritorial context under Article 5 of the ECHR. On the morning of 23 April 2003, a British army unit came to the house of the Hassan family in Umm Qasr, Iraq hoping to arrest a senior, high-ranking member of the Ba'ath, which was Saddam Hussein's party ruling Iraq from 1968 to 2003.[23] According to their records, they found Tarek Hassan on top of the house's roof armed with an AK-47 machine gun and arrested him on suspicion of being a combatant or a civilian posing a threat to security.[24] Mr Hassan was detained and questioned for several days. He was taken later that day to Camp Bucca, a detention facility in Iraq operated by the United States.[25]

Also in this case, the Grand Chamber showed adherence to the *Al-Skeini* precedent by citing in its entirety the section of that judgment setting out the four 'applicable principles on jurisdiction'.[26] As in *Al-Skeini*, the Grand Chamber did not find it necessary to decide whether the UK was in effective control of the area. It recognised that the detention centre where Hassan had been taken, Camp Bucca, was under the jurisdiction of the US. Nonetheless, it concluded that during the period at Camp Bucca, Hassan fell under 'the authority and control of United Kingdom forces' as he had been 'admitted to the Camp as a United Kingdom prisoner'.[27] It was therefore an exercise of jurisdiction over the person of Mr Hassan or, in other words, control that the UK could exercise over him that kept him under detention and under the jurisdiction of the UK. As concluded by the Grand Chamber, Mr Hassan fell within the jurisdiction of the United Kingdom 'from the moment of his capture by the UK troops … until his release from the bus that took him from Camp Bucca to the drop-off point, most probably Umm Qasr on 2 May 2003'.[28]

The approach adopted in these cases and carved out in *Al-Skeini* is different from that adopted in *Banković*. Both the FRY and Iraq fell outside the territory of the members of the Council of Europe. In each of these cases, it was the conduct of armed forces in the course of an international armed conflict that required scrutiny. In *Banković*, however, the ECtHR remained silent on the question of whether personal jurisdiction existed on the basis that the citizens

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[22] Ibid.

[23] *Hassan v the United Kingdom*, App no 29750/09 (ECtHR [GC] 16 September 2014) para. 11.

[24] Ibid, paras. 11 and 53.

[25] Ibid, para. 14.

[26] Ibid, para. 74.

[27] Ibid, para. 78.

[28] Ibid, para. 80.

of the FRY had been subjected to the control of NATO countries due to the NATO bombing campaign over the territory of the FRY. The ECtHR simply declined jurisdiction, excluding that an instantaneous extraterritorial act as such could trigger jurisdiction as Article 1 of the ECHR did not admit of a 'cause and effect' notion of jurisdiction. It consequently adopted an essentially territorial notion of *espace juridique* by holding that the FRY fell outside the legal space (*espace juridique*) of the members of the Council of Europe.

That interpretation contrasts with that adopted in the subsequent cases, where the ECtHR has been open to inquiring whether there were grounds of jurisdiction other than territorial connection. The approach adopted in *Al-Skeini* enabled the ECtHR to find jurisdiction where it would probably not have found it had it followed the *Banković* approach. As such, the argument that *Al-Skeini* constitutes an implicit departure from the *Banković* precedent can be made with reasonable confidence. This does not mean, however, that the personal criterion has replaced, or taken precedence over, other criteria developed in the jurisprudence of the ECtHR and summarised in *Al-Skeini*, which do remain in the arsenal of the ECtHR as evidenced, among others, by the following two cases.

In *Chiragov and Others v Armenia*, the ECtHR examined the complaints of six Azerbaijani refugees alleging that they were unable to return to their homes and property located in the district of Lachin, a strip of land between Armenia and an area referred to as Nagorno-Karabakh. They were forced to flee in 1992 during the ethnic and territorial conflict between Azerbaijan and Armenia concerning the territory of Nagorno-Karabakh.[29] At the time of the dissolution of the Soviet Union in December 1991, the Nagorno-Karabakh Autonomous Oblast ('NKAO') was a region landlocked within the Azerbaijan Soviet Socialist Republic. It included the district of Lachin. On 2 September 1991 – shortly after Azerbaijan had declared its independence from the Soviet Union – the Regional Council of the NKAO announced the establishment of the 'Nagorno-Karabakh Republic' ('NKR'). Subsequently, the NKR, which was never recognised by any state or international organisation, came under the occupation of Armenia.[30]

The ECtHR found that the matters complained of by the applicants fell within the jurisdiction of Armenia for the purposes of Article 1 of the ECHR because Armenia exercised effective control over Nagorno-Karabakh. It excluded that the situation pertaining to the Nagorno-Karabakh and its surrounding territories was one concerning 'Armenian State agents exercising authority and control over individuals'.[31] Instead, it found that Armenia 'exercised and

[29] *Chiragov and Others v Armenia*, App no 13216/05 (ECtHR [GC] 16 June 2015) para. 32.

[30] Ibid, paras. 12-21.

[31] Ibid, para. 169.

continues to exercise' effective control over the territory itself, holding thus:

> All of the above reveals that Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the 'NKR', that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. In other words, the 'NKR' and its administration survive by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin. [32]

The significance of the criterion of effective control over a territory was recently reaffirmed in the *Güzelyurtlu and Others v Cyprus and Turkey*. In this case, the Grand Chamber was called to examine the effectiveness of the investigation into the death of three members of the Güzelyurtlu family, a Cypriot family with a Turkish-Cypriot background. [33] In 2005, the three relatives were found dead with gunshot wounds. [34] They were found in Southern Cyprus, the portion of the island controlled by the government of Cyprus. Criminal investigations were opened by both the Cypriot authorities, who had identified the suspects, and the authorities of the 'Turkish Republic of Northern Cyprus' ('TRNC'), who had arrested and questioned the suspects on suspicion of premeditated murder after they had fled to Northern Cyprus. [35] As recalled by the Grand Chamber, the TRCN is the entity that has been governing Northern Cyprus since 1974 and has never gained recognition as a State within international law, let alone as the legitimate ruler of that territory. [36]

The TRNC authorities asked the Cyprus authorities for the case file with the evidence against the suspects, so as to prosecute them in Northern Cyprus. The government of Cyprus refused. Instead, they demanded the transfer or extradition of the suspects in order to prosecute them in Southern Cyprus. The TRNC authorities rejected this demand. As a consequence, both investigations came to a stalemate because of the lack of cooperation. Efforts made through the good offices of the UN Peacekeeping Force in Cyprus ('UNFICYP') were unsuccessful. [37] On 18 September 2017, the case was referred to the Grand

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[32] Ibid, para. 186.

[33] *Güzelyurtlu and Others v Cyprus and Turkey*, App no 36925/07 (ECtHR [GC] 29 January 2019) para. 10.

[34] Ibid, para. 15.

[35] Ibid, paras. 16-31.

[36] Ibid, para. 193. See also *Cyprus v Turkey*, App no 25781/94 (ECtHR [GC] 10 May 2001) para. 61.

[37] Ibid, paras. 106-136.

Chamber at the request of the governments of both respondent States. [38]

The Turkish government submitted a preliminary objection arguing that there was no 'jurisdictional link' between the three victims killed in Southern Cyprus and Turkey, and rather that Cyprus was competent *ratione loci*. [39] The Grand Chamber rejected it on the basis of the following reasoning.

First, it noted that the TRNC authorities had instituted their own criminal investigation. Second, earlier jurisprudence of the ECtHR had already clarified that Turkey exercised 'effective control' over Cyprus. The Grand Chamber maintained that this circumstance prevented the Republic of Cyprus, a member of the Council of Europe, from fulfilling its ECHR obligations in Northern Cyprus. Hence, Turkey, which had essentially replaced the Republic of Cyprus in the governance of Northern Cyprus, was under an obligation to secure for the inhabitants of that area 'the entire range of substantive rights set out in the Convention'. [40] The Grand Chamber argued that '[a]ny other finding would result in a vacuum in the system of human-rights protection in the territory of Cyprus', which fell within the 'legal space of the Convention'. [41] Third, the Grand Chamber remarked that the murder suspects had fled to the TRNC and that, consequently, Cyprus was prevented from pursuing its own criminal investigation in respect of those suspects and thus from fulfilling its ECHR obligations. [42]

The Grand Chamber found that both the Turkish and the TRNC authorities were informed of the crime and that Red Notices concerning the suspects were published by Interpol. The presence of the suspects in the territory controlled by Turkey was known to the Turkish and TRNC authorities, which kept them in detention on suspicion of premeditated murder. [43]The Grand Chamber emphasised that both the initiation of criminal investigations by the TRNC authorities and the fact that the suspects fled to a part of the Cypriot territory under the effective control of Turkey 'would suffice in itself to establish a jurisdictional link to Turkey'. [44] It therefore found that it had jurisdiction to examine the complaints against Turkey under Article 2. [45]

In a sense the *Güzelyurtlu* case, which does not cite the *Al-Skeini* judgment, takes a more cautious approach than the two cases discussed earlier. It is

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[38] Ibid, para. 6.

[39] Ibid, paras. 172-174.

[40] Ibid, paras. 191-194.

[41] Ibid, para. 195.

[42] Ibid, para. 194.

[43] Ibid.

[44] Ibid, para. 196.

[45] Ibid, para. 197.

grounded on what the ECtHR had already decided in previous jurisprudence, namely that Turkey was an occupying power in Cyprus and it was therefore necessary to avoid a vacuum of protection in Cyprus, a State member of the Council of Europe and thus within the *espace juridique* of the ECHR. One could argue that this approach amounts to a backpedalling from *Al-Skeini*, where the ECtHR established jurisdiction based on the conduct of the UK forces regardless of the situation of occupation. On the other hand, more simply, it could be said that the Grand Chamber in this case walked a path already trodden by adhering to settled jurisprudence specifically concerned with the occupation of Northern Cyprus by the TRNC and Turkey, from which there was no need to depart.

In conclusion to this section, it could be said that the development[46] and consolidation of the personal criterion of jurisdiction in *Al-Skeini* after the manifest gap in *Banković* constitutes a significant development in the practice of the ECtHR. It enables the ECtHR to find jurisdiction – or in other words to ensure the respect of the human rights of individuals falling under the control of States parties to the ECtHR regardless of their citizenship – in cases where States operate extraterritorially and the ECtHR is unable or unwilling to find jurisdiction on other grounds. This criterion supplements and enriches the jurisprudence of the ECtHR without sidelining the more traditional criteria for establishing jurisdiction, which continue to be affirmed in parallel through the different streams of the ECtHR's jurisprudence.

[46] On the earlier practice of the ECtHR establishing the basis for the approach taken in *Al-Skeini* see *Drozd and Janousek v France and Spain*, App no 12747/87 (ECtHR 26 June 1992) para. 91; *Issa and Others v Turkey*, App no 31821/96 (ECtHR 16 November 2004) paras. 66-71; *Al-Saadoon and Mufdhi v the United Kingdom*, App no 61498/08 (ECtHR 2 March 2010) para 128; *Medvedyev and Others v France*, App no 3394/03 (ECtHR [GC] 29 March 2010) paras. 66-67.

Chapter 3
The Obligation to Protect 'Everyone's Right to Life' by Law

3.1. *The Positive Obligation to Safeguard Life*

3.1.1. Osman v the United Kingdom *(1998)*

I. Summary [*]

The applicants are Mrs Mulkiye Osman and Ahmet Osman, both of whom are British citizens resident in London at the time of the events. Mr Ali Osman, the husband and father of the respective applicants, was shot dead on 7 March 1988 by Mr Paul Paget-Lewis, a high school teacher. At the same shooting incident, Ahmet Osman, the son of Mr Ali Osman, was also seriously wounded. Invoking Article 2 of the ECHR, the applicants complained, *inter alia*, that the British authorities had failed to take adequate and appropriate steps to protect their family from the danger posed by Paget-Lewis. The Government maintained that there had been no breach of Article 2. The Grand Chamber ruled in favour of the Government.

In the course of 1986, the headmaster of Homerton House School, Mr John Prince, came to realise that one of his teaching staff, Paget-Lewis, had developed an unusual 'attachment' to Ahmet Osman, a pupil at the school. Mrs Green, the mother of Leslie Green who was another pupil at the school, made a formal complaint on 2 March 1987 alleging that Paget-Lewis had been spreading rumours of a sexual nature about her son because of his friendship with Osman. On 3 March 1987, Mr Perkins, a deputy headmaster, interviewed Green, who confirmed what his mother had said and stated that Paget-Lewis had been following him home. On that same day, Mr Fleming, another deputy

[*] Grand Chamber, *Osman v the United Kingdom*, App no 23452/94, Judgment of 28 October 1998.

headmaster, interviewed Osman, who confirmed that Paget-Lewis had warned him about Green, accusing Green of sexual misconduct with another boy at the school. Osman also reported that on one occasion Paget-Lewis had followed Green and himself home in his car; that Paget-Lewis had asked Osman to come into his classroom at lunch times, presumably to learn Turkish; had taken photographs of him; and had given him money, a pen and a Turkish dictionary. On 16 March 1987, Green and his mother informed Mr Prince that Paget-Lewis had been spying on Osman and had told him that 'if he left school, he would find him'.

Between 3 March 1987 and 17 March 1987, according to his own diary, Mr Prince met with Mr Williams, a Police Commissioner ('PC'), on four occasions. However, PC Williams did not keep any record of the meetings, or – if he did – no such record now exists. According to the applicants information concerning Paget-Lewis' conduct was given to the police during these meetings. The Government stresses that all concerned were satisfied that the matter could be dealt with internally by the school.

By 17 March 1987, graffiti reading 'Leslie, do not forget to wear a condom when you screw Ahmet or he will get Aids.' had appeared at six locations around the school. Mr Perkins interviewed Paget-Lewis, who denied being responsible for the graffiti but appeared to know their precise wording and locations. Around the same time, Mr Youssouf, another deputy headmaster, had been informed by Osman that Paget-Lewis had claimed to have discovered his previous address and school, and had visited the area and spoken to his former neighbours. On 19 March 1987, Mr Youssouf discovered that the school's files relating to Osman and Green, as well as the file relating to staff disciplinary matters, had been stolen from the school office. He then questioned Paget-Lewis who denied involvement in the visit, conversations and theft.

On 14 April 1987, Paget-Lewis changed his name by deed poll to Paul Ahmet Yildirim Osman. On 4 May 1987, Mr Prince spoke with Detective Chief Inspector Newman and Detective Inspector Clarke, two police officers. According to the applicants, during this meeting the headmaster informed them of the missing files and the graffiti incident. He also clarified that Paget-Lewis's real name was Ronald Stephen Potter, which he had previously changed to name himself after a pupil whom he had taught at Highbury Grove School. The Government stressed that the two police officers had no recollection of having been informed of these matters.

On 1 and 9 May 1987, Mr Prince wrote to the Inner London Education Authority ('ILEA') calling for Paget-Lewis's removal from the school. An internal memorandum of 9 May from the Head of Discipline at the ILEA expressed 'a fear that [Paget-Lewis] might seek to take the boy out of the country' and stated that the police were investigating the complaint that 'he has

removed certain files about the matter from the school'. The same official also wrote in his notes between 14 April and 8 May 1987 fearing that Paget-Lewis may cause harm to Osman, and by changing his name may abscond with the boy; that the police had stated that Mr Prince should contact them if Ahmet went missing for more than an hour; and that the police would investigate the disappearance of the missing files, search Paget-Lewis's home and check up on his background. The Government, however, denied that the police gave such indications and assurances.

On 19 May, 2 June and 16 June 1987, Dr Ferguson, the ILEA psychiatrist, examined Paget-Lewis. On the first occasion, Dr Ferguson recommended that Paget-Lewis remain teaching at the school, although while receiving some form of psychotherapy. As a result of the second interview, Paget-Lewis was designated temporarily unfit to work. Following the third examination, Dr Ferguson recommended that Paget-Lewis should no longer teach at Homerton House. On 18 June 1987, Paget-Lewis was suspended from school pending an ILEA investigation for 'unprofessional behaviour' towards Osman.

On 7 August 1987, the ILEA sent a letter to Paget-Lewis stating that he was not to return to Homerton House. Shortly thereafter, Paget-Lewis, who had never returned to Homerton House after the second interview with Dr Ferguson, began working as a reserve teacher at two other local schools, Haggerston School and Skinners School.

On or about 21 May 1987, a brick was thrown through a window of the applicants' house. On two occasions in June 1987, the tyres of Ali Osman's car were deliberately burst. While there is a crime report for the first of these offences, no police records relating to the offences in June can be found, although they were both reported to the police.

In August or September 1987, a mixture of engine oil and paraffin was poured on the area outside the Osman family home. On 18 October 1987, the windscreen of Ali Osman's car was smashed. During November 1987, in a series of incidents, the applicants' front door lock was jammed with superglue, dog excrement was smeared on their doorstep and on their car, and the light bulb was stolen from the light in the outside porch on more than one occasion. Around this time, all the windows of the Osman family car were also smashed. All these incidents were reported to the police and Ali Osman visited Hackney police station on two occasions to discuss the vandalism and criminal damage to his property.

In November 1987, PC Adams visited the Osmans' home and then spoke to Paget-Lewis about the acts of vandalism. In a later statement to the police, Paget-Lewis alleged that he had told PC Adams that the loss of his job was so distressing that he feared that he may be doing something criminally insane. The Government, however, denied this, stressing that during that interview Paget-Lewis had denied any involvement in acts of vandalism. Without reach-

ing a conclusion on this point, the Grand Chamber stated that no detailed records were made by Mr Adams of his contacts with Paget-Lewis or the Osman family, and that any entries in notebooks or duty registers could not later be traced by the Metropolitan Police Solicitor's Department.

On 7 December 1987, a car driven by Paget-Lewis collided with a van in which Leslie Green was a passenger. The police arrived and warned Paget-Lewis. On 22 December 1987, the driver of the van stated to the police that after the accident Paget-Lewis had said: 'I'm not worried because in a few months I'll be doing life.' On 8 December 1987, following the car collision, Detective Sergeant Boardman contacted the ILEA stating that he wished to interview Paget-Lewis and the headmaster of the school. The applicants stated that Detective Sergeant Boardman assured the ILEA that the Osman family would be protected. The Government denied that such an assurance was ever given. An ILEA memorandum of 8 December 1987 spoke of the harassment of the Osman family and noted that Paget-Lewis had allegedly admitted responsibility for the van collision by saying that Green had lured Osman away from his affections.

On 9 December 1987, Detective Sergeant Boardman took a detailed statement from Green and his mother concerning, *inter alia*, Paget-Lewis following Leslie home, the acts of harassment and the graffiti. In his statement, Green claimed that Paget-Lewis had threatened to 'get him' whether it took 'thirty days or thirty years.' On 14 December 1987, Detective Sergeant Boardman visited Homerton House and inspected the graffiti together with a police photographer who documented the scene. On or about 15 December 1987, Detective Sergeant Boardman visited the Osman family. The applicants alleged that Detective Sergeant Boardman told them he knew Paget-Lewis was responsible for the acts of vandalism and gave them assurances that he would cause the incidents to stop. The Government denied that Detective Sergeant Boardman gave such acknowledgment and assurances. In his report completed on or about 15 December 1987, Detective Sergeant Boardman remarked that there was no evidence to implicate Paget-Lewis in either the graffiti or the acts of vandalism at the Osmans' address, although 'there is no doubt in everybody's mind that he was in fact responsible and this was just another example of his spite.'

On 15 December 1987, Paget-Lewis was interviewed by officers of the ILEA at his own request. An ILEA memorandum dated the same day recorded that Paget-Lewis stated that it was all a 'symphony' and that 'the last chord had to be played.' He blamed Mr Perkins for all his troubles (essentially, his having lost his job and being deeply in debt), but stated that he would not do a 'Hungerford' [1] in a school: he would see Osman at his home. According to the

[1] Hungerford was the scene of a 1987 massacre in which a gunman killed sixteen persons before committing suicide.

same memorandum, Detective Sergeant Boardman was unavailable by phone after the interview, but a detailed message was left with the police receptionist. The applicants stated that the content of the interview was passed on to the police. The Government denied that mention was made of the 'Hungerford' reference or that there was any suggestion that the Osmans might be in danger.

On 15 December 1987, after receiving a message from the ILEA's officer, Detective Sergeant Boardman sent a telex to the local police station near Mr Perkins's home asking them to pay casual attention to his address, giving Paget-Lewis's car registration number and a brief description of him. On 16 December 1987, Detective Sergeant Boardman met with Mr Prince and Mr Perkins. The applicants stated that he assured Mr Prince that the police would protect both him and Mr Perkins. According to the Government, no assurance of protection was given. Detective Sergeant Boardman's impression from those meetings was that Paget-Lewis's anger was directed against Mr Perkins. On 17 December 1987, Detective Sergeant Boardman and other police officers arrived at Paget-Lewis's house with the intention of arresting him on suspicion of criminal damage, but he was absent.

In early January 1988, Paget-Lewis's name was put on the Police National Computer as being wanted in relation to the car collision incident and on suspicion of having committed offences of criminal damage. Between January and March 1988, Paget-Lewis travelled around England hiring cars in his adopted name of Osman and was involved in a number of accidents. During this period, he spent time at his home address, where he also continued to receive mail.

On 1, 4 and 5 March 1988, Leslie Green saw Paget-Lewis wearing a black crash helmet near the applicants' home. According to the applicants, Mrs Green informed the police on each occasion, but her calls were not returned. On 7 March 1988, at about 11:00 p.m., Paget-Lewis threatened the Osmans at gunpoint as they were on their way home, made Ali and Ahmet Osman kneel down in the kitchen, turned out the light, and shot at them. Ali Osman was killed, and Ahmet Osman was seriously wounded. Paget-Lewis then drove to Mr Perkins's home, where he shot and wounded him and killed his son. Early the next morning, Paget-Lewis was arrested. At the time of his arrest, he asked 'why didn't you stop me before I did it, I gave you all the warning signs?'.

Later on, Paget-Lewis, admitting his responsibility, declared that he had been planning the shooting of the Osmans ever since he lost his job, and that for the previous two weeks he had been watching the Osmans' house. Although he considered Mr Perkins as his main target, he also believed that Ali and Ahmet Osman were responsible for the loss of his job at Homerton House. He denied that on earlier occasions he had damaged the windows of the Osmans' house, but admitted that he had burst the tyres of their car as a prank.

He also denied responsibility for the graffiti and for taking the files from the school office.

II. Proceedings in Domestic and International Jurisdictions

On 28 October 1988, Paget-Lewis was convicted of two charges of manslaughter having pleaded guilty on grounds of diminished responsibility. He was sentenced to be detained in a secure mental hospital for an indefinite period of time. Following unsuccessful proceedings before the UK courts, the applicants turned to the ECommHR, which declared their application admissible on 17 May 1996. In a report dated 1 July 1997, the ECommHR found by ten votes to seven that there had been no violation of Article 2 of the ECHR. Subsequently, on 26 June 1998, a Chamber of the ECtHR decided to relinquish jurisdiction forthwith in favour of the Grand Chamber.

III. Judgment (paras. 113–122)

B. The Court's assessment

1. As to the establishment of the facts

113. The Court notes that there was never any independent judicial determination at the domestic level of the facts of the instant case. The Commission on the basis of the pleadings of the parties and the hearing which it held in the case made its own findings on the course of events in the case up until the time of the armed attack by Paget-Lewis on Ali and Ahmet Osman on 7 March 1988 (see paragraphs 67–71 above). According to the applicants, the Commission overlooked in its findings of fact the importance of certain events which they claim have a bearing on the level of knowledge which can be imputed to the police in respect of the seriousness of the danger which Paget-Lewis represented for the lives of the Osman family (see paragraph 10 above).

114. The Court observes that it is called on to determine whether the facts of the instant case disclose a failure by the authorities of the respondent State to protect the right to life of Ali and Ahmet Osman, in breach of Article 2 of the Convention. In addressing that issue, and having due regard to the Commission's role under the Convention in the establishment and verification of the facts of a case, it will assess this issue in accordance with its usual practice in the light of all the material placed before it by the applicants and by the Government or, if necessary, material obtained of its own motion (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 64, § 160; and the McCann and

Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 51, § 173).

2. As to the alleged failure of the authorities to protect the rights to life of Ali and Ahmet Osman

115. The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (see paragraph 107 above). Such a rigid standard

must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (see, *mutatis mutandis*, the above-mentioned McCann and Others judgment, p. 45, § 146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.

On the above understanding the Court will examine the particular circumstances of this case.

117. The Court observes, like the Commission, that the concerns of the school about Paget-Lewis' disturbing attachment to Ahmet Osman can be reasonably considered to have been communicated to the police over the course of the five meetings which took place between 3 March and 4 May 1987 (see paragraphs 21 and 27 above), having regard to the fact that Mr Prince's decision to call in the police in the first place was motivated by the allegations which Mrs Green had made against Paget-Lewis and the school's follow-up to those allegations. It may for the same reason be reasonably accepted that the police were informed of all relevant connected matters which had come to light by 4 May 1987 including the graffiti incident, the theft of the school files and Paget-Lewis' change of name.

It is the applicants' contention that by that stage the police should have been alert to the need to investigate further Paget-Lewis' alleged involvement in the graffiti incident and the theft of the school files or to keep a closer watch on him given their awareness of the obsessive nature of his behaviour towards Ahmet Osman and how that behaviour manifested itself. The Court for its part is not persuaded that the police's failure to do so at this stage can be impugned from the standpoint of Article 2 having regard to the state of their knowledge at that time. While Paget-Lewis' attachment to Ahmet Osman could be judged by the police officers who visited the school to be most reprehensible from a professional point of view, there was never any suggestion that Ahmet Osman was at risk sexually from him, less so that his life was in danger. Furthermore, Mr Perkins, the deputy headmaster, alone had reached the conclusion that Paget-Lewis had been responsible for the graffiti in the neighbourhood of the school and the theft of the files. However Paget-Lewis had denied all involvement when interviewed by Mr Perkins and there was nothing to link him with either incident. Accordingly, at that juncture, the police's appreciation of the situation and their decision to treat it as a matter internal to the school cannot be considered unreasonable.

Like the Commission (see paragraph 68 above), the Court is not persuaded either that the ILEA official's memorandum and internal notes written between 14 April and 8 May 1987 are an accurate reflection of how the discussions between Mr Prince and the police officers wound up (see paragraph 28 above).

118. The applicants have attached particular weight to Paget-Lewis' mental

condition and in particular to his potential to turn violent and to direct that violence at Ahmet Osman. However, it is to be noted that Paget-Lewis continued to teach at the school up until June 1987. Dr Ferguson examined him on three occasions and was satisfied that he was not mentally ill. On 7 August 1987 he was allowed to resume teaching, although not at Homerton House (see paragraph 35 above). It is most improbable that the decision to lift his suspension from teaching duties would have been made if it had been believed at the time that there was the slightest risk that he constituted a danger to the safety of young people in his charge. The applicants are especially critical of Dr Ferguson's psychiatric assessment of Paget-Lewis. However, that assessment was made on the basis of three separate interviews with Paget-Lewis and if it appeared to a professional psychiatrist that he did not at the time display any signs of mental illness or a propensity to violence it would be unreasonable to have expected the police to have construed the actions of Paget-Lewis as they were reported to them by the school as those of a mentally disturbed and highly dangerous individual.

119. In assessing the level of knowledge which can be imputed to the police at the relevant time, the Court has also had close regard to the series of acts of vandalism against the Osmans' home and property between May and November 1987 (see paragraphs 30, 36 and 37 above). It observes firstly that none of these incidents could be described as life-threatening and secondly that there was no evidence pointing to the involvement of Paget-Lewis. This was also the view of Detective Sergeant Boardman in his report on the case in mid-December 1987 having interviewed the Green and Osman families, visited the school and taken stock of the file (see paragraphs 42–45 above). The completeness of Detective Sergeant Boardman's report and the assessment he made in the knowledge of all the allegations made against Paget-Lewis would suggest that even if it were to be assumed that the applicants are correct in their assertions that the police did not keep records of the reported incidents of vandalism and of their meetings with the school and ILEA officials, this failing could not be said to have prevented them from apprehending at an earlier stage any real threat to the lives of the Osman family or that the irrationality of Paget-Lewis' behaviour concealed a deadly disposition. The Court notes in this regard that when the decision was finally taken to arrest Paget-Lewis it was not based on any perceived risk to the lives of the Osman family but on his suspected involvement in acts of minor criminal damage (see paragraph 49 above).

120. The Court has also examined carefully the strength of the applicants' arguments that Paget-Lewis on three occasions communicated to the police, either directly or indirectly, his murderous intentions (see paragraph 105 above). However, in its view these statements cannot be reasonably considered to imply that the Osman family were the target of his threats and to put the police on notice of such. The applicants rely in particular on Paget-Lewis' threat to "do a sort of Hungerford" which they allege he uttered at the meeting with ILEA officers on 15 December 1987 (see paragraph 46 above). The Government have disputed that these words were said on that occasion, but even taking them at their most fa-

vourable to the applicants' case, it would appear more likely that they were uttered with respect to Mr Perkins whom he regarded as principally to blame for being forced to leave his teaching post at Homerton House. Furthermore, the fact that Paget-Lewis is reported to have intimated to the driver of the car with which he collided on 7 December 1987 that he was on the verge of committing some terrible deed (see paragraphs 38 and 40 above) could not reasonably be taken at the time to be a veiled reference to a planned attack on the lives of the Osman family. The Court must also attach weight in this respect to the fact that, even if Paget-Lewis had deliberately rammed the vehicle as alleged, that act of hostility was in all probability directed at Leslie Green, the passenger in the vehicle. Nor have the applicants adduced any further arguments which would enhance the weight to be given to Paget-Lewis' claim that he had told PC Adams that he was in danger of doing something criminally insane (see paragraph 37 above). In any event, as with his other cryptic threats, this statement could not reasonably be construed as a threat against the lives of the Osman family.

121. In the view of the Court the applicants have failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis. While the applicants have pointed to a series of missed opportunities which would have enabled the police to neutralise the threat posed by Paget-Lewis, for example by searching his home for evidence to link him with the graffiti incident or by having him detained under the Mental Health Act 1983 or by taking more active investigative steps following his disappearance, it cannot be said that these measures, judged reasonably, would in fact have produced that result or that a domestic court would have convicted him or ordered his detention in a psychiatric hospital on the basis of the evidence adduced before it. As noted earlier (see paragraph 116 above), the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals. In the circumstances of the present case, they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would in fact have produced concrete results.

122. For the above reasons, the Court concludes that there has been no violation of Article 2 of the Convention in this case.

IV. Questions for the Students

Question 1

To determine that there has been a violation of the positive obligation to protect the right to life, the Grand Chamber says that it must be established that the 'authorities knew or ought to have known at the time of the existence of a

real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk' (paragraph 116 above).

Reflect on the standard formulated by the Grand Chamber and the specific words employed. Are you able to provide examples of what would constitute a 'real and immediate risk'? Is this standard not too lenient towards public authorities considering that the information available to the police might never be comprehensive enough to satisfy it?

Question 2

In his partly dissenting and partly concurring opinion, Judge Lopes Rocha takes the view that 'there was strong evidence of aggressive behaviour on the part of Mr Paget-Lewis suggesting that at the first opportunity he would act violently'. He finds that the police had 'underestimated the danger Mr Paget-Lewis presented for Mr Ahmet Osman and [...] his close relatives', despite the fact that they could legitimately be required to exercise caution and to take measures to protect the people at risk given the professional experience one is entitled to expect of the police. The Judge concludes that the failure to take such measures rendered the police and the State concerned liable for breaching Article 2 of the ECHR. Reflect on the standard outlined by the Grand Chamber and discussed in Question 1. Does Judge Lopes Rocha's view convince you? Is it correct to say that the police underestimated the danger Mr Paget-Lewis posed?

3.1.2. *The Purview of the Positive Obligation to Safeguard Life*

In *L.C.B. v the United Kingdom*, the ECtHR recognised, for the first time, that the first sentence of Article 2(1) requires States not only to refrain from the intentional and unlawful taking of life, but also to 'take appropriate steps to safeguard the lives of those within their jurisdiction.' [2] This positive obligation requires the taking of certain active measures (as opposed to the negative obligation preventing certain actions) to protect individuals from situations where their right to life would be threatened or affected due to serious shortcomings in the functioning of or misconduct by public authorities. [3] The sphere of application of the positive obligation is broad; it applies in the context of any ac-

[2] *L.C.B. v the United Kingdom*, App no 23413/94 (ECtHR 9 June 1998) para. 36.

[3] See for a detailed overview Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd ed, OUP 2019) 278-290.

tivity in connection with which the right to life may be at stake, whether public or not.[4] Examples of its practical application range from the field of protection of individuals under State custody (such as in the case of health care institutions,[5] detention centres,[6] and schools[7]); to the management of dangerous activities, including acts related to industrial or environmental disasters;[8] and to cases arising in the context of accidents.[9]

The above-cited *Osman* case is an offshoot of the general obligation to protect the right to life identified in the *L.C.B.* case. The Grand Chamber in *Osman* specified that the obligation to safeguard lives extends 'in well-defined circumstances' to 'a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.' [10] As this duty includes preventive and operational aspects, States are required to secure the right to life both by putting in place 'effective criminal-law provisions to deter the commission of offences against the person' and by enforcing these provisions through a functioning 'law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.' [11] The ECtHR qualified these obliga-

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[4] See, among others, *Dodov v Bulgaria*, App no 59548/00 (ECtHR 17 January 2008) paras. 70-71 and 79-83; *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, App no 47848/08 (ECtHR [GC] 17 July 2014) para. 130.

[5] *Calvelli and Ciglio v Italy*, App no 32967/96 (ECtHR [GC] 17 January 2002) paras. 48-49. See also *Nencheva and Others v Bulgaria*, App no 48609/06 (ECtHR 18 June 2013) para. 111.

[6] *Renolde v France*, App no 5608/05 (ECtHR 16 October 2008) paras. 83 and 109; *Dzieciak v Poland,* App no 77766/01 (ECtHR 9 December 2008) paras. 89-91,

[7] See, among others, *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v Turkey*, App no 19986/06 (ECtHR 10 April 2012) para. 35. In this case, the applicants, Mr İlbeyi Kemaloğlu and Mrs Meriye Kemaloğlu, were a Turkish couple living in İstanbul with their son Atalay. In 2004, on a day when school classes ended earlier due to a blizzard, Atalay tried to walk back home, which was 4 km away from his school. The municipality shuttle did not come when the school was closed as the early dismissal of the classes had not been notified to the municipality. Late in the afternoon, when Atalay did not return from school, his parents called the police. The following day Atalay's body was found frozen near a river. The ECtHR found a breach of the positive obligation under Article 2 because in Atalay's case, by neglecting to inform the municipality's shuttle service about the early closure of the school, the Turkish authorities had failed to take measures which might have avoided a risk to his life.

[8] See, among others, *Öneryıldız v Turkey*, App no 48939/99 (ECtHR [GC] 30 November 2004) para. 71; *Brincat and Others v Malta*, App nos 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11 (ECtHR 24 July 2014) paras. 79-85; *Budayeva and Others v Russia*, App nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR 20 March 2008) paras. 158-160.

[9] See, among others, *Ciechońska v Poland*, App no 19776/04 (ECtHR 14 June 2011) paras. 62-63; *Banel v Lithuania*, App no 14326/11 (ECtHR 18 June 2013) paras. 67-69; *Cevrioğlu v Turkey*, App no 69546/12 (ECtHR 4 October 2016) paras. 49-57.

[10] *Osman v the United Kingdom*, App no 23452/94 (ECtHR [GC] 28 October 1998) para. 115.

[11] Ibid, para. 115.

tions by noting that they are to be interpreted realistically, that is, 'in a way which does not impose an impossible or disproportionate burden on the authorities.' [12] The *Osman* obligation to protect from criminal acts has since been extended to apply not only in situations concerning the requirement of 'personal protection of one or more individuals identifiable in advance', but also 'in cases raising the obligation to afford general protection to society.' [13]

Some examples of the concrete level of protection afforded by the ECtHR in light of the general obligations discussed in this section are proffered below.

3.1.3. *State Obligations in Cases of Medical Negligence and Self-Harm*

(a) Denial of Health Care

In the field of health care, the ECtHR has determined that the positive aspect of the right to life requires States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. [14] The jurisprudence considering health care under Article 2 has drawn a distinction between: (i) cases involving denial of health care, particularly in emergency situations; and (ii) cases involving medical negligence. Although the borders between the two may be rather porous, the normative consequences in each case are different. Two examples of how the ECtHR has been diligent in finding that Article 2 had been violated when the lack of emergency treatment amounted to a denial of health care is discussed here.

In *Mehmet Şentürk and Bekir Şentürk v Turkey*, the first applicant's pregnant wife died in an ambulance while being transferred to a hospital to deliver her child. [15] The Chamber found that the risk posed to her life during this transfer without urgent medical treatment had been both real and immediate. It observed that the hospital's doctors had 'caused their patient's death by having her trans-

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[12] Ibid, para. 116. See also *Mastromatteo v Italy*, App no 37703/97 (ECtHR [GC] 24 October 2002) paras. 67 and 89; *Jelić v Croatia*, App no 57856/11 (ECtHR 12 June 2014) para. 74.

[13] *Mastromatteo v Italy*, App no 37703/97 (ECtHR [GC] 24 October 2002) para. 69; *Maiorano and Others v Italy*, App no 28634/06 (ECtHR 15 December 2009) para. 107; *Cevrioğlu v Turkey* (n 9) para. 50. On the obligation of a State to 'afford general protection to society against potential violent acts of an apparently mentally disturbed person' see, in particular, *Bljakaj and Others v Croatia*, App no no 74448/12 (ECtHR 18 September 2014) paras 121-22.

[14] *Calvelli and Ciglio v Italy*, App no 32967/96 (ECtHR [GC] 17 January 2002) para. 49. See also *Hristozov and Others v Bulgaria*, App nos 47039/11 and 358/12 (ECtHR 13 November 2012) para. 108.

[15] *Mehmet Şenturk and Bekir Şenturk v Turkey*, App no 13423/09 (ECtHR 9 April 2013) paras. 6-10.

ferred without treatment' to another hospital.[16] The transfer was due to her inability to pay the required medical fees notwithstanding that 'there was no doubt as to the seriousness of the patient's condition … nor as to the need for immediate surgery.'[17] This requirement to pay fees, that is, making urgent and indispensable medical treatment conditional on the fulfilment of a prior financial obligation for advance payment, revealed severe defects in the hospital practices.[18] The Chamber consequently found that the deceased woman had been a victim of a 'flagrant malfunctioning of the relevant hospital departments', which resulted in her being 'deprived of the possibility of access to appropriate emergency care' in violation of the positive aspect of Article 2.[19]

Along the same lines, in *Asiye Genç v Turkey*, the applicant's new-born baby died in an ambulance after being refused admission to a number of public hospitals owing to lack of space and/or adequate equipment in their neonatal units.[20] The Chamber determined that 'the applicant's son must be considered as having been the victim of a malfunctioning of the hospital departments, in that he was deprived of any access to appropriate emergency care.'[21] This situation was analogous to a denial of medical care serious enough to put a person's life in danger in violation of the State's obligations under Article 2.[22]

These cases are characterised by the finding that the fault attributable to the healthcare providers went beyond a mere error or medical negligence. They

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[16] Ibid, para. 91.

[17] Ibid, para. 96.

[18] Ibid, paras. 95-96.

[19] Ibid, para. 97.

[20] *Asiye Genç v Turkey*, App no 24109/07 (ECtHR 27 January 2015) paras. 8-13. For a comparative analysis on the topic of 'reproductive health' discussing this case and others of contemporary relevance see Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 253-261.

[21] *Asiye Genç v Turkey* (n 20) para. 82.

[22] Ibid, paras. 82 and 87. See also *Powell v the United Kingdom*, App no 45305/99 (ECtHR 4 May 2000) p. 18; *Elena Cojocaru v Romania,* App no 74114/12 (ECtHR 22 March 2016) paras. 108-111. In *Powell v the United Kingdom* the Chamber held, rather permissively, that although States were required to secure high professional standards among health professionals, 'matters such as error of judgment on the part of health professional or negligent co-ordination among health professionals in the treatment of a particular patient' were not alone sufficient to trigger a State's responsibility. By contrast, in *Elena Cojocaru v Romania* the Chamber found the respondent State liable under Article 2 when the applicant's daughter, who was suffering from a serious pre-natal condition, died after a doctor at the public hospital refused to perform an emergency C-section, forcing her to be transferred to another hospital 159 kilometres away without medical supervision. Her newborn baby died two days later. The Chamber held that the circumstances of the case, and in particular the apparent lack of coordination of the medical services and the delay in administering the appropriate emergency treatment, constituted a failure to provide adequate emergency treatment because, irrespective of the reason, the patient's transfer had delayed the emergency treatment she needed.

involved no less than the malfunctioning of State institutions, caused by the absence of adequate regulations and procedures together with the concrete inability to provide basic services. Subsequent case-law has defined cases based on such gross malfunctions in the healthcare system as 'exceptional'.[23] By contrast, the ECtHR has not found the responsibility of the State to be engaged solely on account of fault attributable to 'mere' negligence on the part of the medical personnel.

This approach was adhered to in *Lopes de Sousa Fernandes v Portugal*. In this case, the ECtHR dealt with the responsibility of the State in the context of a death following medical treatment. The applicant's husband had died due to numerous health issues that emerged during the four months after he had received surgery for the removal of nasal polyps.[24] The applicant complained that her husband's death was due to a hospital-acquired infection and that the medical personnel had been careless and medically negligent during the post-surgery period.[25] The Grand Chamber found no violation of the substantive aspect of Article 2.

Based upon a review of the relevant case law, the Grand Chamber determined that the denial of emergency medical treatment may give rise to a violation of Article 2 of the ECHR in two exceptional circumstances: (i) 'where an individual patient's life is knowingly put in danger by denial of access to life-saving emergency treatment';[26] and (ii) 'where a systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment and the authorities knew about or ought to have known about that risk and failed to undertake the necessary measures to prevent that risk from materialising, thus putting the patients' lives, including the life of the particular patient concerned, in danger.'[27]

By contrast, the decisive issue in medical negligence cases was whether the State had in place a regulatory framework that makes 'adequate provision for securing high professional standards among health professionals and the protection of the lives of patients.'[28] This regulatory duty does not, however, cover matters such as errors of judgment or negligent coordination among health professionals in treating a particular patient because such shortcomings 'are not sufficient of themselves to call a Contracting State to account from

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[23] See to this effect the analysis in *Lopes de Sousa Fernandes v Portugal*, App no 56080/13 (ECtHR [GC] 19 December 2017) paras. 177-192.

[24] Ibid, paras. 13-27.

[25] Ibid, para. 143.

[26] Ibid, para. 191.

[27] Ibid, para. 192.

[28] Ibid, para. 168.

the standpoint of its positive obligations under Article 2.' [29] Rather, negligent acts and omissions by healthcare providers trigger State responsibility only in 'exceptional circumstances.' [30]

Applying this logic to the facts of the case, the Grand Chamber exonerated the medical personnel and health care institutions whose poor functioning had caused the death of the applicant's husband from responsibility under Article 2. The Grand Chamber's view was essentially that 'an alleged error in diagnosis leading to a delay in the administration of proper treatment, or an alleged delay in performing a particular medical intervention' were not in themselves comparable to a denial of healthcare. [31] The fault alleged by the applicant was limited to a mere error or medical negligence because the healthcare professionals involved had not breached their professional obligations by failing to provide emergency treatment where the patient's life was known to be at risk without it. [32] There was also no evidence 'establishing a situation of structural or systemic dysfunctions in the health-care services in question.' [33] In these circumstances, Portugal's substantive positive obligations were limited to the setting-up of an adequate regulatory framework compelling hospitals to adopt appropriate measures for the protection of patients' lives. [34] The medical negligence causing the death of the applicant's husband was consequently insufficient to give rise to a violation of Article 2. [35]

The Grand Chamber's reasoning makes clear that States are likely to incur responsibility for a violation of the right to life when access to health care is denied, particularly in emergency cases. Conversely, they are unlikely to bear such responsibility in cases of medical negligence, which only exceptionally give rise to a violation of Article 2. [36] By reaching this conclusion, the Grand Chamber appears to have affirmed a right to receive medical treatment. This is not the same, however, as a right to free medical treatment; [37] nor does it

[29] Ibid.

[30] See ibid, paras. 191-192.

[31] Ibid, para. 200.

[32] Ibid, para. 202.

[33] Ibid, paras. 201-202.

[34] Ibid, para. 203.

[35] Ibid, paras. 204-205.

[36] See ibid, paras. 182-183 and 186-187. See also, among others, *Byrzykowski v Poland*, App no 11562/05 (ECtHR 27 June 2006) para. 104; *Arskaya v Ukraine*, App no 45076/05 (ECtHR 5 December 2013) paras. 84-91.

[37] In *Wiater v Poland*, App no 42290/09 (ECtHR Admissibility Decision 15 May 2012) para. 36, the ECtHR noted that 'the Convention did not guarantee as such a right to free medical care and that the State's margin of appreciation when it came to the assessment of priorities in the context of limited public resources was a wide one. The national authorities were in a better position to carry out

equate to a right to receive medical treatment free from malpractice. The problem with this reasoning is that while the two scenarios are distinct, the denial of health care and provision of poor health care are both liable to bring about the same outcome, that is, unfortunately, the death of the individual seeking care.

As such, while the Grand Chamber may have relied on previous case law in adopting this approach, the result remains somewhat puzzling. It may be taken as an admission of the ECtHR's impotence in cases of serious medical negligence and its inability (or perhaps political powerlessness in face of different national policies) to devise a normative framework for such cases.

In a partially dissenting opinion, Judge Pinto de Albuquerque noted that '[t]he horrendous suffering that the applicant's husband, a young, healthy man, went through from November 1997 to March 1998 is indescribable.' He argued that '[n]o accountability was afforded for the conduct of medical doctors who were public officials working in public hospitals.' [38] According to the Judge, the ECtHR had yet to move health care issues from 'useless rhetoric' towards practical human rights implementation, rendering the Convention 'an unfulfilled promise'. [39] He further criticised the majority for focusing essentially on the question of whether there was an adequate regulatory framework, without examining the way hospitals in practice exercised their mandate as if 'the Convention should stay at the hospital door.' [40] Against this criticism, it may be noted that expanding accountability under Article 2 to include negligence cases could open the floodgates to unmotivated complaints and, as a result, paralyse the work of hospitals. That said, as it currently stands, the test concerning the responsibility of health professionals described above might be setting the bar too low to the point of becoming more of a shield against unfounded legal actions, rather than an effective review mechanism ensuring that State institutions have taken all the appropriate steps to safeguard the lives of those within their custody.

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this assessment than an international court in view of their familiarity with the competing demands made on the health care system as well as with the funds available to meet those demands'. Based on this jurisprudence, in *Lopes de Sousa Fernandes v Portugal* (n 23) para. 175 the ECtHR made clear that 'issues such as the allocation of public funds in the area of health care are not a matter on which the Court should take a stand and that it is for the competent authorities of the Contracting States to consider and decide how their limited resources should be allocated, as those authorities are better placed than the Court to evaluate the relevant demands in view of the scarce resources and to take responsibility for the difficult choices which have to be made between worthy needs'.

[38] *Lopes de Sousa Fernandes v Portugal* (n 23) Partly Concurring, Partly Dissenting Opinion of Judge Pinto De Albuquerque, para. 90.

[39] Ibid, Partly Concurring, Partly Dissenting Opinion of Judge Pinto De Albuquerque, para. 93.

[40] Ibid.

(b) Protection from Self-Harm

In *Keenan v the United Kingdom*, the ECtHR extended the *Osman* obligation to apply also in self-harm cases where State officials knew or ought to have known that an individual under their custody posed a real and immediate risk of suicide. The son of the applicant, Mark Keenan, died at the age of 28 from asphyxia caused by self-suspension while serving a sentence of four months' imprisonment.[41] Mr Keenan had a long history of disturbed behaviour, including self-harm, and had been diagnosed with paranoid schizophrenia.[42] He was imprisoned in April 1993 after being convicted of assaulting his girlfriend.[43] On 16 April 1993, he was discharged from the prison's health centre, but was readmitted on the same evening after his cellmate reported that he had fashioned a noose from a bedsheet.[44] Mr Keenan was then placed in an unfurnished cell and put on a 15-minute watch.[45] Subsequently, while receiving medication at a hospital on 30 April 1993 – nine days before his expected release date – he assaulted two hospital officers, and was punished with an additional 28 days of imprisonment.[46] On 1 May 1993, Mr Keenan was considered fit for placement in the segregation unit within the prison's punishment block and transferred there.[47] On 15 May 1993, he was found dead, hanging from the bars of his cell.[48]

Building on the *Osman* obligation, the Chamber in *Keenan* was able to define criteria to determine when authorities are obliged under Article 2 to intervene in cases involving the risk of suicide. Given that *Osman* required the positive obligation under Article 2 to be 'interpreted in a way which does not impose an impossible or disproportionate burden on the authorities', the Chamber held that 'not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.'[49] On the other hand, the Chamber also stressed that 'persons in custody are in a vulnerable position' and that, therefore, 'the authorities are under a duty to protect them.'[50] This includes ensuring the adequate provision

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[41] *Keenan v the United Kingdom*, App no 27229/95 (ECtHR 3 April 2001) para. 8.

[42] Ibid, paras. 10-11.

[43] Ibid, para. 14.

[44] Ibid, para. 15.

[45] Ibid.

[46] Ibid, paras. 20 and 37.

[47] Ibid, paras. 21-22.

[48] Ibid, para. 42.

[49] Ibid, para. 90.

[50] Ibid, para. 91.

of any necessary medical care.[51] Hence, it is incumbent upon the State to 'account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies.'[52] Prison authorities are similarly required to 'discharge their duties in a manner compatible with the rights and freedoms of the individual concerned.'[53] Taking all this into account, the Chamber outlined the general test for intervention by public authorities thus:

> For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[54]

Application of this standard in *Keenan* led the Chamber to conclude that there was no breach of Article 2 because 'on the whole, the authorities responded in a reasonable way.'[55] The Chamber further rejected – perhaps somewhat abruptly – as speculative the applicant's argument that the infliction of a further prison term should have been foreseen as likely to negatively affect his fragile mental state given that it was 'not known what made Mark Keenan commit suicide.'[56] Whilst it can only be speculated why Mr Keenan took his own life, the Chamber's reasoning appears somewhat tangential. The point was not, under the abovementioned test, to gauge why Mr Keenan had committed suicide. Instead, it was to assess whether the authorities ought to have known that the risk to Mr Keenan's life had increased, becoming real and immediate, because of the distressing news that he had to serve a further term of imprisonment so close to his scheduled release. Regrettably, however, the Chamber did not elaborate on the matter.

In *Mikayil Mammadov v Azerbaijan*, the ECtHR dealt with the suicide of a

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[51] See *Anguelova v Bulgaria*, App no 38361/97 (ECtHR 13 July 2002) paras. 110 and 125-131; *Tais v France*, App no 39922/03 (ECtHR 1 June 2006) paras. 97-98; *Gorelov v Russia*, App no 49072/11 (ECtHR 9 January 2014) para. 42.

[52] *Keenan v United Kingdom*, App no 27229/95 (ECtHR 3 April 2001) para 91. See also *Salman v Turkey*, App no 21986/93 (ECtHR 17 June 2000), para. 99; *Anguelova v Bulgaria*, App no 38361/97 (ECtHR 13 July 2002) para. 110; *Jasinskis v Latvia*, App no 45744/08 (ECtHR 21 December 2010) para. 59.

[53] *Keenan v United Kingdom*, App no 27229/95 (ECtHR 3 April 2001) para. 92.

[54] Ibid, para. 91. See also *Paul and Audrey Edwards v United Kingdom*, App no 46477/99 (ECtHR 14 March 2002) para. 55; *Branko Tomašić and Others v Croatia*, App no 46598/06 (ECtHR 15 January 2009) para. 51; *Dink v Turkey*, App nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECtHR 14 September 2010) para. 65.

[55] *Keenan v United Kingdom*, App no 27229/95 (ECtHR 3 April 2001) paras. 93-99.

[56] Ibid, para. 101.

woman terrified by her family's eviction from the place in which they had sought refuge. The applicant (the deceased woman's husband) and his family were internally displaced persons from Gubadly, which they had left because of the occupation of the region by Armenian military forces.[57] The family had lived in a State-owned hostel after their displacement.[58] In 2003, they discovered three abandoned rooms in an unoccupied administrative building that belonged to the Sumgayit City Military Commissariat, and decided to move in without seeking any public permission for doing so.[59] In March 2004, a group of local authority representatives and police officers came to evict them.[60] In a state of anxious shock, the applicant's wife threatened to set fire to herself. Shortly afterwards, she followed up on her threat by pouring kerosene over herself and setting it alight.[61] The family members took her to a hospital, while the police officers at the scene transferred the family's belongings to the hostel where they had previously resided.[62] The applicant's wife died from the resulting injuries a few days later.[63]

The applicant complained that the police had not taken his wife's threat seriously and that one of the local authority representatives had even mockingly encouraged her to carry out her threat.[64] The Grand Chamber found that 'self-immolation as a protest tactic does not constitute predictable or reasonable conduct in the context of eviction from an illegally occupied dwelling', and that the evidence was insufficient to show that State agents had incited the applicant's wife to commit suicide.[65] The Grand Chamber then clarified the duty of State agents in cases of emotional reactions endangering one's right to life in the following terms:

> … where an individual threatens to take his or her own life in plain view of State agents and, moreover, where this threat is an emotional reaction directly induced by the State agents' actions or demands, the latter should treat this threat with the utmost seriousness as constituting an imminent risk to that individual's life, regardless of how unexpected that threat might have been.[66]

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[57] *Mikayil Mammadov v Azerbaijan*, App no 4762/05 (ECtHR 17 December 2009) para. 6.

[58] Ibid, para. 7.

[59] Ibid, paras. 9-10.

[60] Ibid, para. 11.

[61] Ibid, paras. 12, 17 and 20.

[62] Ibid, paras. 12-13.

[63] Ibid, para. 14.

[64] Ibid, para. 94.

[65] Ibid, paras. 111-112.

[66] Ibid, para. 115.

Therefore, it falls on the State agents to 'prevent this threat from materialising, by any means which are reasonable and feasible in the circumstances.' [67] In the case at hand, such steps could have included 'calming down the situation by verbally persuading' the applicant's wife and 'preventing her from taking hold of and pouring kerosene on herself.' [68] Applying the foregoing considerations to the facts of the case, the Grand Chamber was unable to determine with certainty whether the State agents had become aware of the danger to the woman's life in time to prevent the fire or to extinguish it as soon as possible, even though their responsibility in this regard could not be excluded. [69] Hence the Grand Chamber found no violation of the substantive positive obligation to protect the right to life. [70]

In *Fernandes de Oliveira v Portugal*, the applicant complained that her son had committed suicide as a result of the negligence of a psychiatric hospital in which he was receiving treatment. The applicant's son, A.J., suffered from various mental illnesses, including schizophrenia and major depression, and had spent several periods in a psychiatric hospital. [71] Until 1999, A.J. had been hospitalised voluntarily but was not authorised to leave the hospital during treatment; thereafter, he was granted permission to leave to spend weekends at home. [72] On 1 April 2000, he attempted to commit suicide by taking an overdose of prescription drugs and was taken to the emergency department of the Coimbra University Hospital. The next day A.J. was voluntarily admitted to the psychiatric hospital where he had been previously treated. A.J. remained hospitalised between 2 April 2000 and 27 April 2000, but was still allowed to spend two weekends at home, including one during Easter. [73] On 25 April, he was taken to the emergency department and later sent back to the psychiatric hospital because he had drunk a large amount of alcohol. [74] Two days later, he left the hospital without permission and committed suicide by jumping in front of a train near the hospital. [75]

The Grand Chamber stressed that the authorities, having decided to place a person suffering from a mental illness in custody, should demonstrate special

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[67] Ibid.

[68] Ibid, para. 116.

[69] Ibid, para. 118.

[70] Ibid, paras. 120-121.

[71] *Fernandes de Oliveira v Portugal*, App no 78103/14 (ECtHR [GC] 31 January 2019) paras. 11-12.

[72] Ibid, paras. 12-15.

[73] Ibid, paras. 16-19.

[74] Ibid, para. 20.

[75] Ibid, para. 28.

care in guaranteeing the conditions warranted by the person's special needs resulting from his or her disability. This duty exists equally in the case of both involuntary and voluntary psychiatric inpatients. The Grand Chamber stressed that 'a psychiatric patient is particularly vulnerable even when treated on a voluntary basis.' [76] Due to a patient's mental disorder, his or her capacity to make rational decisions concerning his or her life may to some degree be impaired. Further, any hospitalisation of a psychiatric patient, whether involuntary or voluntary, inevitably involves a certain level of restrictive measures due to the patient's medical condition and the ensuing treatment by medical professionals. Such restrictions may take different forms and also include the limitation of personal liberty and privacy rights. The Grand Chamber therefore considered that the 'authorities do have a general operational duty with respect to a voluntary psychiatric patient to take reasonable measures to protect him or her from a real and immediate risk of suicide.' [77]

Agreeing with professional assessments, the Grand Chamber noted that while a risk of suicide could not be excluded in inpatients such as A.J. whose psychopathological conditions were based on a variety of diagnoses, the immediacy of that risk could vary. In the present case, the Grand Chamber relied on the Coimbra Administrative Court's finding that A.J.'s suicide was not foreseeable. [78] Noting that the positive obligation incumbent upon the State had to be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities, the Grand Chamber concluded that it had not been established that the authorities knew or ought to have known that there was an immediate risk to A.J.'s life. [79]

The case law shows the ECtHR's constant effort to clarify the purview of the applicable law and, in so doing, to expand it to fit the new issues that emerge in each specific case. It also highlights that regardless of how detailed and far-reaching a norm is, the facts of each case remain of equal importance and require being treated comprehensively to make an informed decision. On one hand, the facts, if taken seriously and comprehensively, operate as a limit against unjust outcomes by narrowing down the number of conclusions a court of law can reach in a given case. On the other hand, the facts also enable the ECtHR to bridge the gap between law and reality, so that findings of responsibility are reasonable and grounded on a solid basis. Nevertheless, the legal standard applied to the facts in *Fernandes de Oliveira* appears somewhat bittersweet. Affirming that the authorities have a duty with respect to a voluntary

[76] Ibid, para. 124.

[77] Ibid.

[78] Ibid, para. 131.

[79] Ibid.

psychiatric patient 'to take reasonable measures to protect him or her from a real and immediate risk of suicide' may in fact be too lenient as a protective standard. By focusing solely on the 'real and immediate risk' criterion, the standard formulated by the Grand Chamber seemingly assumes that it is possible to distinguish between such a risk of suicide and a 'mere' possibility of suicide. This arguably artificial distinction might enable public authorities to evade responsibility in self-harm cases where the risk of suicide may not rise to the requisite level, even though the possibility of suicide demonstrably exists.

3.2. *Protection from Domestic Violence*

3.2.2. Opuz v Turkey *(2009)*

I. Summary [*]

On 15 July 2002, the applicant, Mrs Nahide Opuz, a Turkish national, lodged a complaint with the ECtHR against Turkey alleging, *inter alia*, that the State authorities had violated Article 2(1) of the ECHR by failing to safeguard the right to life of her mother, who had been killed by her husband. The Government responded that no negligence had been shown by the local authorities. The ECtHR ruled in favour of the applicant and condemned Turkey to the payment of 30,000 euros for non-pecuniary damage and 6,500 euros (less 1,494 euros yet received by legal aid from the Council of Europe) for costs associated with the proceedings.

The main facts of the case relate to numerous incidents of domestic violence spanning over several years and affecting the lives of two women (the applicant and her mother) who belonged to families linked together by ties of marriage. First, the mother of the applicant had married A.O. Subsequently, her daughter married H.O., the son of A.O. Since the outset of their relationship, the applicant and H.O. had heated arguments. On 10 April 1995, the applicant and her mother complained to the Diyarbakır Public Prosecutor's Office that H.O. and A.O. had beaten them and threatened to kill them. On 25 April 1995, the Public Prosecutor lodged indictments against H.O. and A.O. for death threats and actual bodily harm. On 15 June 1995, however, the Diyarbakır First Magistrate's Court discontinued the assault case, as the applicant and her mother had withdrawn their complaints.

[*] Chamber (Third Section), *Opuz v Turkey*, App no 33401/02, Judgment of 9 June 2009.

On 5 February 1998, H.O. pulled a knife on the applicant during a fight also involving the applicant's mother and sister. They all sustained injuries, which were medically certified as rendering the three of them unfit for work for seven, three, and five days respectively. On 6 March 1998, however, the Diyarbakır Public Prosecutor concluded that there was insufficient evidence to prosecute H.O. The applicant decided to go to live with her mother.

On 4 March 1998, H.O. ran a car into the applicant and her mother, causing life-threatening injuries to the latter. At the police station, H.O. maintained that the incident had been an accident. In their statements to the police, the applicant and her mother alleged that he had instead tried to kill them. On 5 March 1998, the Diyarbakır Magistrate's Court remanded H.O. in custody. On 19 March 1998, the Public Prosecutor charged H.O. in the Diyarbakır Third Criminal Court with making death threats and inflicting grievous bodily harm.

On 30 April 1998, the Diyarbakır Criminal Court released H.O. pending trial, and sent the file of his case to the Diyarbakır Assize Court declaring that it had no jurisdiction. On 23 June 1998, the Diyarbakır Assize Court acquitted H.O. and his father of the charges of issuing death threats due to lack of evidence. During the hearing of 9 July 1998 before the Assize Court, the applicant and her mother confirmed H.O.'s statement that the incident had been an accident and maintained that they had made their earlier declarations in anger. Thus, at the hearing of 8 October 1998, they withdrew their complaints. On 17 November 1998, the Diyarbakır Assize Court accordingly discontinued the case in respect of the offence against the applicant. However, the Assize Court nonetheless decided that H.O. should still be convicted of the offence towards the applicant's mother given that her injuries were more serious. Subsequently, the Assize Court sentenced H.O. to three months' imprisonment and a fine; the sentence of imprisonment was later commuted to a fine.

On 29 October 2001, the applicant went to visit her mother. Later that day, H.O. telephoned and asked the applicant to return home. The applicant worried that her husband would again be violent towards her. The applicant's mother encouraged her to return home with the children. Three-quarters of an hour later, one of the children came back, saying that his father had stabbed and killed his mother. The applicant's mother rushed to the applicant's house. She saw her daughter lying on the floor bleeding. With the help of neighbours, the applicant's mother put her into a taxi and took her to the Diyarbakır State Hospital. The hospital medical report noted seven knife injuries on her body, but did not classify them as life-threatening. At about 11.30 p.m. on the same day, H.O. handed himself in at a police station. He stated that he regretted what he had done. He was released after his statement had been taken.

On 19 November 2001, the applicant's mother filed a complaint with the Public Prosecutor stating that H.O. was harassing her by wandering around her

property carrying knives and guns. In her petition, she also stated that H.O., A.O. and their relatives had been consistently threatening her and her daughter. In particular, H.O. had told her, 'I am going to kill you, your children and all of your family!' On 14 December 2001, the applicant again initiated divorce proceedings in the Diyarbakir Civil Court.[80] Following the complaint of 19 November, the police took statements from H.O., who denied the allegations against him; and from the applicant's mother, who claimed that H.O. had been coming to her doorstep every day, showing a knife or a shotgun and threatening to kill her, her daughter and her grandchildren. On 10 January 2002, H.O. was charged with making death threats. On 27 February 2002, the applicant's mother submitted a further petition to the Diyarbakır Public Prosecutor's Office maintaining that H.O.'s behaviour had intensified: H.O., together with friends, had been harassing and threatening her as well as swearing at her on the telephone. On the same day, the Public Prosecutor instructed the Directorate of Turkish Telecom in Diyarbakır to submit to his office a list of all the telephone numbers which would call the applicant's mother over the following month.

In connection with these events, the applicant's mother decided to leave her house and move her furniture to İzmir with a removal company. On 11 March 2002, the furniture was loaded onto the removal company's pick-up truck. The applicant's mother sat on the front seat, next to the driver. On their way, a taxi pulled up in front of the truck and started signalling. The pick-up driver, thinking that the taxi driver was going to ask for an address, stopped. H.O. got out of the taxi, opened the front door where the applicant's mother was sitting, shouted something like 'Where are you taking the furniture?' and shot her. She died instantly.

II. Proceedings in Domestic and International Jurisdictions

On 13 March 2002, the Diyarbakır Public Prosecutor accused H.O. of intentional murder before the Diyarbakır Assize Court. In a final judgment issued on 26 March 2008, this court convicted H.O. of murder and illegal possession of a firearm. It finally sentenced him to fifteen years and ten months' imprisonment and a fine of 180 Turkish liras ('TRY'). However, because of the time he had spent in pre-trial detention and the fact that the judgment would be examined on appeal, the court ordered the release of H.O. The appeal proceedings were still pending before the Court of Cassation at the time of the EC-

[80] The applicant had brought divorce proceedings against H.O. on 20 March 1998, but had later dropped the divorce case due to threats and pressure from her husband. On an unspecified date subsequent to the killing of her mother, however, the applicant obtained a divorce from her husband.

tHR's judgment, over six years after the criminal proceedings were initiated. The Grand Chamber found that this delay 'rendered recourse to criminal and civil remedies in Turkey ineffective in the circumstances' and, therefore, examined the application notwithstanding the non-exhaustion of domestic remedies and the Government's preliminary objection (see para. 152).

III. Judgment (paras. 128–153)

B. The Court's assessment

1. Alleged failure to protect the applicant's mother's life

(a) Relevant principles

128. The Court reiterates that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998-III). This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports* 1998-VIII, cited in *Kontrová v. Slovakia*, no. 7510/04, § 49, 31 May 2007).

129. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention (see *Osman*, cited above, § 116).

130. In the opinion of the Court, where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Furthermore, having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case (ibid.).

(b) Application of the above principles to the present case

(i) Scope of the case

131. On the above understanding, the Court will ascertain whether the national authorities have fulfilled their positive obligation to take preventive operational measures to protect the applicant's mother's right to life. In this connection, it must establish whether the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of the applicant's mother from criminal acts by H.O. As it appears from the parties' submissions, a crucial question in the instant case is whether the local authorities displayed due diligence to prevent violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against H.O. despite the withdrawal of complaints by the victims.

132. However, before embarking upon these issues, the Court must stress that the issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse, cannot be confined to the circumstances of the present case. It is a general problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The Court acknowledges that men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly. Accordingly, the Court will bear in mind the gravity of the problem at issue when examining the present case.

(ii) Whether the local authorities could have foreseen a lethal attack from H.O.

133. Turning to the circumstances of the case, the Court observes that the applicant and her husband, H.O., had a problematic relationship from the very beginning. As a result of disagreements, H.O. resorted to violence against the appli-

cant and the applicant's mother therefore intervened in their relationship in order to protect her daughter. She thus became a target for H.O., who blamed her for being the cause of their problems (see paragraph 28 above). In this connection, the Court considers it important to highlight some events and the authorities' reaction.

(i) On 10 April 1995 H.O. and A.O. beat up the applicant and her mother, causing severe physical injuries, and threatened to kill them. Although the applicant and her mother initially filed a criminal complaint about this event, the criminal proceedings against H.O. and A.O. were terminated because the victims withdrew their complaints (see paragraphs 9-11 above).

(ii) On 11 April 1996 H.O. again beat the applicant, causing life-threatening injuries. H.O. was remanded in custody and a criminal prosecution was commenced against him for aggravated bodily harm. However, following the release of H.O., the applicant withdrew her complaint and the charges against H.O. were dropped (see paragraphs 13-19 above).

(iii) On 5 February 1998 H.O. assaulted the applicant and her mother using a knife. All three were severely injured and the public prosecutor decided not to prosecute anyone on the ground that there was insufficient evidence (see paragraphs 20 and 21 above).

(iv) On 4 March 1998 H.O. ran his car into the applicant and her mother. Both victims suffered severe injuries, and the medical reports indicated that the applicant was unfit for work for seven days and that her mother's injuries were life-threatening. Subsequent to this incident, the victims asked the Chief Public Prosecutor's Office to take protective measures in view of the death threats issued by H.O., and the applicant initiated divorce proceedings. The police investigation into the victims' allegations of death threats concluded that both parties had threatened each other and that the applicant's mother had made such allegations in order to separate her daughter from H.O. for the purpose of revenge, and had also "wasted" the security forces' time. Criminal proceedings were instituted against H.O. for issuing death threats and attempted murder, but following H.O.'s release from custody (see paragraph 31 above) the applicant and her mother again withdrew their complaints. This time, although the prosecuting authorities dropped the charges against H.O. for issuing death threats and hitting the applicant, the Diyarbakır Assize Court convicted him for causing injuries to the mother and sentenced him to three months' imprisonment, which was later commuted to a fine (see paragraphs 23-36 above).

(v) On 29 October 2001 H.O. stabbed the applicant seven times following her visit to her mother. H.O. surrendered to the police claiming that he had attacked his wife in the course of a fight caused by his mother-in-law's interference with their marriage. After taking H.O.'s statements the police officers released him. However, the applicant's mother applied to the Chief Public Prosecutor's Office seeking the detention of H.O., and also claimed that she and her daughter had had to withdraw their complaints in the past because of death threats and pressure by H.O. As a result, H.O. was convicted of knife assault and sentenced to a fine (see paragraphs 37-44 above).

(vi) On 14 November 2001 H.O. threatened the applicant but the prosecuting authorities did not press charges for lack of concrete evidence (see paragraphs 45 and 46 above).

(vii) On 19 November 2001 the applicant's mother filed a petition with the local public prosecutor's office, complaining about the ongoing death threats and harassment by H.O., who had been carrying weapons. Again, the police took statements from H.O. and released him, but the public prosecutor pressed charges against him for making death threats (see paragraphs 4749 above).

(viii) Later, on 27 February 2002, the applicant's mother applied to the public prosecutor's office, informing him that H.O.'s threats had intensified and that their lives were in immediate danger. She therefore asked the police to take action against H.O. The police took statements from H.O. and the Diyarbakır Magistrate's Court questioned him about the allegations only after the killing of the applicant's mother. H.O. denied the allegations and claimed that he did not wish his wife to visit her mother, who was living an immoral life (see paragraphs 51-52 above).

134. In view of the above events, it appears that there was an escalating violence against the applicant and her mother by H.O. The crimes committed by H.O. were sufficiently serious to warrant preventive measures and there was a continuing threat to the health and safety of the victims. When examining the history of the relationship, it was obvious that the perpetrator had a record of domestic violence and there was therefore a significant risk of further violence.

135. Furthermore, the victims' situations were also known to the authorities and the mother had submitted a petition to the Diyarbakır Chief Public Prosecutor's Office, stating that her life was in immediate danger and requesting the police to take action against H.O. However, the authorities' reaction to the applicant's mother's request was limited to taking statements from H.O. about the mother's allegations. Approximately two weeks after this request, on 11 March 2002, he killed the applicant's mother (see paragraph 54 above).

136. Having regard to the foregoing, the Court finds that the local authorities could have foreseen a lethal attack by H.O. While the Court cannot conclude with certainty that matters would have turned out differently and that the killing would not have occurred if the authorities had acted otherwise, it reiterates that a failure to take reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State (see *E. and Others v. the United Kingdom*, no. 33218/96, § 99, 26 November 2002). Therefore, the Court will next examine to what extent the authorities took measures to prevent the killing of the applicant's mother.

(iii) Whether the authorities displayed due diligence to prevent the killing of the applicant's mother

137. The Government claimed that each time the prosecuting authorities commenced criminal proceedings against H.O., they had to terminate those proceedings, in accordance with the domestic law, because the applicant and her mother

withdrew their complaints. In their opinion, any further interference by the authorities would have amounted to a breach of the victims' Article 8 rights. The applicant explained that she and her mother had had to withdraw their complaints because of death threats and pressure exerted by H.O.

138. The Court notes at the outset that there seems to be no general consensus among States Parties regarding the pursuance of the criminal prosecution against perpetrators of domestic violence when the victim withdraws her complaints (see paragraphs 87 and 88 above). Nevertheless, there appears to be an acknowledgement of the duty on the part of the authorities to strike a balance between a victim's Article 2, Article 3 or Article 8 rights in deciding on a course of action. In this connection, having examined the practices in the member States (see paragraph 89 above), the Court observes that there are certain factors that can be taken into account in deciding to pursue the prosecution:

– the seriousness of the offence;

– whether the victim's injuries are physical or psychological;

– if the defendant used a weapon;

– if the defendant has made any threats since the attack;

– if the defendant planned the attack;

– the effect (including psychological) on any children living in the household;

– the chances of the defendant offending again;

– the continuing threat to the health and safety of the victim or anyone else who was, or could become, involved;

– the current state of the victim's relationship with the defendant and the effect on that relationship of continuing with the prosecution against the victim's wishes;

– the history of the relationship, particularly if there had been any other violence in the past; and

– the defendant's criminal history, particularly any previous violence.

139. It can be inferred from this practice that the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints.

140. As regards the Government's argument that any attempt by the authorities to separate the applicant and her husband would have amounted to a breach of their right to family life, and bearing in mind that under Turkish law there is no requirement to pursue the prosecution in cases where the victim withdraws her complaint and did not suffer injuries which renders her unfit for work for ten or more days, the Court will now examine whether the local authorities struck a proper balance between the victim's Article 2 and Article 8 rights.

141. In this connection, the Court notes that H.O. resorted to violence from the very beginning of his relationship with the applicant. On many instances both the applicant and her mother suffered physical injuries and were subjected to psychological pressure, given the anguish and fear. For some assaults H.O. used lethal weapons, such as a knife or a shotgun, and he constantly issued death threats against the applicant and her mother. Having regard to the circumstances of the killing of the applicant's mother, it may also be stated that H.O. had planned the

attack, since he had been carrying a knife and a gun and had been wandering around the victim's house on occasions prior to the attack (see paragraphs 47 and 54 above).

142. The applicant's mother became a target as a result of her perceived involvement in the couple's relationship, and the couple's children can also be considered as victims on account of the psychological effects of the ongoing violence in the family home. As noted above, in the instant case, further violence was not only possible but even foreseeable, given the violent behaviour and criminal record of H.O., his continuing threat to the health and safety of the victims and the history of violence in the relationship (see paragraphs 10, 13, 23, 37, 45, 47 and 51 above).

143. In the Court's opinion, it does not appear that the local authorities sufficiently considered the above factors when repeatedly deciding to discontinue the criminal proceedings against H.O. Instead, they seem to have given exclusive weight to the need to refrain from interfering with what they perceived to be a "family matter" (see paragraph 123 above). Moreover, there is no indication that the authorities considered the motives behind the withdrawal of the complaints. This is despite the applicant's mother's indication to the Diyarbakır Public Prosecutor that she and her daughter had withdrawn their complaints because of the death threats issued and pressure exerted on them by H.O. (see paragraph 39 above). It is also striking that the victims withdrew their complaints when H.O. was at liberty or following his release from custody (see paragraphs 9-12, 17-19, 31 and 35 above).

144. As regards the Government's argument that any further interference by the national authorities would have amounted to a breach of the victims' rights under Article 8 of the Convention, the Court notes its ruling in a similar case of domestic violence (see *Bevacqua and S. v. Bulgaria*, no. 71127/01, § 83, 12 June 2008), where it held that the authorities' view that no assistance was required as the dispute concerned a "private matter" was incompatible with their positive obligations to secure the enjoyment of the applicants' rights. Moreover, the Court reiterates that, in some instances, the national authorities' interference with the private or family life of the individuals might be necessary in order to protect the health and rights of others or to prevent commission of criminal acts (see *K.A. and A.D. v. Belgium*, nos. 42758/98 and 45558/99, § 81, 17 February 2005). The seriousness of the risk to the applicant's mother rendered such intervention by the authorities necessary in the present case.

145. However, the Court regrets to note that the criminal investigations in the instant case were strictly dependent on the pursuance of complaints by the applicant and her mother on account of the domestic-law provisions in force at the relevant time; namely Articles 456 § 4, 457 and 460 of the now defunct Criminal Code, which prevented the prosecuting authorities from pursuing the criminal investigations because the criminal acts in question had not resulted in sickness or unfitness for work for ten days or more (see paragraph 70 above). It observes that the application of the above-mentioned provisions and the cumulative failure of the domestic authorities to pursue criminal proceedings against H.O. deprived the

applicant's mother of the protection of her life and safety. In other words, the legislative framework then in force, particularly the minimum ten days' sickness unfitness requirement, fell short of the requirements inherent in the State's positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims. The Court thus considers that, bearing in mind the seriousness of the crimes committed by H.O. in the past, the prosecuting authorities should have been able to pursue the proceedings as a matter of public interest, regardless of the victims' withdrawal of complaints (see, in this respect, Recommendation Rec(2002)5 of the Committee of the Ministers, paragraphs 80-82 above).

146. The legislative framework preventing effective protection for victims of domestic violence aside, the Court must also consider whether the local authorities displayed due diligence to protect the right to life of the applicant's mother in other respects.

147. In this connection, the Court notes that despite the deceased's complaint that H.O. had been harassing her, invading her privacy by wandering around her property and carrying knives and guns (see paragraph 47 above), the police and prosecuting authorities failed either to place H.O. in detention or to take other appropriate action in respect of the allegation that he had a shotgun and had made violent threats with it (see *Kontrová*, cited above, § 53). While the Government argued that there was no tangible evidence that the applicant's mother's life was in imminent danger, the Court observes that it is not in fact apparent that the authorities assessed the threat posed by H.O. and concluded that his detention was a disproportionate step in the circumstances; rather the authorities failed to address the issues at all. In any event, the Court would underline that in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity (see the *Fatma Yıldırım v. Austria* and *A.T. v. Hungary* decisions of the CEDAW Committee, both cited above, §§ 12.1.5 and 9.3 respectively).

148. Furthermore, in the light of the State's positive obligation to take preventive operational measures to protect an individual whose life is at risk, it might have been expected that the authorities, faced with a suspect known to have a criminal record of perpetrating violent attacks, would take special measures consonant with the gravity of the situation with a view to protecting the applicant's mother. To that end, the local public prosecutor or the judge at the Diyarbakır Magistrate's Court could have ordered on his/her initiative one or more of the protective measures enumerated under sections 1 and 2 of Law no. 4320 (see paragraph 70 above). They could also have issued an injunction with the effect of banning H.O. from contacting, communicating with or approaching the applicant's mother or entering defined areas (see, in this respect, Recommendation Rec(2002)5 of the Committee of the Ministers, paragraph 82 above). On the contrary, in response to the applicant's mother's repeated requests for protection, the police and the Diyarbakır Magistrate's Court merely took statements from H.O. and released him (see paragraphs 47-52 above). While the authorities remained passive for almost two weeks apart from taking statements, H.O. shot dead the applicant's mother.

149. In these circumstances, the Court concludes that the national authorities cannot be considered to have displayed due diligence. They therefore failed in their positive obligation to protect the right to life of the applicant's mother within the meaning of Article 2 of the Convention.

2. The effectiveness of the criminal investigation into the killing of the applicant's mother

150. The Court reiterates that the positive obligations laid down in the first sentence of Article 2 of the Convention also require by implication that an efficient and independent judicial system should be set in place by which the cause of a murder can be established and the guilty parties punished (see, *mutatis mutandis*, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, §§ 69 and 71, ECHR 2002-II). A requirement of promptness and reasonable expedition is implicit in the context of an effective investigation within the meaning of Article 2 of the Convention (see *Yaşa v. Turkey*, 2 September 1998, §§ 10204, *Reports* 1998-VI, and *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80-87 and 106, ECHR 1999-IV). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of tolerance of unlawful acts (see *Avşar v. Turkey*, no. 25657/94, § 395, ECHR 2001-VII).

151. The Court notes that a comprehensive investigation has indeed been carried out by the authorities into the circumstances surrounding the killing of the applicant's mother. However, although H.O. was tried and convicted of murder and illegal possession of a firearm by the Diyarbakır Assize Court, the proceedings are still pending before the Court of Cassation (see paragraphs 57 and 58 above). Accordingly, the criminal proceedings in question, which have already lasted more than six years, cannot be described as a prompt response by the authorities in investigating an intentional killing where the perpetrator had already confessed to the crime.

3. Conclusion

152. In the light of the foregoing, the Court considers that the above-mentioned failures rendered recourse to criminal and civil remedies equally ineffective in the circumstances. It accordingly dismisses the Government's preliminary objection (see paragraph 114 above) based on non-exhaustion of these remedies.

153. Moreover, the Court concludes that the criminal-law system, as applied in the instant case, did not have an adequate deterrent effect capable of ensuring the effective prevention of the unlawful acts committed by H.O. The obstacles resulting from the legislation and failure to use the means available undermined the deterrent effect of the judicial system in place and the role it was required to play in preventing a violation of the applicant's mother's right to life as enshrined in Article 2 of the Convention. The Court reiterates in this connection that, once the situation has been brought to their attention, the national authorities cannot rely on the victim's attitude for their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim (see *Osman*, cited above, § 116). There has therefore been a violation of Article 2 of the Convention.

IV. Questions for the Students

Question 1

The ECtHR found that 'the criminal-law system, as operated in the instant case, did not have an adequate deterrent effect capable of ensuring the effective prevention of unlawful acts' against the applicant and her mother's personal integrity and thus violated Articles 2 and 3 of the ECHR. How would you define deterrence? Further, when would you consider a given criminal-law system's deterrent effect as being 'adequate'?

Question 2

At paragraph 139 of the judgment, the ECtHR notes State practice within the Council of Europe to reveal that 'the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints.' If it were up to you, judging also in light of the facts of this case, what other factors would you put in your own checklist in order to determine whether criminal prosecution is to be pursued or not notwithstanding the withdrawal of the complaints?

3.2.3. *Determining the Existence of a 'Real and Immediate Risk'*

In line with the principles set out in the *Osman* case, the Chamber in *Opuz* crystallised the content of the State's positive obligation under Article 2 in cases arising from criminal acts of a third party as follows:

> … it must be established to [the ECtHR's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. [81]

This positive obligation should, however, be interpreted with a grain of salt. It is not intended to place an 'impossible or disproportionate burden on the authorities' because not every 'claimed risk to life' requires the taking of 'operational measures to prevent that risk from materialising.' [82] What all this means depends of course on the interpretation of these terms, that is, the process of applying the law to the facts. Notably in *Opuz*, the Turkish Government claimed that any further interference by the authorities would have intruded into a 'family matter' and amounted to a breach of the applicant and her deceased mother's Article 8 rights. [83] The Chamber dismissed this argument, stressing that sometimes interference with individuals' private or family life might be necessary to protect the health and rights of others or to prevent the commission of criminal acts. [84] In the case, this balancing approach led the Chamber to emphasise that 'in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity.' [85] Two further cases illustrate this point.

In *Branko Tomasić and Others v Croatia*, decided a few months before *Opuz*, the five applicants were a family composed of a married couple and their three children. [86] One of the daughters of the family (M.T.) had entered into a relationship with a certain M.M. They started living together in the family's house, had a child and began to have serious disputes. M.M. left the

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[81] *Opuz v Turkey*, App no 33401/02 (ECtHR 9 June 2009) para. 130. In addition to the developments discussed in this section concerning the right to life, it is important to recall that the *Opuz* case marks the first time in which the ECtHR recognised that the failure of states to address gender-based domestic violence can amount to a form of discrimination under the ECHR. The ECtHR also looked to human rights norms in other jurisdictions to determine how they treated violence against women. Based on both the ECHR and other international law instruments, the ECtHR made clear that a 'State's failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional'. Because of the overall failure of local authorities to protect women from domestic violence, the ECtHR held the Turkish government was in violation of Article 14 of the ECHR (protection from discrimination). See ibid, para. 191.

[82] Ibid, para. 129.

[83] Ibid, paras. 140 and 143.

[84] Ibid, para. 144.

[85] Ibid, para. 147.

[86] *Branko Tomašić and Others v Croatia*, App no 46598/06 (ECtHR 15 January 2009) para. 4.

house after a year.[87] M.T. subsequently lodged a criminal complaint against M.M., alleging that he frequently came to her house threatening to 'kill her and their daughter with a bomb unless she agreed to come back to him.'[88] On 15 March 2006, a municipal court found M.M. guilty of repeatedly threatening to kill M.T. and their child, sentenced him to five months' imprisonment and ordered him to undertake compulsory psychiatric treatment, including after the end of his prison term.[89] The Croatian appellate court subsequently nullified the requirement of post-detention psychiatric treatment given that it lacked a basis in Croatian law.[90] M.M. was consequently released on 3 July 2006, without being subjected to any prior adequate psychiatric examination as a preventive security measure.[91] On 15 August 2006, he fatally shot M.T. and V.T. (their daughter), before committing suicide.[92]

The Chamber found that the Croatian authorities had failed in their obligation under Article 2 to take all necessary and reasonable steps in the circumstances to prevent the deaths of M.T. and V.T.[93] This was namely due to two circumstances. First, the Croatian authorities underestimated the fact that M.M. had not shown any self-criticism or remorse for his initial crimes, and that he had publicly stated that he had meant to kill M.T. and V.T. on the latter's first birthday on 1 March 2006.[94] Second, the Chamber noted that the Croatian appellate court had reduced and limited the measure of compulsory psychiatric treatment imposed by the first instance court. The relevant authorities had consequently not sufficiently assessed or treated M.M.'s psychiatric condition and as such had failed to appropriately protect the lives of M.T. and V.T.[95]

In *Talpis v Italy*, the Chamber found that the applicant's husband constituted a real threat to her and her family, and that as a result the State had borne an obligation to adopt concrete measures to protect the individuals whose lives were threatened by him.[96] The applicant, Elisabeta Talvis, had been the victim of numerous acts of violence carried out by her husband A.T., an alcoholic.[97]

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[87] Ibid, para. 5.

[88] Ibid, para. 6.

[89] Ibid, para. 8.

[90] Ibid, paras. 9 and 59.

[91] Ibid, paras. 10 and 58.

[92] Ibid, para. 10.

[93] Ibid, para. 61.

[94] Ibid, para. 58.

[95] Ibid, paras. 59-60.

[96] *Talpis v Italy*, App no 41237/14 (ECtHR 2 March 2017) paras. 122-124.

[97] Ibid, para. 9.

On 5 September 2012, Ms Talpis lodged a complaint urging the authorities to take prompt action to protect her and her children, and explaining that she had taken refuge in a women's shelter because her husband was harassing her by telephone. [98] On 4 April 2013, Ms Talpis was questioned for the first time by the police. She changed her statement, downplaying the seriousness of her original allegations. [99] Committed for trial on 28 October 2013, A.T. was fined 2,000 euros for having caused actual bodily harm. [100]

On 25 November 2013, Ms Talpis once again called the police, reporting an argument with her husband who was subsequently taken to hospital in a state of intoxication. [101] After his discharge from hospital, A.T. was found on the streets by the police who confirmed his identity, but did not check his criminal record. [102] At around 5:00 a.m., armed with a kitchen knife, A.T. entered the family apartment and attacked Ms Talpis. He stabbed the couple's son, who had tried to separate his parents, and his wife as she was attempting to escape. Ms Talpis survived, but her son died of his injuries. [103]

The Chamber reprimanded the Italian authorities for not having conducted 'an assessment of the risks facing the applicant, including the risk of renewed assaults' [104] and for their failure to act rapidly after the applicant's last complaint, which had created 'a situation of impunity conducive to the recurrence of A.T.'s acts of violence.' [105] The Chamber also rebuked the Italian police because they had neglected to check A.T.'s criminal record in real time on the night of 25 November 2013 and as such were not alerted to the threat he posed to his family. [106] The Chamber concluded that the Italian authorities had failed to take measures that could reasonably have prevented, or at least mitigated, the materialisation of a real risk to A.T.'s family. [107] In response to the Italian police's rather cautious approach not to take measures to check and restrain a likely suspect of further violence, the Chamber further stressed, as it had done in *Opuz*, that in 'domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and psychological integrity.' [108]

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[98] Ibid, para. 21.

[99] Ibid, para. 30.

[100] Ibid, para. 35.

[101] Ibid, paras. 37-39.

[102] Ibid, paras. 40-41 and 122.

[103] Ibid, para. 42.

[104] Ibid, para. 116.

[105] Ibid, para. 117.

[106] Ibid, para. 122.

[107] Ibid.

[108] Ibid, para. 123.

In the cases just described, the ECtHR had to determine whose rights ought to prevail in a situation of fundamental uncertainty involving the prevention of a threat. They demonstrate that in risk situations where the occurrence of a given event is subject to a degree of uncertainty, the State's positive obligation is reasonably clear. Public authorities must take the necessary preventive measures whenever the facts as a whole suggest that the potential victim is facing a real and immediate risk, even if those measures may run against the perpetrators' legitimate quest for the protection of their own rights. The carefully worded standard of reality and immediacy is strict and realistic enough to prevent abuses. It is not anchored in a mere subjective evaluation, and calls for a reasonable assessment of all the facts. Still, its value should not be overstated. The standard remains general, and does not prescribe a specific course of conduct for any particular case. Rather, it necessitates careful assessment by public authorities on a case-by-case basis. As such, the cases discussed above provide useful guidance on the practical application of the standard both to make such an assessment possible, and to prevent shortcomings and abuses by public authorities.

3.3. *Protection from Dangerous Activities and against Natural Hazards*

3.3.1. Öneryıldız v Turkey *(2004)*

I. Summary [*]

The applicant, Mr Maşallah Öneryıldız, complained of the death of nine of his close relatives as a result of a methane explosion on 28 April 1993 at a municipal rubbish tip in Ümraniye, Istanbul, Turkey under Article 2 of the ECHR. [109] The Turkish Government disagreed. The Grand Chamber ruled in favour of the applicant, finding, unanimously, a violation of the substantive aspect of Article 2 due to the Turkish Government's failure to take appropriate steps to prevent the accident; and, by sixteen votes to three, a violation of the procedural aspect of Article 2 due to lack of adequate legislative safeguards.

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[*] Grand Chamber, *Öneryıldız v Turkey*, App no 48939/99, Judgment of 30 November 2004.

[109] The application, originally also lodged by another Turkish national, Mr Ahmet Nuri Çınar, was declared admissible (Chamber, First Section) only in so far as it concerned Ms Öneryildiz (disjoining the respective complaints). See *Öneryıldız v Turkey*, App no 48939/99, Judgment of 30 November 2004, para. 3.

At the time of the relevant facts, the applicant was living with twelve of his close relatives in the slum quarter (*gecekondu mahallesi*) of Kazım Karabekir in Ümraniye, a district of Istanbul. Since the early 1970s, a household-refuse tip had been in operation in Hekimbaşı, which is a slum area adjoining Kazım Karabekir. On 22 January 1960, the Istanbul City Council ('City Council') had obtained the usufruct of the land, belonging to the Forestry Commission, for a term of 99 years. From 1972 onwards, the site of approximately 35 hectares was used as a rubbish tip by the districts of, *inter alia*, Üsküdar and Ümraniye under the authority of the City Council and, ultimately, the ministerial/governmental authorities. When the rubbish tip began being used, the area was uninhabited and the closest built-up area was approximately 3.5 kilometres away. However, as the years passed by, rudimentary dwellings were built without any authorisation in the area surrounding the rubbish tip, eventually developing into the slums of Ümraniye. The applicant's house was built on a part of the settlement adjacent to the municipal rubbish tip which since 1978 had been under the authority of the local mayor answerable to the district council.

On 28 April 1993, at about 11:00 a.m., a methane explosion occurred at the rubbish tip in Ümraniye. Following a landslide caused by mounting pressure, the refuse erupted from the mountain of waste and engulfed some ten slum dwellings, including the one belonging to the applicant. Thirty-nine people, including nine members of the applicant's family, died in the accident.

II. Proceedings in Domestic and International Jurisdictions

On 30 November 1995, the Istanbul Administrative Court found a direct causal link between the accident of 28 April 1993 and the contributory negligence of the authorities concerned. It ordered them to pay the applicant and his children 100,000,000 Turkish liras ('TRL') for non-pecuniary damage and 10,000,000 TRL for pecuniary damage (at the time, these amounts were the equivalent to 2,077 euros and 208 euros, respectively). The latter amount was awarded because of the destruction of household goods. The Administrative Court dismissed the remainder of the claim, holding that the applicant could not maintain that he had been deprived of financial support since he had been partly responsible for the damage incurred. The parties appealed against that judgment to the Supreme Administrative Court, which dismissed their appeal in a judgment of 21 April 1998.

III. Judgment (paras. 89–118)

3. The Court's assessment

(a) General principles applicable in the present case

(i) Principles relating to the prevention of infringements of the right to life as a result of dangerous activities: the substantive aspect of Article 2 of the Convention

89. The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 (see paragraph 71 above) entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life (see, for example, *mutatis mutandis*, *Osman*, cited above, p. 3159, § 115; *Paul and Audrey Edwards*, cited above, § 54; *İlhan v. Turkey* [GC], no. 22277/93, § 91, ECHR 2000-VII; *Kılıç v. Turkey*, no. 22492/93, § 62, ECHR 2000-III; and *Mahmut Kaya v. Turkey*, no. 22535/93, § 85, ECHR 2000-III).

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

Among these preventive measures, particular emphasis should be placed on the public's right to information, as established in the case-law of the Convention institutions. The Grand Chamber agrees with the Chamber (see paragraph 84 of the Chamber judgment) that this right, which has already been recognised under Article 8 (see *Guerra and Others*, cited above, p. 228, § 60), may also, in principle, be relied on for the protection of the right to life, particularly as this interpretation is supported by current developments in European standards (see paragraph 62 above).

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

(ii) Principles relating to the judicial response required in the event of alleged infringements of the right to life: the procedural aspect of Article 2 of the Convention

91. The obligations deriving from Article 2 do not end there. Where lives have been lost in circumstances potentially engaging the responsibility of the State, that provision entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative

framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished (see, *mutatis mutandis*, *Osman*, cited above, p. 3159, § 115, and *Paul and Audrey Edwards*, cited above, § 54).

92. In this connection, the Court has held that if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation to set up an "effective judicial system" does not necessarily require criminal proceedings to be brought in every case and may be satisfied if civil, administrative or even disciplinary remedies were available to the victims (see, for example, *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII; *Calvelli and Ciglio*, cited above, § 51; and *Mastromatteo*, cited above, §§ 90 and 94-95).

93. However, in areas such as that in issue in the instant case, the applicable principles are rather to be found in those the Court has already had occasion to develop in relation notably to the use of lethal force, principles which lend themselves to application in other categories of cases.

In this connection, it should be pointed out that in cases of homicide the interpretation of Article 2 as entailing an obligation to conduct an official investigation is justified not only because any allegations of such an offence normally give rise to criminal liability (see *Caraher v. the United Kingdom* (dec.), no. 24520/94, ECHR 2000-I), but also because often, in practice, the true circumstances of the death are, or may be, largely confined within the knowledge of State officials or authorities (see *McCann and Others v. the United Kingdom*, judgment of 27September 1995, Series A no. 324, pp. 4749, §§ 157-64, and *İlhan*, cited above, § 91).

In the Court's view, such considerations are indisputably valid in the context of dangerous activities, when lives have been lost as a result of events occurring under the responsibility of the public authorities, which are often the only entities to have sufficient relevant knowledge to identify and establish the complex phenomena that might have caused such incidents.

Where it is established that the negligence attributable to State officials or bodies on that account goes beyond an error of judgment or carelessness, in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity (see, *mutatis mutandis*, *Osman*, cited above, pp. 3159-60, § 116), the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy which individuals may exercise on their own initiative (see paragraphs 48-50 above); this is amply evidenced by developments in the relevant European standards (see paragraph 61 above).

94. To sum up, the judicial system required by Article 2 must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied where lives are lost as a result of a dangerous activity if and to the extent that this is justified by the findings of the investigation (see, *mutatis mutandis*, *Hugh Jordan v. the United Kingdom*, no. 24746/94, §§ 105-09, 4

May 2001, and *Paul and Audrey Edwards*, cited above, §§ 69-73). In such cases, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved in whatever capacity in the chain of events in issue.

95. That said, the requirements of Article 2 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law.

96. It should in no way be inferred from the foregoing that Article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence (see, *mutatis mutandis*, *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I) or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence (see, *mutatis mutandis*, *Tanlı v. Turkey*, no. 26129/95, § 111, ECHR 2001-III).

On the other hand, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts (see, *mutatis mutandis*, *Hugh Jordan*, cited above, §§ 108 and 136-40). The Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined.

(b) Assessment of the facts of the case in the light of these principles

(i) Responsibility borne by the State for the deaths in the instant case, in the light of the substantive aspect of Article 2 of the Convention

97. In the instant case the Court notes at the outset that in both of the fields of activity central to the present case – the operation of household-refuse tips (see paragraphs 56-57 above) and the rehabilitation and clearance of slum areas (see paragraphs 54-55 above) – there are safety regulations in force in Turkey.

It must therefore determine whether the legal measures applicable to the situation in issue in the instant case call for criticism and whether the national authorities actually complied with the relevant regulations.

98. To that end, the Court considers that it should begin by noting a decisive factor for the assessment of the circumstances of the case, namely that there was practical information available to the effect that the inhabitants of certain slum areas of Ümraniye were faced with a threat to their physical integrity on account of the technical shortcomings of the municipal rubbish tip.

According to an expert report commissioned by the Third Division of the Üsküdar District Court and submitted on 7 May 1991, the rubbish tip began operating in the early 1970s, in breach of the relevant technical standards, and subsequently remained in use despite contravening the health and safety and technical requirements laid down, in particular, in the Regulations on Solid-Waste Control, published in the Official Gazette of 14 March 1991 (see paragraph 56 above). Listing the various risks to which the site exposed the public, the report specifically referred to the danger of an explosion due to methanogenesis, as the tip had "no means of preventing an explosion of methane occurring as a result of the decomposition" of household waste (see paragraph 13 above).

99. On that point, the Court has examined the Government's position regarding the validity of the expert report of 7 May 1991 and the weight to be attached, in their submission, to the applications by Kadıköy and Üsküdar District Councils and Istanbul City Council to have the report set aside (see paragraph 14 above). However, the Court considers that those steps are more indicative of a conflict of powers between different authorities, or indeed delaying tactics. In any event, the proceedings to have the report set aside were in fact abortive, having not been pursued by the councils' lawyers, and the report was never declared invalid. On the contrary, it was decisive for all the authorities responsible for investigating the accident of 28 April 1993 and, moreover, was subsequently confirmed by the report of 18 May 1993 by the committee of experts appointed by the Üsküdar public prosecutor (see paragraph 23 above) and by the two scientific opinions referred to in the report of 9 July 1993 by the chief inspector appointed by the Ministry of the Interior (see paragraph 28 above).

100. The Court considers that neither the reality nor the immediacy of the danger in question is in dispute, seeing that the risk of an explosion had clearly come into being long before it was highlighted in the report of 7 May 1991 and that, as the site continued to operate in the same conditions, that risk could only have increased during the period until it materialised on 28 April 1993.

101. The Grand Chamber accordingly agrees with the Chamber (see paragraph 79 of the Chamber judgment) that it was impossible for the administrative and municipal departments responsible for supervising and managing the tip not to have known of the risks inherent in methanogenesis or of the necessary preventive measures, particularly as there were specific regulations on the matter. Furthermore, the Court likewise regards it as established that various authorities were also aware of those risks, at least by 27 May 1991, when they were notified of the report of 7 May 1991 (see paragraphs 13 and 15 above).

It follows that the Turkish authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons living near the Ümraniye municipal rubbish tip. They consequently had a positive obligation under Article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals (see paragraphs 92-93 above), especially as they themselves had set up the site and authorised its operation, which gave rise to the risk in question.

102. However, it appears from the evidence before the Court that Istanbul City Council in particular not only failed to take the necessary urgent measures, either before or after 14 March 1991, but also – as the Chamber observed – opposed the recommendation to that effect by the Prime Minister's Environment Office (see paragraph 15 above). The Environment Office had called for the tip to be brought into line with the standards laid down in regulations 24 to 27 of the Regulations on Solid-Waste Control, the last-mentioned of which explicitly required the installation of a "vertical and horizontal drainage system" allowing the controlled release into the atmosphere of the accumulated gas (see paragraph 56 above).

103. The city council also opposed the final attempt by the mayor of Ümraniye to apply to the courts, on 27 August 1992, for the temporary closure of the waste-collection site. It based its opposition on the ground that the district council in question was not entitled to seek the closure of the site because it had hitherto made no effort to decontaminate it (see paragraph 16 above).

Besides that ground, the Government also relied on the conclusions in *Chapman*, cited above, and criticised the applicant for having knowingly chosen to break the law and live in the vicinity of the rubbish tip (see paragraphs 23, 43 and 80 above).

However, those arguments do not stand up to scrutiny for the following reasons.

104. In the instant case the Court has examined the provisions of domestic law regarding the transfer to third parties of public property, whether inside or outside the "slum rehabilitation and clearance zones". It has also studied the impact of various legislative initiatives designed to extend in practice the scope *ratione temporis* of Law no. 775 of 20 July 1966 (see paragraphs 54-55 above).

The Court concludes from these legal considerations that, in spite of the statutory prohibitions in the field of town planning, the State's consistent policy on slum areas encouraged the integration of such areas into the urban environment and hence acknowledged their existence and the way of life of the citizens who had gradually caused them to build up since 1960, whether of their own free will or simply as a result of that policy. Seeing that this policy effectively established an amnesty for breaches of town-planning regulations, including the unlawful occupation of public property, it must have created uncertainty as to the extent of the discretion enjoyed by the administrative authorities responsible for applying the measures prescribed by law, which could not therefore have been regarded as foreseeable by the public.

105. This interpretation is, moreover, borne out in the instant case by the administrative authorities' attitude towards the applicant.

The Court observes that between the unauthorised construction of the house in issue in 1988 and the accident of 28 April 1993, the applicant remained in possession of his dwelling, despite the fact that during that time his position remained subject to the rules laid down in Law no. 775, in particular section 18, by which

the municipal authorities could have destroyed the dwelling at any time. Indeed, this was what the Government suggested (see paragraphs 77 and 80 above), although they were unable to show that in the instant case the relevant authorities had even envisaged taking any such measure against the applicant.

The authorities let the applicant and his close relatives live entirely undisturbed in their house, in the social and family environment they had created. Furthermore, regard being had to the concrete evidence adduced before the Court and not rebutted by the Government, there is no cause to call into question the applicant's assertion that the authorities also levied council tax on him and on the other inhabitants of the Ümraniye slums and provided them with public services, for which they were charged (see paragraphs 11 and 85 above).

106. In those circumstances, it would be hard for the Government to maintain legitimately that any negligence or lack of foresight should be attributed to the victims of the accident of 28 April 1993, or to rely on the Court's conclusions in *Chapman*, cited above, in which the British authorities were not found to have remained passive in the face of Mrs Chapman's unlawful actions.

It remains for the Court to address the Government's other arguments relating, in general, to: the scale of the rehabilitation projects carried out by Istanbul City Council at the time in order to alleviate the problems caused by the Ümraniye waste-collection site; the amount invested, which was said to have influenced the way in which the national authorities chose to deal with the situation at the site; and, lastly, the humanitarian considerations which at the time allegedly precluded any measure entailing the immediate and wholesale destruction of the slum areas.

107. The Court acknowledges that it is not its task to substitute for the views of the local authorities its own view of the best policy to adopt in dealing with the social, economic and urban problems in this part of Istanbul. It therefore accepts the Government's argument that in this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources (see *Osman*, cited above, pp. 3159-60, § 116); this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres such as the one in issue in the instant case (see *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, §§ 100-01, ECHR 2003-VIII).

However, even when seen from this perspective, the Court does not find the Government's arguments convincing. The preventive measures required by the positive obligation in question fall precisely within the powers conferred on the authorities and may reasonably be regarded as a suitable means of averting the risk brought to their attention. The Court considers that the timely installation of a gas-extraction system at the Ümraniye tip before the situation became fatal could have been an effective measure without diverting the State's resources to an excessive degree in breach of Article 65 of the Turkish Constitution (see paragraph 52 above) or giving rise to policy problems to the extent alleged by the Govern-

ment. Such a measure would not only have complied with Turkish regulations and general practice in the area, but would also have been a much better reflection of the humanitarian considerations the Government relied on before the Court.

108. The Court will next assess the weight to be attached to the issue of respect for the public's right to information (see paragraph 90 above). It observes in this connection that the Government have not shown that any measures were taken in the instant case to provide the inhabitants of the Ümraniye slums with information enabling them to assess the risks they might run as a result of the choices they had made. In any event, the Court considers that in the absence of more practical measures to avoid the risks to the lives of the inhabitants of the Ümraniye slums, even the fact of having respected the right to information would not have been sufficient to absolve the State of its responsibilities.

109. In the light of the foregoing, the Court cannot see any reason to cast doubt on the domestic investigating authorities' findings of fact (see paragraphs 23, 28 and 78 above; see also, for example, *Klaas v. Germany*, judgment of 22 September 1993, Series A no. 269, p. 17, §§ 29-30) and considers that the circumstances examined above show that in the instant case the State's responsibility was engaged under Article 2 in several respects.

Firstly, the regulatory framework proved defective in that the Ümraniye municipal waste-collection site was opened and operated despite not conforming to the relevant technical standards and there was no coherent supervisory system to encourage those responsible to take steps to ensure adequate protection of the public and coordination and cooperation between the various administrative authorities so that the risks brought to their attention did not become so serious as to endanger human lives.

That situation, exacerbated by a general policy which proved powerless in dealing with general town-planning issues and created uncertainty as to the application of statutory measures, undoubtedly played a part in the sequence of events leading to the tragic accident of 28 April 1993, which ultimately claimed the lives of inhabitants of the Ümraniye slums, because the State officials and authorities did not do everything within their power to protect them from the immediate and known risks to which they were exposed.

110. Such circumstances give rise to a violation of Article 2 of the Convention in its substantive aspect; the Government's submission relating to the favourable outcome of the administrative action brought in the instant case (see paragraph 84 above) is of no consequence here, for the reasons setout in paragraphs 151 and 152 below.

(ii) Responsibility borne by the State as regards the judicial response required on account of the deaths, in the light of the procedural aspect of Article 2 of the Convention

111. The Court considers that, contrary to what the Government suggest, it is likewise unnecessary to examine the administrative remedy used to claim com-

pensation (see paragraphs 37, 39-40, 84 and 88 above) in assessing the judicial response required in the present case, as such a remedy, regardless of its outcome, cannot be taken into consideration for the purposes of Article 2 in its procedural aspect (see paragraphs 91-96 above).

112. The Court observes at the outset that the criminal-law procedures in place in Turkey are part of a system which, in theory, appears sufficient to protect the right to life in relation to dangerous activities: in that regard, Article 230 § 1 and Article 455 §§ 1 and 2 of the Turkish Criminal Code deal with negligence on the part of State officials or authorities (see paragraph 44 above).

It remains to be determined whether the measures taken in the framework of the Turkish criminal-law system following the accident at the Ümraniye municipal rubbish tip were satisfactory in practice, regard being had to the requirements of the Convention in this respect (see paragraphs 91-96 above).

113. In this connection, the Court notes that immediately after the accident had occurred on 28 April 1993 at about 11 a.m. the police arrived on the scene and interviewed the victims' families. In addition, the Istanbul Governor's Office set up a crisis unit, whose members went to the site on the same day. On the following day, 29 April 1993, the Ministry of the Interior ordered, of its own motion, the opening of an administrative investigation to determine the extent to which the authorities had been responsible for the accident. On 30 April 1993 the Üsküdar public prosecutor began a criminal investigation. Lastly, the official inquiries ended on 15 July 1993, when the two mayors, Mr Sözen and Mr Öktem, were committed for trial in the criminal courts.

Accordingly, the investigating authorities may be regarded as having acted with exemplary promptness (see *Yaşa*, cited above, pp. 2439-40, §§ 102-04; *Mahmut Kaya*, cited above, §§ 106-07; and *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 109, ECHR 1999-IV) and as having shown diligence in seeking to establish the circumstances that led both to the accident of 28 April 1993 and to the ensuing deaths.

114. It may also be concluded that those responsible for the events in issue were identified. In an order of 21 May 1993, based on an expert report whose validity has not been challenged (see paragraph 24 above), the public prosecutor concluded that Istanbul City Council should be held liable on the ground that it had "fail[ed] to act sufficiently early to prevent the technical problems which already existed when the tip was first created in 1970 and [had] continued to increase since then, or to indicate to the district councils concerned an alternative waste-collection site, as it was obliged to do under Law no. 3030". The order further concluded that other State authorities had contributed to aggravating and prolonging the situation: Ümraniye District Council had implemented an urban development plan that did not comply with the applicable regulations, and had not prevented illegal dwellings from being built in the area; the Ministry of the Environment had failed to ensure compliance with the Regulations on Solid-Waste Control; and the government of the time had encouraged the spread of this type of illegal dwelling by passing amnesty laws in which the occupants had been granted property titles.

The public prosecutor therefore concluded that Articles 230 and 455 of the Criminal Code (see paragraph 44 above) were applicable in respect of the authorities concerned.

115. Admittedly, the administrative bodies of investigation, which were empowered to institute criminal proceedings (see paragraph 46 above), only partly endorsed the public prosecutor's submissions, for reasons which elude the Court and which the Government have never attempted to explain.

Indeed, those bodies, whose independence has already been challenged in a number of cases before the Court (see *Güleç v. Turkey*, judgment of 27 July 1998, *Reports* 1998-IV, pp. 1732-33, §§ 79-81, and *Oğur v. Turkey* [GC], no. 21954/93, §§ 91-92, ECHR 1999-III), ultimately dropped the charges against the Ministry of the Environment and the government authorities (see paragraphs 29 and 31 above) and sought to limit the charge to "negligence" as such, precluding the examination of the life-endangering aspect of the case.

However, there is no need to dwell on those shortcomings, seeing that criminal proceedings were nonetheless instituted in the Fifth Division of the Istanbul Criminal Court and that, once the case had been brought before it, that court had full jurisdiction to examine the facts as it saw fit and, where appropriate, to order further inquiries; its judgment was, moreover, subject to review by the Court of Cassation.

Accordingly, in the Court's view, rather than examining whether there was a preliminary investigation fully compatible with all the procedural requirements established in such matters (see paragraph 94 above), the issue to be assessed is whether the judicial authorities, as the guardians of the laws laid down to protect lives, were determined to sanction those responsible.

116. In the instant case, in a judgment of 4 April 1996, the Istanbul Criminal Court sentenced the two mayors in question to suspended fines of TRL 610,000 (an amount equivalent at the time to approximately 9.70 euros) for negligent omissions in the performance of their duties within the meaning of Article 230 § 1 of the Criminal Code (see paragraph 23 above). Before the Court, the Government attempted to explain why that provision alone had been applied in respect of the two mayors and why they had been sentenced to the minimum penalty applicable (see paragraph 82 above). However, it is not for the Court to address such issues of domestic law concerning individual criminal responsibility, that being a matter for assessment by the national courts, or to deliver guilty or not-guilty verdicts in that regard.

Having regard to its task, the Court would simply observe that in the instant case the sole purpose of the criminal proceedings in issue was to establish whether the authorities could be held liable for "negligence in the performance of their duties" under Article 230 of the Criminal Code, which provision does not in any way relate to life-endangering acts or to the protection of the right to life within the meaning of Article 2.

Indeed, it appears from the judgment of 4 April 1996 that the trial court did not see any reason to depart from the reasoning set out in the committal order issued

by the administrative council, and left in abeyance any question of the authorities' possible responsibility for the death of the applicant's nine relatives. The judgment of 4 April 1996 does, admittedly, contain passages referring to the deaths that occurred on 28 April 1993 as a factual element. However, that cannot be taken to mean that there was an acknowledgment of any responsibility for failing to protect the right to life. The operative provisions of the judgment are silent on this point and, furthermore, do not give any precise indication that the trial court had sufficient regard to the extremely serious consequences of the accident; the persons held responsible were ultimately sentenced to derisory fines, which were, moreover, suspended.

117. Accordingly, it cannot be said that the manner in which the Turkish criminal justice system operated in response to the tragedy secured the full accountability of State officials or authorities for their role in it and the effective implementation of provisions of domestic law guaranteeing respect for the right to life, in particular the deterrent function of the criminal law.

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

IV. Questions for the Students

Question 1

In paragraph 107, the Grand Chamber recognises that States enjoy a 'wide margin of appreciation' in 'difficult social and technical spheres'. This means that a State should not have an 'impossible or disproportionate burden' imposed on it when fulfilling its obligations under Article 2 of the ECHR. How wide does the 'margin of appreciation' actually afforded to the respondent Government in the present judgment seem to you?

Question 2

In the present case, the Grand Chamber set out the measures a State is required to undertake in order to comply with its positive obligations under Article 2 in the context of dangers and risks to life arising from environmental accidents. Are you able to illustrate what these obligations, and the required measures, are? What kind of measure aimed at preventing environmental disasters could constitute a 'disproportionate burden' on a State?

Among the 'appropriate steps' to be taken to safeguard life, the Grand Chamber emphasised the preventive measure consisting of respecting the public's right

to information. Nonetheless, in a somewhat cryptic way, the Grand Chamber stated at the end of paragraph 108 that 'even the fact of having respected the right to information would not have been sufficient to absolve the State.' What does the Grand Chamber mean with this last formulation? Is it not downplaying the right to information?

Question 3

In his partly dissenting opinion, Judge Türmen criticised the majority for having found a violation of the procedural aspect of Article 2. Among the reasons for his disagreement, the dissenting Judge stated that the majority had not attached 'any weight to the fact that the applicant by his own behaviour contributed to the creation of a risk to life and caused the death of nine members of his own family'. In his words:

> It is not contested that the applicant (a) built an illegal dwelling on land that did not belong to him, and (b) did so at a very close distance to the rubbish tip. The negligence of the authorities and that of the applicant constitute essential elements of causality. They are both conditions *sine qua non* of the harm caused. Neither of them alone would have been sufficient to cause the harm. The death of nine people was due to the negligence of both the authorities and the applicant.

Reflect on the Grand Chamber's reasoning and arguments leading to the finding of a violation of Article 2 in its procedural aspect. Do you agree with the dissenting Judge that the Grand Chamber did not attach any weight to the applicant's behaviour? If so, what are the reasons for the Grand Chamber to have done so, according to you?

3.3.2. *Natural Hazards and Duties on Public Authorities*

Given the absence of an express provision in the ECHR, the jurisprudence of the ECtHR has not focused on the existence of a human right to a healthy environment, or to the protection of the environment as such.[110] In one instance, it has indeed conversely been noted that 'no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention.'[111] That said, the ECtHR's jurisprudence has dealt with environmental

[110] Ole W. Pedersen, 'The European Court of Human Rights and International Environmental Law', in John H. Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018) 88-96.

[111] *Fadeyeva v Russia*, App no 55723/00 (ECtHR 9 June 2005) para. 68; *Dubetska and Others v Ukraine*, App no 30499/03 (ECtHR 10 February 2011) para. 105. See in this regard also Dinah

issues from the perspective of Article 2 and Article 8 (right to respect for private and family life).[112] In *Dubetska and Others v Ukraine*, for instance, the Chamber found that the Ukrainian government had violated Article 8 by failing to protect the applicants from the pollution generated by two State-owned industrial facilities, despite the fact that the authorities had been aware of the adverse environmental effects of the facilities. The Chamber held that the level of pollution attained a level of severity 'resulting in significant impairment of the applicant's ability to enjoy his home, private or family life.'[113]

With regard to Article 2, the ECtHR has emphasised the State's positive obligations to cover all activities, whether public or not, that are capable of endangering life, including imminent natural catastrophes.[114] Its case law has sought to further define specific measures that States are required to adopt and enforce to ensure the effective protection of the civilian population at risk of, or affected by, dangerous activities and natural hazards.

In *Budayeva and Others v Russia*, the Chamber was confronted with a threat to life originating from a natural hazard rather than dangerous human activity. Nonetheless, some of the principles dealing with negligence by public authorities developed in *Öneryıldız* and *Osman* turned out to be relevant. On 18 July 2000, a flow of mud and debris hit the Russian town of Tyrnauz in central Caucasus, flooding some residential quarters.[115] In the following days and until 25 July 2000, the town was hit by a succession of severe mudslides that threatened the lives of the various applicants and caused eight deaths, including that of the husband of one of the applicants.[116] The inhabitants and authorities of Tyrnauz were generally aware of the hazard and were accustomed to the mudslides, which normally occurred in the summer and early autumn.[117] In respect of the events of July 2000, however, the applicants argued that the local authorities had essentially underestimated the threat for the city and failed to prepare an adequate defence and warning infrastructure.[118] The Chamber ruled in favour of the applicants. It faulted the local authorities for

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Shelton, 'Complexities and Uncertainties in Matters of Human Rights and the Enviroment: Identifying the Judicial Role' in John H. Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018) 97-105.

[112] For a recent case on Article 8 and industrial pollution see *Cordella and Others v Italy*, App nos 54414/13 and 54264/15 (ECtHR 24 January 2019) paras. 157-160.

[113] *Dubetska and Others v Ukraine* (n 111) paras. 105, 119 and 123. See also *Di Sarno and Others v Italy*, App no 30765/08 (ECtHR 10 January 2012) paras. 104-106.

[114] *M. Özel and Others v Turkey*, App nos 14350/05, 15245/05 and 16051/05 (ECtHR 17 November 2015) paras. 170-171.

[115] *Budayeva and Others v Russia* (n 8) para. 26.

[116] Ibid, paras. 32-33. See also ibid, para. 161.

[117] Ibid, para. 15.

[118] Ibid, paras. 124-127.

not having exercised 'all possible diligence in informing the civilians and making advance arrangements for the emergency evacuation', [119] and for failures to implement the 'land-planning and emergency relief policies in the hazardous area of Tyrnauz regarding the foreseeable exposure of residents … to mortal risk.' [120]

Relying on the principles established in *Öneryıldız*, [121] the Chamber asserted that all possible steps had to be taken to mitigate risks to people's lives in the context of natural disasters, while still cautioning that this should not impose 'impossible or disproportionate' burdens on domestic authorities given the States' wide margin of appreciation in 'difficult social and technical spheres.' [122] These considerations, said the Chamber, were all the more relevant 'in the sphere of emergency relief in relation to a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature.' [123] In assessing whether the respondent State had complied with the positive obligation, the Chamber considered 'the particular circumstances of the case', including: (i) 'the domestic legality of the authorities' acts or omissions'; (ii) the 'domestic decision-making process, including the appropriate investigations and studies'; and (iii) 'the complexity of the issue, especially where conflicting Convention interests are involved.' [124] The Chamber consequently found 'a causal link between the serious administrative flaws that had prevented the implementation of [protective policies] and the injuries sustained by the first and the second applicants and the members of their family.' [125] The Russian authorities had therefore failed in their duty to establish a legislative and administrative framework with which to provide effective protection against natural threats to the right to life, in violation of Article 2. [126]

In *Kolyadenko and Others v Russia*, the six applicants complained that the competent authorities had put their lives at risk, and caused damage to their homes and property by releasing a large amount of water from the Pionerskoye reservoir without any prior warning. [127] On 7 August 2001, the area of the Pionerskoye reservoir experienced heavy rain that, by the evening, amounted to

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[119] Ibid, paras. 151-152.

[120] Ibid, para. 158.

[121] See *Öneryıldız v Turkey* (n 8) para. 107.

[122] *Budayeva and Others v Russia* (n 8) paras. 130-135.

[123] Ibid.

[124] Ibid, para. 136.

[125] Ibid, para. 158.

[126] Ibid, paras. 159-160.

[127] *Kolyadenko and Others v Russia*, App nos 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (ECtHR 28 February 2012) para. 130.

the equivalent of a full month's rainfall.[128] To counter the exceptionally heavy rain and to keep the water in the reservoir within the proper limits, the local water company increased the release of water from the reservoir into the adjacent Pionerskaya river.[129] This, however, resulted in a flash flood in the area around the reservoir where the applicants lived, causing extensive damage.[130] The applicants claimed that responsibility for the flood damage fell onto the State-owned water company and the regional and city authorities.[131] They were aware of the poor state of the channel of the Pionerskaya river two years before the events of 7 August 2001, but had ignored all prior warnings.[132]

The Chamber ruled in favour of the applicants. It found that while the release of water from the reservoir was unavoidable, the events of 7 August 2001 could not be explained merely by adverse meteorological conditions.[133] The Pionerskoye reservoir was a man-made industrial facility containing millions of cubic metres of water in an area prone to heavy rains and typhoons during the summer seasons. The operation of the reservoir therefore fell within the category of dangerous industrial activities.[134] The Chamber noted that, notwithstanding this situation, the authorities had neither prevented the area from being inhabited nor taken effective measures to protect it from flooding.[135] This was so despite their positive obligations under Article 2 to 'assess all potential risks inherent in the operation of the reservoir, and to take practical measures to ensure the effective protection of those whose lives might be endangered by these risks.'[136]

Moreover, said the Chamber, the Russian authorities bore a responsibility to keep the Pionerskaya river channel free of obstruction and, in particular, to ensure that its throughput capacity met the relevant technical requirements of the reservoir.[137] Under the circumstances, the authorities could reasonably have been expected to acknowledge the increased risk of grave consequences in the event of flooding following the urgent removal of water from the reservoir and to show all possible diligence in alerting the residents of the area downstream of the reservoir.[138] In fact, the preventive measures required un-

[128] Ibid, para. 26.

[129] Ibid, paras. 25-31 and 74.

[130] Ibid, paras. 32-40 and 130.

[131] Ibid, para. 131.

[132] Ibid, para. 132.

[133] Ibid, paras. 163-164.

[134] Ibid, para. 164.

[135] Ibid, paras. 168-169.

[136] Ibid, para. 166.

[137] Ibid, para. 174.

[138] Ibid, para. 181.

der Article 2 included those satisfying the 'public's right to information.' [139]

The Chamber showed consideration for the 'authorities' wide margin of appreciation in matters where the State is required to take positive action.' [140] It nonetheless found a breach of Article 2 because 'the authorities failed to establish a clear legislative and administrative framework to enable them effectively to assess the risks inherent in the operation of the Pionerskoye reservoir and to implement town planning policies in the vicinity of the reservoir in compliance with the relevant technical standards.' [141] The authorities had not established a 'coherent supervisory system to encourage those responsible to take steps to ensure adequate protection of the population living in the area'; had not 'set in place an emergency warning system there'; and had not ensured 'sufficient coordination and cooperation between the various administrative authorities.' [142] These measures could have prevented or mitigated the risks posed to the population near the reservoir without impermissibly or disproportionately burdening the local authorities. [143] Consequently, the failure to undertake them gave rise to a violation of the substantive aspect of Article 2. [144]

3.4. *Protection of the Unborn and Euthanasia*

3.4.1. Vo v France *(2004)*

I. Summary [*]

The applicant, Mrs Thi-Nho Vo, a French national, lodged a complaint concerning the French authorities' refusal to classify as 'unintentional homicide' the conduct of a doctor (Doctor G) that had resulted in the death of her child *in utero*. She argued that the absence of criminal legislation to prevent and punish the conduct of Doctor G constituted a breach of Article 2 of the ECHR. The French Government replied that Article 2 of the ECHR does not protect the foetus's right to life, as the term 'everyone' ('*toute personne*') in Article 2

[139] Ibid, para. 159.

[140] Ibid, para. 183.

[141] Ibid, para. 185.

[142] Ibid.

[143] Ibid, para. 183.

[144] Ibid, paras. 186-187.

[*] Grand Chamber, *Vo v France*, App no 5394/00, Judgment of 8 July 2004.

of the ECHR allows its application only postnatally. The Grand Chamber found in favour of the French Government, holding by fourteen votes to three that there had been no violation of Article 2.

On 27 November 1991, Mrs Thi-Nho Vo went to the Lyons General Hospital for a medical check scheduled at the sixth month of her pregnancy. However, on the same day, another woman with an almost identical name (Mrs Thi Thanh Van Vo) was to have a contraceptive coil removed by the same doctor at the same facility. This coincidence contributed to a fatal switch of person. When Doctor G called out the name 'Mrs Vo' in the waiting room, the applicant erroneously answered the call. After a brief interview, the doctor noted that the applicant had difficulty in understanding French. Having consulted the medical file he erroneously believed to belong to the person who had answered the call, Doctor G set to proceed with the removal of the coil without examining the patient beforehand. While performing the removal, Doctor G inadvertently pierced the amniotic sac, causing the loss of a substantial amount of amniotic fluid. The doctor ordered a scan, which led to the ascertainment of the pregnancy and, consequently, to the understanding that there had been a case of mistaken identity. The applicant was immediately admitted to a hospital to take the necessary tests, the outcome of which was that the pregnancy could no longer continue because of the loss of irreplaceable amniotic fluid. The pregnancy was terminated on health grounds on 5 December 1991.

II. Proceedings in Domestic and International Jurisdictions

In its judgment of 13 March 1997, the Lyons Court of Appeal found Doctor G guilty of unintentional homicide. It held, *inter alia*, that the age of the foetus (between 20 and 24 weeks according to the anatomo-pathological examination) was very close to that of certain foetuses that had managed to survive. This observation led to the inference that the death of a 20 to 24-week-old foetus in perfect health should be classified as unintentional homicide. On 30 June 1999, the Court of Cassation reversed the judgment of the Court of Appeal, holding that causing the death of a foetus does not constitute unintentional homicide within the meaning of Articles 221-226 of the French Criminal Code.

III. Judgment (paras. 74–95)

C. The Court's assessment

74. The applicant complained that she had been unable to secure the conviction of the doctor whose medical negligence had caused her to have to undergo a

therapeutic abortion. It has not been disputed that she intended to carry her pregnancy to full term and that her child was in good health. Following the material events, the applicant and her partner lodged a criminal complaint, together with an application to join the proceedings as civil parties, alleging unintentional injury to the applicant and unintentional homicide of the child she was carrying. The courts held that the prosecution of the offence of unintentional injury to the applicant was statute-barred and, quashing the Court of Appeal's judgment on the second point, the Court of Cassation held that, regard being had to the principle that the criminal law was to be strictly construed, a foetus could not be the victim of unintentional homicide. The central question raised by the application is whether the absence of a criminal remedy within the French legal system to punish the unintentional destruction of a foetus constituted a failure on the part of the State to protect by law the right to life within the meaning of Article 2 of the Convention.

1. Existing case-law

75. Unlike Article 4 of the American Convention on Human Rights, which provides that the right to life must be protected "in general, from the moment of conception", Article 2 of the Convention is silent as to the temporal limitations of the right to life and, in particular, does not define "everyone" ("*toute personne*") whose "life" is protected by the Convention. The Court has yet to determine the issue of the "beginning" of "everyone's right to life" within the meaning of this provision and whether the unborn child has such a right.

To date it has been raised solely in connection with laws on abortion. Abortion does not constitute one of the exceptions expressly listed in paragraph 2 of Article 2, but the Commission has expressed the opinion that it is compatible with the first sentence of Article 2 § 1 in the interests of protecting the mother's life and health because "if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the 'right to life' of the foetus" (see *X v. the United Kingdom*, Commission decision cited above, p. 253).

76. Having initially refused to examine *in abstracto* the compatibility of abortion laws with Article 2 of the Convention (see *X v. Norway*, no. 867/60, Commission decision of 29 May 1961, Collection of Decisions, vol. 6, p. 34, and *X v. Austria*, no. 7045/75, Commission decision of 10 December 1976, DR 7, p. 87), the Commission acknowledged in *Brüggemann and Scheuten* (cited above) that women complaining under Article 8 of the Convention about the Constitutional Court's decision restricting the availability of abortions had standing as victims. It stated on that occasion: "... pregnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant her private life becomes closely connected with the developing foetus" (ibid., p. 116, § 59). However, the Commission did not find it "necessary to decide, in this context, whether the unborn child is to be considered as 'life' in the sense of Article 2 of the Convention, or whether it could be regarded as an entity which under Article 8 § 2 could justi-

fy an interference 'for the protection of others' " (ibid., p. 116, § 60). It expressed the opinion that there had been no violation of Article 8 of the Convention because "not every regulation of the termination of unwanted pregnancies constitutes an interference with the right to respect for the private life of the mother" (ibid., pp. 116-17, § 61), while emphasising: "There is no evidence that it was the intention of the Parties to the Convention to bind themselves in favour of any particular solution" (ibid., pp. 117-18, § 64).

77. In *X v. the United Kingdom* (cited above), the Commission considered an application by a man complaining that his wife had been allowed to have an abortion on health grounds. While it accepted that the potential father could be regarded as the "victim" of a violation of the right to life, it considered that the term "everyone" in several Articles of the Convention could not apply prenatally, but observed that "such application in a rare case – e.g. under Article 6, paragraph 1 – cannot be excluded" (p. 249, § 7; for such an application in connection with access to a court, see *Reeve v. the United Kingdom*, no. 24844/94, Commission decision of 30 November 1994, DR 79-A, p. 146). The Commission added that the general usage of the term "everyone" ("*toute personne*") and the context in which it was used in Article 2 of the Convention did not include the unborn. As to the term "life" and, in particular, the beginning of life, the Commission noted a "divergence of thinking on the question of where life begins" and added: "While some believe that it starts already with conception, others tend to focus upon the moment of nidation, upon the point that the foetus becomes 'viable', or upon live birth" (*X v. the United Kingdom*, p. 250, § 12).

The Commission went on to examine whether Article 2 was "to be interpreted: as not covering the foetus at all; as recognising a 'right to life' of the foetus with certain implied limitations; or as recognising an absolute 'right to life' of the foetus" (ibid. p. 251, § 17). Although it did not express an opinion on the first two options, it categorically ruled out the third interpretation, having regard to the need to protect the mother's life, which was indissociable from that of the unborn child: "The 'life' of the foetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman. If Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the 'unborn life' of the foetus would be regarded as being of a higher value than the life of the pregnant woman" (ibid., p. 252, § 19). The Commission adopted that solution, noting that by 1950 practically all the Contracting Parties had "permitted abortion when necessary to save the life of the mother" and that in the meantime the national law on termination of pregnancy had "shown a tendency towards further liberalisation" (ibid., p. 252, § 20).

78. In *H. v. Norway* (cited above), concerning an abortion carried out on non-medical grounds against the father's wishes, the Commission added that Article 2

required the State not only to refrain from taking a person's life intentionally but also to take appropriate steps to safeguard life (p. 167). It considered that it did not have to decide "whether the foetus may enjoy a certain protection under Article 2, first sentence", but did not exclude the possibility that "in certain circumstances this may be the case notwithstanding that there is in the Contracting States a considerable divergence of views on whether or to what extent Article 2 protects the unborn life" (ibid.). It further noted that in such a delicate area the Contracting States had to have a certain discretion, and concluded that the mother's decision, taken in accordance with Norwegian legislation, had not exceeded that discretion (p. 168).

79. The Court has only rarely had occasion to consider the application of Article 2 to the foetus. In *Open Door and Dublin Well Woman* (cited above), the Irish Government relied on the protection of the life of the unborn child to justify their legislation prohibiting the provision of information concerning abortion facilities abroad. The only issue that was resolved was whether the restrictions on the freedom to receive and impart the information in question had been necessary in a democratic society, within the meaning of paragraph 2 of Article 10 of the Convention, to pursue the "legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect" (pp. 2728, § 63), since the Court did not consider it relevant to determine "whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2" (p. 28, § 66). Recently, in circumstances similar to those in *H. v. Norway* (cited above), where a woman had decided to terminate her pregnancy against the father's wishes, the Court held that it was not required to determine "whether the foetus may qualify for protection under the first sentence of Article 2 as interpreted [in the case-law relating to the positive obligation to protect life]", and continued: "Even supposing that, in certain circumstances, the foetus might be considered to have rights protected by Article 2 of the Convention, ... in the instant case ... [the] pregnancy was terminated in conformity with section 5 of Law no. 194 of 1978" – a law which struck a fair balance between the woman's interests and the need to ensure protection of the foetus (see *Boso*, cited above).

80. It follows from this recapitulation of the case-law that in the circumstances examined to date by the Convention institutions – that is, in the various laws on abortion – the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention and that if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests. The Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child. That is what appears to have been contemplated by the Commission in considering that "Article 8 § 1 cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother" (see *Brüggemann and Scheuten*, cited above, pp. 116-17, § 61) and by the Court in the above-mentioned *Boso* decision.

It is also clear from an examination of these cases that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a woman, a mother or a father in relation to one another or *vis-à-vis* an unborn child.

2. Approach in the instant case

81. The special nature of the instant case raises a new issue. The Court is faced with a woman who intended to carry her pregnancy to term and whose unborn child was expected to be viable, at the very least in good health. Her pregnancy had to be terminated as a result of an error by a doctor and she therefore had to have a therapeutic abortion on account of negligence by a third party. The issue is consequently whether, apart from cases where the mother has requested an abortion, harming a foetus should be treated as a criminal offence in the light of Article 2 of the Convention, with a view to protecting the foetus under that Article. This requires a preliminary examination of whether it is advisable for the Court to intervene in the debate as to who is a person and when life begins, in so far as Article 2 provides that the law must protect "everyone's right to life".

82. As is apparent from the above recapitulation of the case-law, the interpretation of Article 2 in this connection has been informed by a clear desire to strike a balance, and the Convention institutions' position in relation to the legal, medical, philosophical, ethical or religious dimensions of defining the human being has taken into account the various approaches to the matter at national level. This has been reflected in the consideration given to the diversity of views on the point at which life begins, of legal cultures and of national standards of protection, and the State has been left with considerable discretion in the matter, as the opinion of the European Group on Ethics in Science and New Technologies at the European Commission appositely puts it: "the ... Community authorities have to address these ethical questions taking into account the moral and philosophical differences, reflected by the extreme diversity of legal rules applicable to human embryo research ... It is not only legally difficult to seek harmonisation of national laws at Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code" (see paragraph 40 above).

It follows that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a "living instrument which must be interpreted in the light of present-day conditions" (see *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, pp. 15-16, § 31, and subsequent case-law). The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate (see paragraph 83 below) and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life (see paragraph 84 below).

83. The Court observes that the French Court of Cassation, in three successive

judgments delivered in 1999, 2001 and 2002 (see paragraphs 22 and 29 above), considered that the rule that offences and punishment must be defined by law, which required criminal statutes to be construed strictly, excluded acts causing a fatal injury to a foetus from the scope of Article 221-6 of the Criminal Code, under which unintentional homicide of "another" is an offence. However, if, as a result of unintentional negligence, the mother gives birth to a live child who dies shortly after being born, the person responsible may be convicted of the unintentional homicide of the child (see paragraph 30 above). The first-mentioned approach, which conflicts with that of several courts of appeal (see paragraphs 21 and 50 above), was interpreted as an invitation to the legislature to fill a legal vacuum. That was also the position of the Criminal Court in the instant case: "The court ... cannot create law on an issue which [the legislature has] not yet succeeded in defining." The French parliament attempted such a definition in proposing to create the offence of involuntary termination of pregnancy (see paragraph 32 above), but the bill containing that proposal was lost, on account of the fears and uncertainties that the creation of the offence might arouse as to the determination of when life began, and the disadvantages of the proposal, which were thought to outweigh its advantages (see paragraph 33 above). The Court further notes that alongside the Court of Cassation's repeated rulings that Article 221-6 of the Criminal Code does not apply to foetuses, the French parliament is currently revising the 1994 laws on bioethics, which added provisions to the Criminal Code on the protection of the human embryo (see paragraph 25 above) and required reexamination in the light of scientific and technological progress (see paragraph 34 above). It is clear from this overview that in France the nature and legal status of the embryo and/or foetus are currently not defined and that the manner in which it is to be protected will be determined by very varied forces within French society.

84. At European level, the Court observes that there is no consensus on the nature and status of the embryo and/or foetus (see paragraphs 39-40 above), although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom (see paragraph 72 above) – require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2. The Oviedo Convention on Human Rights and Biomedicine, indeed, is careful not to give a definition of the term "everyone", and its explanatory report indicates that, in the absence of a unanimous agreement on the definition, the member States decided to allow domestic law to provide clarification for the purposes of the application of that Convention (see paragraph 36 above). The same is true of the Additional Protocol on the Prohibition of Cloning Human Beings and the Additional Protocol on Biomedical Research, which do not define the concept of "human being" (see

paragraphs 37-38 above). It is worth noting that the Court may be requested under Article 29 of the Oviedo Convention to give advisory opinions on the interpretation of that instrument.

85. Having regard to the foregoing, the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention ("*personne*" in the French text). As to the instant case, it considers it unnecessary to examine whether the abrupt end to the applicant's pregnancy falls within the scope of Article 2, seeing that, even assuming that that provision was applicable, there was no failure on the part of the respondent State to comply with the requirements relating to the preservation of life in the public-health sphere. With regard to that issue, the Court has considered whether the legal protection afforded the applicant by France in respect of the loss of the unborn child she was carrying satisfied the procedural requirements inherent in Article 2 of the Convention.

86. In that connection, it observes that the unborn child's lack of a clear legal status does not necessarily deprive it of all protection under French law. However, in the circumstances of the present case, the life of the foetus was intimately connected with that of the mother and could be protected through her, especially as there was no conflict between the rights of the mother and the father or of the unborn child and the parents, the loss of the foetus having been caused by the unintentional negligence of a third party.

87. In *Boso*, cited above, the Court said that even supposing that the foetus might be considered to have rights protected by Article 2 of the Convention (see paragraph 79 above), Italian law on the voluntary termination of pregnancy struck a fair balance between the woman's interests and the need to ensure protection of the unborn child. In the present case, the dispute concerns the involuntary killing of an unborn child against the mother's wishes, causing her particular suffering. The interests of the mother and the child clearly coincided. The Court must therefore examine, from the standpoint of the effectiveness of existing remedies, the protection which the applicant was afforded in seeking to establish the liability of the doctor concerned for the loss of her child *in utero* and to obtain compensation for the abortion she had to undergo. The applicant argued that only a criminal remedy would have been capable of satisfying the requirements of Article 2 of the Convention. The Court does not share that view, for the following reasons.

88. The Court reiterates that the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, § 147), requires the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see, for example, *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36).

89. Those principles apply in the public-health sphere too. The positive obligations require States to make regulations compelling hospitals, whether private or

public, to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V, and *Calvelli and Ciglio*, cited above, § 49).

90. Although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently (see *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I), the Court has stated on a number of occasions that an effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence, "the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged" (see *Calvelli and Ciglio*, cited above, § 51; *Lazzarini and Ghiacci v. Italy* (dec.), no. 53749/00, 7 November 2002; and *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII).

91. In the instant case, in addition to the criminal proceedings which the applicant instituted against the doctor for unintentionally causing her injury – which, admittedly, were terminated because the offence was covered by an amnesty, a fact that did not give rise to any complaint on her part – she had the possibility of bringing an action for damages against the authorities on account of the doctor's alleged negligence (see *Kress v. France* [GC], no. 39594/98, §§ 14 et seq., ECHR 2001-VI). Had she done so, the applicant would have been entitled to have an adversarial hearing on her allegations of negligence (see *Powell*, cited above) and to obtain redress for any damage sustained. A claim for compensation in the administrative courts would have had fair prospects of success and the applicant could have obtained damages from the hospital. That is apparent from the findings clearly set out in the expert reports (see paragraph 16 above) in 1992 – before the action had become statute-barred – concerning the poor organisation of the hospital department in question and the serious negligence on the doctor's part, which nonetheless, in the Court of Appeal's opinion (see paragraph 21 above), did not reflect a total disregard for the most fundamental principles and duties of his profession such as to render him personally liable.

92. The applicant's submission concerning the fact that the action for damages in the administrative courts was statute-barred cannot succeed in the Court's view. In this connection, it refers to its case-law to the effect that the "right to a court", of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admis-

sibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (see, among other authorities, *Brualla Gómez de la Torre v. Spain*, judgment of 19 December 1997, *Reports* 1997VIII, p. 2955, § 33). These legitimate restrictions include the imposition of statutory limitation periods, which, as the Court has held in personal injury cases, "serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time" (see *Stubbings and Others v. the United Kingdom*, judgment of 22 October 1996, *Reports* 1996-IV, pp. 1502-03, § 51).

93. In the instant case, a four-year limitation period does not in itself seem unduly short, particularly in view of the seriousness of the damage suffered by the applicant and her immediate desire to prosecute the doctor. However, the evidence indicates that the applicant deliberately turned to the criminal courts, apparently without ever being informed of the possibility of applying to the administrative courts. Admittedly, the French parliament recently extended the time allowed to ten years under the Law of 4 March 2002 (see paragraph 28 above). It did so with a view to standardising limitation periods for actions for damages in all courts, whether administrative or ordinary. This enables the general emergence of a system increasingly favourable to victims of medical negligence to be taken into account, an area in which the administrative courts appear capable of striking an appropriate balance between consideration of the damage to be redressed and the excessive "judicialisation" of the responsibilities of the medical profession. The Court does not consider, however, that these new rules can be said to imply that the previous period of four years was too short.

94. In conclusion, the Court considers that in the circumstances of the case an action for damages in the administrative courts could be regarded as an effective remedy that was available to the applicant. Such an action, which she failed to use, would have enabled her to prove the medical negligence she alleged and to obtain full redress for the damage resulting from the doctor's negligence, and there was therefore no need to institute criminal proceedings in the instant case.

95. The Court accordingly concludes that, even assuming that Article 2 was applicable in the instant case (see paragraph 85 above), there has been no violation of Article 2 of the Convention.

IV. Questions for the Students

Question 1

The Grand Chamber believes that it is neither desirable nor even possible to answer in the abstract the question of whether the unborn child is a person

('*personne*' in the French text) for the purposes of Article 2 of the ECHR. In his separate opinion, Judge Costa (joined by Judge Traja) criticises the Grand Chamber for not answering that question. Notwithstanding the present inability of ethics to reach a consensus on what is a person and who is entitled to the right to life, he argues that a court of law should not refrain from defining such important terms. He puts it thus:

> It is the task of lawyers, and in particular judges, especially human rights judges, to identify the notions – which may, if necessary, be the autonomous notions the Court has always been prepared to use – that correspond to the words or expressions in the relevant legal instruments (in the Court's case, the Convention and its Protocols). Why should the Court not deal with the terms 'everyone' and the 'right to life' (which the European Convention on Human Rights does not define) in the same way it has done from its inception with the terms 'civil rights and obligations', 'criminal charges' and 'tribunals', even if we are here concerned with philosophical, not technical, concepts?

Is Judge Costa right?

Question 2

Judge Ress challenges the Grand Chamber's conclusion that 'an action for damages in the administrative courts could be regarded as an effective remedy' (paragraph 94). For Judge Ress, an action in damages in the administrative courts on account of the hospital doctor's alleged negligence does not afford 'the unborn child adequate and effective protection against medical negligence'. Only the protection of criminal law can adequately safeguard and defend the right to life because it is only through criminal law that a society 'most clearly and strictly' conveys messages to its members and identifies values that are most in need of protection. This is all the more so in cases in which hospitals and doctors are insured against risks of negligence and thus the financial 'pressure' is even less capable of protecting life.

Is the argument of Judge Ress persuasive? What is the legal basis for Judge Ress' argument?

Question 3

In his separate opinion, Judge Rozakis (joined by Judges Caflisch, Fischbach, Lorenzen and Thomassen) argues that Article 2 is not applicable in the instant case. This is because:

> [I]n the present state of development of science, law and morals, both in France and across Europe, the right to life of the unborn child has yet to be secured. Even

> if one accepts that life begins before birth, that does not automatically and unconditionally confer on this form of human life a right to life equivalent to the corresponding right of a child after its birth. This does not mean that the unborn child does not enjoy any protection by human society, since – as the relevant legislation of European States, and European agreements and relevant documents show – the unborn life is already considered to be worthy of protection. But as I read the relevant legal instruments, this protection, though afforded to a being considered worthy of it, is, as stated above, distinct from that given to a child after birth, and far narrower in scope. It consequently transpires from the present stage of development of the law and morals in Europe that the life of the unborn child, although protected in some of its attributes, cannot be equated to postnatal life, and, therefore, does not enjoy a right in the sense of 'a right to life', as protected by Article 2 of the Convention.

Read this passage carefully. Judge Rozakis speaks of the 'present state of development of the law and morals in Europe'. What does he mean? Is Judge Rozakis suggesting that a judge should apply law on the basis of not only legal but also moral considerations? Does this view of the judicial function accord with the norms and values contained in the ECHR?

3.4.2. Pretty v the United Kingdom *(2002)*

I. Summary [*]

The applicant is Mrs Diane Pretty, a national of the UK. She lodged a complaint, under Article 2 of the ECHR, concerning the refusal of the UK Director of Public Prosecutions ('DPP') to grant immunity from prosecution to her husband, who was willing to assist her in committing suicide. The Chamber found unanimously that there had been no violation of Article 2.

In November 1999, at the age of 43, Mrs Pretty was diagnosed with motor neurone disease ('MND'). MND is a progressive neuro-degenerative disease that affects someone's ability to move their arms, legs and the muscles involved in the control of breathing, which leads to paralysis. Death usually occurs as a result of weakness of the breathing muscles in association with weakness in the muscles that control speaking and swallowing. No treatment can prevent the progression of the disease. Since being diagnosed with MND,

[*] Chamber (Fourth Section), *Pretty v the United Kingdom*, App no 2346/02, Judgment of 29 April 2002.

the applicant's condition deteriorated rapidly. At the time of lodging the complaint, the disease was at an advanced stage. She was essentially paralysed from the neck down, had virtually no decipherable speech, and was fed through a tube. However, her intellect and capacity to make decisions was unimpaired. Frightened at the prospect of a humiliating and distressing death, she wished to die at a time of her choosing.

Under English law, it was not a crime to commit suicide, but the applicant's physical incapacity prevented her from taking her own life. She needed assistance in order to realise her intention, and her husband was willing to assist her. Under English law (Section 2(1) of the Suicide Act of 1961), however, it was criminal to assist another person to commit suicide. Therefore, the applicant asked the DPP to give an undertaking not to prosecute her husband should he help her to commit suicide. In a letter dated 8 August 2001, the DPP refused to give such an undertaking, stating that no immunity authorising or permitting the future commission of a criminal offence could be granted regardless of the exceptionality of the circumstances.

II. Proceedings in Domestic and International Jurisdictions

On 17 October 2001, a UK Divisional Court rejected the application for judicial review of the DPP's decision, holding that the DPP did not have the power to give an undertaking not to prosecute and that the relevant law (Section 2(1) of the Suicide Act 1961) was compatible with the ECHR. The ensuing appeal against the decision of the UK Court to the House of Lords was dismissed on 29 November 2001.

III. Judgment (paras. 35–42)

A. Submissions of the parties

1. The applicant

35. The applicant submitted that permitting her to be assisted in committing suicide would not be in conflict with Article 2 of the Convention, otherwise those countries in which assisted suicide was not unlawful would be in breach of this provision. Furthermore, Article 2 protected not only the right to life but also the right to choose whether or not to go on living. It protected the right to life and not life itself, while the sentence concerning deprivation of life was directed towards protecting individuals from third parties, namely the State and public authorities, not from themselves. Article 2 therefore acknowledged that it was for the individ-

ual to choose whether or not to go on living and protected her right to die to avoid inevitable suffering and indignity as the corollary of the right to life. In so far as the *Keenan* case referred to by the Government indicated that an obligation could arise for prison authorities to protect a prisoner who tried to take his own life, the obligation only arose because he was a prisoner and lacked, due to his mental illness, the capacity to take a rational decision to end his life (see *Keenan v. the United Kingdom*, no. 27229/95, ECHR 2001-III).

2. The Government

36. The Government submitted that the applicant's reliance on Article 2 was misconceived, being unsupported by direct authority and being inconsistent with existing authority and with the language of the provision. Article 2, guaranteeing one of the most fundamental rights, imposed primarily a negative obligation. Although it had in some cases been found to impose positive obligations, this concerned steps appropriate to safeguard life. In previous cases the State's responsibility under Article 2 to protect a prisoner had not been affected by the fact that he committed suicide (see *Keenan*, cited above) and it had also been recognised that the State was entitled to force-feed a prisoner on hunger strike (see *X v. Germany*, no. 10565/83, Commission decision of 9 May 1984, unreported). The wording of Article 2 expressly provided that no one should be deprived of their life intentionally, save in strictly limited circumstances which did not apply in the present case. The right to die was not the corollary, but the antithesis of the right to life.

B. The Court's assessment

37. The Court's case-law accords pre-eminence to Article 2 as one of the most fundamental provisions of the Convention (see McCann and Others v. the United Kingdom, judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-47). It safeguards the right to life, without which enjoyment of any of the other rights and freedoms in the Convention is rendered nugatory. It sets out the limited circumstances when deprivation of life may be justified and the Court has applied a strict scrutiny when those exceptions have been relied on by the respondent States (ibid., p. 46, §§ 149-50).

38. The text of Article 2 expressly regulates the deliberate or intended use of lethal force by State agents. However, it has been interpreted as covering not only intentional killing but also the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life (ibid., p. 46, § 148). Furthermore, the Court has held that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36). This obligation extends beyond a primary duty to secure the right to life by putting in place effective criminal-law

provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions; it may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3159, § 115, and *Kılıç v. Turkey*, no. 22492/93, §§ 62 and 76, ECHR 2000-III). More recently, in *Keenan*, Article 2 was found to apply to the situation of a mentally ill prisoner who disclosed signs of being a suicide risk (see *Keenan*, cited above, § 91).

39. The consistent emphasis in all the cases before the Court has been the obligation of the State to protect life. The Court is not persuaded that "the right to life" guaranteed in Article 2 can be interpreted as involving a negative aspect. While, for example in the context of Article 11 of the Convention, the freedom of association has been found to involve not only a right to join an association but a corresponding right not to be forced to join an association, the Court observes that the notion of a freedom implies some measure of choice as to its exercise (see *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A no. 44, pp. 21-22, § 52, and *Sigurđur A. Sigurjónsson v. Iceland*, judgment of 30 June 1993, Series A no. 264, pp. 15-16, § 35). Article 2 of the Convention is phrased in different terms. It is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection from State interference, they may be reflected in the rights guaranteed by other Articles of the Convention, or in other international human rights instruments. Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.

40. The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention. It is confirmed in this view by the recent Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe (see paragraph 24 above).

41. The applicant has argued that a failure to acknowledge a right to die under the Convention would place those countries which do permit assisted suicide in breach of the Convention. It is not for the Court in this case to attempt to assess whether or not the state of law in any other country fails to protect the right to life. As it recognised in *Keenan*, the measures which may reasonably be taken to protect a prisoner from self-harm will be subject to the restraints imposed by other provisions of the Convention, such as Articles 5 and 8, as well as more general principles of personal autonomy (see *Keenan*, cited above, § 92). Similarly, the extent to which a State permits, or seeks to regulate, the possibility for the inflic-

tion of harm on individuals at liberty, by their own or another's hand, may raise conflicting considerations of personal freedom and the public interest that can only be resolved on examination of the concrete circumstances of the case (see, *mutatis mutandis*, *Laskey, Jaggard and Brown v. the United Kingdom*, judgment of 19 February 1997, *Reports* 1997-I). However, even if circumstances prevailing in a particular country which permitted assisted suicide were found not to infringe Article 2 of the Convention, that would not assist the applicant in this case, where the very different proposition – that the United Kingdom would be in breach of its obligations under Article 2 if it did not allow assisted suicide – has not been established.

42. The Court finds that there has been no violation of Article 2 of the Convention.

IV. Questions for the Students

Question 1

The applicant argues that Article 2 protects one's right to die to avoid inevitable suffering and indignity as a corollary of the right to life. The Chamber rejected this view because 'Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite [to the right to life] right, namely a right to die' (paragraph 39).

Reflect on the reasoning of the Chamber. Can it be said that the Chamber excludes the existence of a right to die? How would you argue for the existence of a right to die in international human rights law notwithstanding the provision of Article 2 of the ECHR?

Question 2

The Chamber states that its case law 'safeguards the right to life, without which enjoyment of any of the other rights and freedoms in the Convention is rendered nugatory'. On the other hand, according to the Chamber Article 2 is also 'unconcerned with issues [having] to do with the quality of living' (paragraph 39). Do you agree with the conclusion of the Chamber? What if, for instance, the quality of living is so poor as to render the 'enjoyment of any of the other rights and freedoms' impossible? Consider the concept of 'dignified existence' discussed in the *Villagrán Morales et al*. case (see Appendix I). Would it possible, in the appropriate circumstances, to interpret Article 2 in light of the rationale employed by the IACtHR?

Question 3

In the concluding part of its assessment, the Chamber states that 'even if circumstances prevailing in a particular country which permitted assisted suicide

were found not to infringe Article 2 of the ECHR, that would not assist the applicant in this case, where the very different proposition – that the UK would be in breach of its obligations under Article 2 if it did not allow assisted suicide – has not been established' (paragraph 41).

Reflect on the wording employed in the first part of this sentence. Is the Chamber saying that, in certain circumstances, a country allowing assisted suicide may not be in breach of Article 2? If so, can you think of examples of what such circumstances might be?

3.4.3. *The Role of the Margin of Appreciation Doctrine*

(a) Protection of the Unborn

In line with the approach adopted in *Vo*, the judgments of the ECtHR have been characterised by a cautious, if not modest, approach towards the rights of the unborn, on one hand seeking to ensure that domestic approaches comply with the values of Article 2 and, on the other, leaving some room for each State to decide under which circumstances abortion may be legal and at what stage of the development of an embryo life begins. A significant indirect consequence of this prudent approach is that the ECtHR's jurisprudence leaves room for progressive domestic legislation rather than restricting it through a conservationist approach. This approach is possible, or perhaps even required, because of the margin of appreciation doctrine.[145] The margin of appreciation doctrine postulates that State parties to the ECHR enjoy a degree of discretion in how they apply and implement its provisions. It is based on the principle of subsidiarity, that is, the idea that 'the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.'[146] States have some leeway in how they apply the protective standards domestically, which is however subject to the ECtHR's supervision.[147] The

[145] On the concept of margin of appreciation and its application in various fields of public international law see, among others, Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1998-1999) 31 New York Journal of International Law and Policy 843; Yuval Shany, 'Towards a General Margin of Appreciation Doctrine in International Law?' (2006) 16 EJIL 907.

[146] *Handyside v the United Kingdom*, App no 5493/72 (ECtHR 7 December 1976) para. 48.

[147] Article 1 of Protocol No. 15 (not yet in force at the time of writing) to the ECHR indicates that the following sentence will be added to the Preamble of the ECHR: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'. See Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No 213, 24 June 213.

ECtHR is to review whether decisions taken by national authorities are compatible with the ECHR, having due regard to the States' margin of appreciation.[148] Reliance on this doctrine may be necessary, for instance, due to a lack of uniformity of views among contracting States on a given issue and because of the complexity of the matter to be decided. It has been employed, to give but a very few examples, in the field of security, military and technical evaluations;[149] on technical issues concerning protection from natural disasters;[150] in matters of education and teaching;[151] and in relation to public morals and medical science, such as in the cases to be discussed in this section.

Turning to the analysis of the relevant jurisprudence concerning abortion, attention should first be given to *R. H. v Norway*.[152] In this case, the ECommHR determined that the decision of domestic authorities to authorise the abortion of a 14-week-old foetus because the 'pregnancy, birth or care for the child may place the woman in a difficult situation of life' did not violate the foetus's rights under Article 2.[153] Rather, the ECommHR considered that this matter fell within the States' margin of appreciation. It noted that 'national laws on abortion differ considerably' within the States parties to the ECHR and that therefore 'in such a delicate area the Contracting States must have a certain discretion.'[154] The law applicable in Norway, as it was applied to the facts of the case, was consequently not found to exceed the margin of appreciation under Article 2 of the ECHR.[155]

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[148] Among the vast literature on the margin of appreciation within the ECHR, see in particular Ronald St. J. Macdonald, 'The Margin of Appreciation', in Ronald St. J. Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 83–124; Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012); Janneke Gerards, *General Principles of the European Convention on Human Rights* (OUP 2019) 160-197.

[149] *Finogenov and Others v Russia*, App nos 18299/03 and 27311/03 (ECtHR 20 December 2011) para. 213.

[150] See *Budayeva and Others v Russia* (n 7) para. 135.

[151] *Lautsi and Others v Italy*, App no 30814/06 (ECtHR [GC] 18 March 2011) paras 70-71.

[152] See also, however, *X v the United Kingdom*, App no 8416/79 (EcommHR Admissibility Decision 13 May 1980) para. 19, where the Commission, while noting 'a divergence of thinking on the question of where life beings', states that the 'life of the foetus is intimately connected with, and it cannot be regarded in isolation of the life of the pregnant woman. If Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the 'unborn life' of the foetus would be regarded as being of a higher value than the life of the pregnant woman'.

[153] *R. H. v Norway*, App no 17004/90 (ECommHR Admissibility Decision 19 May 1992) 'The Law', para. 1.

[154] Ibid.

[155] Ibid.

Likewise, in *Boso v Italy* the Chamber found nothing to criticise in the case of an abortion performed in accordance with Italian law within the first 12 weeks of pregnancy. The abortion was deemed not to be in breach of Article 2 namely because it was based on a domestic law that struck 'a fair balance between, on the one hand, the need to ensure protection of the foetus and, on the other, the woman's interests.' [156]

In *Evans v the United Kingdom*, the applicant and her partner at the time underwent *in vitro* fertilisation treatment, resulting in embryos that could later be implanted into the applicant's womb. [157] The applicant complained that the British legislation authorised her ex-partner to withdraw his consent relating to the storage and use of the jointly created embryos, leading to the destruction of the embryos. [158] The Grand Chamber observed that under English law an embryo does not have independent rights or interests and cannot claim – or have claimed on its behalf – a right to life under Article 2. [159] The Grand Chamber consequently rejected the applicant's claim that the destruction had breached Article 2. Following *Vo v France*, the Grand Chamber held that, in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins to apply falls within the margin of appreciation of States. [160] As such, it did not find any violation of the right to life even though the embryos had been destroyed. [161]

(b) Euthanasia

In *Pretty v United Kingdom*, the ECtHR determined that the right to life under Article 2 of the ECHR could not, without a distortion of language, be interpreted as conferring the diametrically opposite right to die, whether at the hands of a third person or with the assistance of a public authority. [162] This position has been upheld in the subsequent jurisprudence.

In *Haas v Switzerland*, the ECtHR was to determine whether, by virtue of the right to respect for private life under Article 8, the State could enable a person suffering from a serious bipolar affective disorder and wishing to commit suicide to gain access to a lethal substance (sodium pentobarbital)

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[156] *Boso v Italy*, App no 50490/99 (ECtHR Admissibility Decision 5 September 2002) 'The Law', para. 1.

[157] *Evans v the United Kingdom*, App no 6339/05 (ECtHR [GC] 10 April 2007) paras. 13-17.

[158] Ibid, para. 53.

[159] Ibid, para. 54.

[160] Ibid.

[161] Ibid, para. 56.

[162] *Pretty v the United Kingdom*, App no 2346/02 (ECtHR 29 April 2002) paras. 39-40.

without a prescription.[163] The applicant sought this exception to the applicable domestic law in order to be able to end his life without pain and with no risk of failure.[164] The Grand Chamber recognised that the applicant had expressed freely his will to commit suicide in a manner that he considered to be certain, dignified and painless. It noted that there was no consensus among the Contracting States as to whether an individual could choose how and when to end his life.[165] As such, and on account of the complexity and delicate balancing exercise required in each case, the Grand Chamber determined that the matter of assisted suicide was one that fell within the margin of appreciation of each State.[166] It observed, furthermore, that although assistance in suicide had been decriminalised (at least partly) in certain States, the vast majority of them appeared to attach more weight to the protection of one's right to life rather than one's right to end it.[167] The Grand Chamber observed that the domestic requirement for a prescription for the sought drug, which was a lethal substance, was fully justified to protect individuals from making a hasty decision, to prevent abuses, to protect public safety, and to prevent crime, and felt that maintaining the existing regulations with all the inherent scrutiny was useful in a country such as Switzerland that readily allowed assisted suicide.[168]

In *Lambert and Others v France*, the Grand Chamber was called to rule on the legality of a decision of the competent authorities to discontinue nutrition and hydration that had allowed Vincent Lambert, while in a state of total dependence, to be artificially kept alive.[169] As a result of a road accident in 2008, Mr Lambert had been in a chronic vegetative state for over five years and received life-sustaining nutrition and hydration.[170]

Following a consultation procedure provided for by the relevant domestic law, which included meetings with the family members, the doctor treating Mr Lambert decided to discontinue the provision of nutrition and hydration.[171] The parents of Mr Lambert unsuccessfully appealed this decision to the *Con-*

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[163] *Haas v Switzerland*, App no 31322/07 (ECtHR 20 January 2011) paras. 7 and 32.

[164] Ibid, para. 33. See also ibid, para. 52.

[165] Ibid, paras. 55-61.

[166] Ibid.

[167] Ibid, para. 55.

[168] Ibid, paras. 56-58.

[169] *Lambert and Others v France*, App no 46043/14 (ECtHR [GC] 5 June 2015) para. 80. Vincent Lambert died officially on 11 July 2011. See, among others, François Beugin, 'Vincent Lambert est mort, neuf jours après le début de l'arrêt des traitements' (Le Monde 11 July 2019) <www.lemonde.fr/societe/article/2019/07/11/vincent-lambert-est-mort_5488017_3224.html> (accessed 30 November 2019).

[170] Ibid, paras. 11-13.

[171] Ibid, paras. 14-15.

seil d'État, notwithstanding the absence of unanimity among the family members.[172]

The applicants in the case (Mr Lambert's parents, half-brother and sister) complained that the *Conseil d'État* judgment authorising the withdrawal of the artificial nutrition and hydration violated the State's obligations under Article 2.[173] The Grand Chamber responded by stressing, first of all, the distinction between intentional taking of life and withdrawal of treatment in certain specific circumstances. While the former, if carried out, may have amounted to a violation of the negative dimension of Article 2 as the State authorities would be the direct perpetrators of Mr Lambert's death, the Grand Chamber clarified that this case did not involve any violation of negative obligations. Instead, the only aspect of Article 2 involved in the case related to the State's positive obligations to take reasonable steps to preserve his life.[174]

The Grand Chamber firstly observed that there was no consensus among the Council of Europe Member States as regards the withdrawal of life-sustaining treatment, although the majority of States appeared to allow it. There was only consensus as to the 'paramount importance of the patient's wishes in the decision-making process.'[175] The matter at issue therefore best fell within the margin of appreciation of individual States. The Grand Chamber explained its thinking thus:

> … in this sphere concerning the end of life, as in that concerning the beginning of life, States must be afforded a margin of appreciation, not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as regards the means of striking a balance between the protection of patients' right to life and the protection of their right to respect for their private life and their personal autonomy.[176]

Within this premise, the Grand Chamber still reserved itself the power to review whether or not a State had complied with its obligations under Article 2.[177] In the present case, it found no fault with the approach of the French institutions because 'both the legislative framework ... and the decision-making process, which was conducted in meticulous fashion in the present case' were compatible with the requirements of Article 2. Likewise, the Grand Chamber was satisfied that 'the present case was the subject of an in-depth examination'

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[172] Ibid, paras. 29-37.

[173] Ibid, para. 80.

[174] Ibid, para. 124.

[175] Ibid, para. 147.

[176] Ibid, para. 148.

[177] Ibid.

during which 'all points of view could be expressed and all aspects were carefully considered', including those originating 'from the highest-ranking medical and ethical bodies.'[178] Consequently, the Grand Chamber found that the domestic authorities had complied with their positive obligations under Article 2, 'in view of the margin of appreciation left to them in the present case.' [179]

3.5. *The Procedural Obligation to Investigate*

3.5.1. Al-Skeini and Others v the United Kingdom *(2011)*

III. Judgment (paras. 161–177) *

(b) The Court's assessment

(i) General principles

161. The Court is conscious that the deaths in the present case occurred in Basra City in south-east Iraq in the aftermath of the invasion, during a period when crime and violence were endemic. Although major combat operations had ceased on 1 May 2003, the Coalition Forces in south-east Iraq, including British soldiers and military police, were the target of over a thousand violent attacks in the subsequent thirteen months. In tandem with the security problems, there were serious breakdowns in the civilian infrastructure, including the law enforcement and criminal justice systems (see paragraphs 22-23 above; see also the findings of the Court of Appeal at paragraph 80 above).

162. While remaining fully aware of this context, the Court's approach must be guided by the knowledge that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective. Article 2, which protects the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions of the Convention. No derogation from it is permitted under Article 15, "except in respect of deaths resulting from lawful acts of war". Article 2 covers both intentional killing and also the situations in which it is permitted to use force

[178] Ibid, para. 181.

[179] Ibid.

* Grand Chamber, *Al-Skeini and Others v the United Kingdom*, App no 55721/07, Judgment of 7 July 2011. For the summary of facts and prior proceedings in the *Al-Skeini* case see above, Chapter 2.1.2.

which may result, as an unintended outcome, in the deprivation of life. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c) (see *McCann and Others*, cited above, §§ 14648).

163. The general legal prohibition of arbitrary killing by agents of the State would be ineffective in practice if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State (see *McCann and Others*, cited above, § 161). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 110, ECHR 2005-VII). However, the investigation should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 to protect life (see, by implication, *McCann and Others*, cited above, §§ 150 and 162; *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 128, 4 May 2001; *McKerr*, cited above, §§ 143 and 151; *Shanaghan v. the United Kingdom*, no. 37715/97, §§ 100-25, 4May 2001; *Finucane v. the United Kingdom*, no. 29178/95, §§ 77-78, ECHR 2003VIII; *Nachova and Others*, cited above, §§ 114-15; and, *mutatis mutandis*, *Tzekov v. Bulgaria*, no. 45500/99, § 71, 23 February 2006).

164. The Court has held that the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict (see, among other examples, *Güleç v. Turkey*, 27 July 1998, § 81, *Reports* 1998IV; *Ergi v. Turkey*, 28 July 1998, §§ 79 and 82, *Reports* 1998IV; *Ahmet Özkan and Others v. Turkey*, no. 21689/93, §§ 85-90, 309-20 and 326-30, 6 April 2004; *Isayeva v. Russia*, no. 57950/00, §§ 180 and 210, 24 February 2005; and *Kanlibaş v. Turkey*, no. 32444/96, §§ 39-51, 8 December 2005). It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and, as the United Nations Special Rapporteur has also observed (see paragraph 93 above), concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed (see, for example, *Bazorkina v. Russia*, no. 69481/01, § 121, 27 July 2006). Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effec-

tive, independent investigation is conducted into alleged breaches of the right to life (see, among many other examples, *Kaya v. Turkey*, 19February 1998, §§ 8692, *Reports* 1998I; *Ergi*, cited above, §§ 82-85; *Tanrıkulu v. Turkey* [GC], no. 23763/94, §§ 101-10, ECHR 1999IV; *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, §§ 156-66, 24 February 2005; *Isayeva*, cited above, §§ 21524; and *Musayev and Others v. Russia*, nos. 57941/00, 58699/00 and 60403/00, §§ 158-65, 26 July 2007).

165. What form of investigation will achieve the purposes of Article 2 may vary depending on the circumstances. However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see *Ahmet Özkan and Others*, cited above, § 310, and *Isayeva*, cited above, § 210). Civil proceedings, which are undertaken on the initiative of the next of kin, not the authorities, and which do not involve the identification or punishment of any alleged perpetrator, cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention (see, for example, *Hugh Jordan*, cited above, § 141). Moreover, the procedural obligation of the State under Article 2 cannot be satisfied merely by awarding damages (see *McKerr*, cited above, § 121, and *Bazorkina*, cited above, § 117).

166. As stated above, the investigation must be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must take the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard (see *Ahmet Özkan and Others*, cited above, § 312, and *Isayeva*, cited above, § 212 and the cases cited therein).

167. For an investigation into alleged unlawful killing by State agents to be effective, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence (see, for example, *Shanaghan*, cited above, § 104). A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of

public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next of kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Ahmet Özkan and Others*, cited above, §§ 31114, and *Isayeva*, cited above, §§ 211-14 and the cases cited therein).

(ii) Application of these principles to the facts of the case

168. The Court takes as its starting-point the practical problems caused to the investigating authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading, *inter alia*, to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. As stated above, the Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators.

169. Nonetheless, the fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command.

170. It was not in issue in the first, second and fourth applicants' cases that their relatives were shot by British soldiers, whose identities were known. The question for investigation was whether in each case the soldier fired in conformity with the rules of engagement. In respect of the third applicant, Article 2 required an investigation to determine the circumstances of the shooting, including whether appropriate steps were taken to safeguard civilians in the vicinity. As regards the fifth applicant's son, although the Court has not been provided with the documents relating to the court martial, it appears to have been accepted that he died of drowning. It needed to be determined whether British soldiers had, as alleged, beaten the boy and forced him into the water. In each case, eyewitness testimony was crucial. It was therefore essential that, as quickly after the event as possible, the military witnesses, and in particular the alleged perpetrators, should have been questioned by an expert and fully independent investigator. Similarly, every effort should have been taken to identify Iraqi eyewitnesses and to persuade them that they would not place themselves at risk by coming forward and giving information and that their evidence would be treated seriously and acted upon without delay.

171. It is clear that the investigations into the shooting of the first, second and third applicants' relatives fell short of the requirements of Article 2, since the investigation process remained entirely within the military chain of command and

was limited to taking statements from the soldiers involved. Moreover, the Government accept this conclusion.

172. As regards the other applicants, although there was an investigation by the Special Investigation Branch into the death of the fourth applicant's brother and the fifth applicant's son, the Court does not consider that this was sufficient to comply with the requirements of Article 2. It is true that the Royal Military Police, including its Special Investigation Branch, had a separate chain of command from the soldiers on combat duty whom it was required to investigate. However, as the domestic courts observed (see paragraphs 77 and 82 above), the Special Investigation Branch was not, during the relevant period, operationally independent from the military chain of command. It was generally for the Commanding Officer of the unit involved in the incident to decide whether the Special Investigation Branch should be called in. If the Special Investigation Branch decided on its own initiative to commence an investigation, this investigation could be closed at the request of the military chain of command, as demonstrated in the fourth applicant's case. On conclusion of a Special Investigation Branch investigation, the report was sent to the Commanding Officer, who was responsible for deciding whether or not the case should be referred to the Army Prosecuting Authority. The Court considers, in agreement with Brooke LJ (see paragraph 82 above), that the fact that the Special Investigation Branch was not "free to decide for itself when to start and cease an investigation" and did not report "in the first instance to the [Army Prosecuting Authority]" rather than to the military chain of command, meant that it could not be seen as sufficiently independent from the soldiers implicated in the events to satisfy the requirements of Article 2.

173. It follows that the initial investigation into the shooting of the fourth applicant's brother was flawed by the lack of independence of the Special Investigation Branch officers. During the initial phase of the investigation, material was collected from the scene of the shooting and statements were taken from the soldiers present. However, Lance Corporal S., the soldier who shot the applicant's brother, was not questioned by Special Investigation Branch investigators during this initial phase. It appears that the Special Investigation Branch interviewed four Iraqi witnesses, who may have included the neighbours the applicant believes to have witnessed the shooting, but did not take statements from them. In any event, as a result of the lack of independence, the investigation was terminated while still incomplete. It was subsequently reopened, some nine months later, and it would appear that forensic tests were carried out at that stage on the material collected from the scene, including the bullet fragments and the vehicle. The Special Investigation Branch report was sent to the Commanding Officer, who decided to refer the case to the Army Prosecuting Authority. The prosecutors took depositions from the soldiers who witnessed the incident and decided, having taken further independent legal advice, that there was no evidence that Lance Corporal S. had not acted in legitimate self-defence. As previously stated, eyewitness testimony was central in this case, since the cause of the death was not in dispute. The

Court considers that the long period of time that was allowed to elapse before Lance Corporal S. was questioned about the incident, combined with the delay in having a fully independent investigator interview the other military witnesses, entailed a high risk that the evidence was contaminated and unreliable by the time the Army Prosecuting Authority came to consider it. Moreover, it does not appear that any fully independent investigator took evidence from the Iraqi neighbours who the applicant claims witnessed the shooting.

174. While there is no evidence that the military chain of command attempted to intervene in the investigation into the fifth applicant's son's death, the Court considers that the Special Investigation Branch investigators lacked independence for the reasons set out above. In addition, no explanation has been provided by the Government in respect of the long delay between the death and the court martial. It appears that the delay seriously undermined the effectiveness of the investigation, not least because some of the soldiers accused of involvement in the incident were by then untraceable (see, in this respect, the comments in the Aitken Report, paragraph 61 above). Moreover, the Court considers that the narrow focus of the criminal proceedings against the accused soldiers was inadequate to satisfy the requirements of Article 2 in the particular circumstances of this case. There appears to be at least prima facie evidence that the applicant's son, a minor, was taken into the custody of British soldiers who were assisting the Iraqi police to take measures to combat looting and that, as a result of his mistreatment by the soldiers, he drowned. In these circumstances, the Court considers that Article 2 required an independent examination, accessible to the victim's family and to the public, of the broader issues of State responsibility for the death, including the instructions, training and supervision given to soldiers undertaking tasks such as this in the aftermath of the invasion.

175. In the light of the foregoing, the Court does not consider that the procedural duty under Article 2 has been satisfied in respect of the fifth applicant. Although he has received a substantial sum in settlement of his civil claim, together with an admission of liability on behalf of the army, there has never been a full and independent investigation into the circumstances of his son's death (see paragraph 165 above). It follows that the fifth applicant can still claim to be a victim within the meaning of Article 34 and that the Government's preliminary objection regarding his lack of victim status must be rejected.

176. In contrast, the Court notes that a full, public inquiry is nearing completion into the circumstances of the sixth applicant's son's death. In the light of this inquiry, the Court notes that the sixth applicant accepts that he is no longer a victim of any breach of the procedural obligation under Article 2. The Court therefore accepts the Government's objection in respect of the sixth applicant.

177. In conclusion, the Court finds a violation of the procedural duty under Article 2 of the Convention in respect of the first, second, third, fourth and fifth applicants.

IV. Questions for the Students

Question 1

The Grand Chamber holds that because Iraq was under UK occupation, in order for an investigation to be effective 'it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command' (paragraph 169). As regards the fifth applicant's son's death, the Grand Chamber found that the Special Investigation Branch investigators lacked independence, notwithstanding that 'there is no evidence that the military chain of command attempted to intervene' in the corresponding investigation (paragraph 174). Reflect on the concept of 'independent investigation'. What does this requirement of independence mean in practice? That is, from what and of whom is an investigation to be independent? On what basis could the Grand Chamber reach the conclusion that the investigation had not been independent, since there was no evidence showing that the military chain of command attempted to intervene?

Question 2

Given the specific circumstances of this case, that is, 'the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war' and the practical problems faced by investigators (shown in paragraph 168 above) because of operating in such a hostile environment, the Grand Chamber found that the procedural duty under Article 2 had to be applied 'realistically'. What does 'realistically' mean here? What elements should be factored in this assessment? Would you find it more appropriate to assign the greatest relative weight to the material and practical problems faced by the occupying power or, on the contrary, to the near absoluteness of the powers it enjoys within the occupied territory?

Question 3

The Grand Chamber considers that, in order for a State's procedural obligation under Article 2 to be fulfilled, its authorities 'cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures' (paragraph 165). How would you circumscribe *ratione personae* the category of 'next of kin', within the meaning and purpose of the above-mentioned distinction made by the Grand Chamber?

3.5.2. *Defining the Adequacy and Independence of an Investigation*

The legal prohibition of arbitrary killing by State agents provided for in Article 2(2) of the ECHR would be ineffective if there were no procedure for reviewing the lawfulness of the use of lethal force by State authorities. As the Grand Chamber put it in the *McCann* case:

> The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State. [180]

The essential purpose of an investigation under the procedural dimension of Article 2 is to secure the effective implementation of the domestic laws that protect the right to life and, in cases involving State agents or bodies, to ensure accountability for deaths occurring under their command.[181] An effective investigation must satisfy two cumulative requirements: adequacy and independence. Both requirements are necessary to appraise whether the investigation itself is sufficient. An adequate investigation must be:

> … capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of this standard…[182]

In terms of the requirement of adequacy, public authorities must secure the evidence concerning the incident, including, *inter alia*, eyewitnesses' testimony,

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[180] *McCann and Others v the United Kingdom*, App no 18984/91 (ECtHR [GC] 27 September 1995) para. 161. See also *Kaya v Turkey*, 19 February 1998, *Reports* 1998-I, para. 105.

[181] *Paul and Audrey Edwards v the United Kingdom*, App no 46477/99 (ECtHR 14 March 2002) para. 195; *Mastromatteo v Italy*, App no 37703/97 (ECtHR [GC] 24 October 2002) para. 89; *M. Özel and Others v Turkey*, App nos 14350/05, 15245/05 and 16051/05 (ECtHR 17 November 2015) paras. 188-189.

[182] *Ramsahai and Others v the Netherlands*, App no 52391/99 (ECtHR [GC] 15 May 2007) para. 324. An indicator of the adequacy of an investigation is its thoroughness. This means that the 'authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions'. See *Finogenov and Others v Russia*, App nos 18299/03 and 27311/03 (ECtHR 20 December 2011) para. 271; *Giuliani and Gaggio v Italy*, App no 23458/02 (ECtHR [GC] 24 March 2011) para. 325; *Güleç v Turkey*, App no 21593/93 (ECtHR 27 July 1998) para. 79. See also para. 175.

forensic evidence and, where appropriate, an autopsy, so as to obtain a 'complete and accurate record' of the events.[183] This is not, however, an 'obligation of result, but one of means: the authorities must take 'whatever reasonable steps' are available to them to fulfil it.[184] A requirement of promptness and reasonable expedition is implicit in this context.[185] A prompt response by the authorities investigating a use of lethal force may generally be regarded as essential to maintain public confidence in the adherence to the rule of law, as well as to prevent any appearance of collusion in or tolerance of unlawful acts.[186] The obligation to carry out an effective investigation applies not only when a death occurs at the hands of States agents, but also at the hands of private or unknown individuals.[187]

The requirement of independence concerns the suitability of the persons or entities to carry out the assigned investigation. The ECtHR has put it thus:

> … it may generally be regarded as necessary for the persons responsible for [the investigation] and carrying it out to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence... What is at stake here is nothing less than public confidence in the State's monopoly on the use of force.[188]

Moreover, the authorities must act of their own motion once the matter has come to their attention.[189] They cannot leave it to the initiative of the next of

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[183] *See Ramsahai and Others v the Netherlands*, App no 52391/99 (ECtHR [GC] 15 May 2007) paras. 324-332. In particular, the investigation's conclusions must be 'based on thorough, objective and impartial analysis of all relevant elements'. *Giuliani and Gaggio v Italy*, App no 23458/02 (ECtHR [GC] 24 March 2011) para. 303.

[184] *Giuliani and Gaggio v Italy*, App no 23458/02 (ECtHR [GC] 24 March 2011) para. 301.

[185] *Paul and Audrey Edwards v the United Kingdom*, App no 46477/99 (ECtHR 14 March 2002) para. 195; *Ramsahai and Others v the Netherlands* (n 182) para. 325, *Šilih v Slovenia*, App no 71463/01 (ECtHR [GC] 9 April 2009) para. 185.

[186] See *Güleç v Turkey*, App no 21593/93 (ECtHR 27 July 1998) paras. 81-82; *Anguelova v Bulgaria*, App no 38361/97 (ECtHR 13 July 2002) para. 140. *Giuliani and Gaggio v Italy*, App no 23458/02 (ECtHR [GC] 24 March 2011) para. 300; *Mustafa Tunç* and *Fecire Tunç* v *Turkey*, App no 24014/05 (ECtHR [GC] 14 April 2015) para. 177-178.

[187] See, for example, *Randelović and Others v Montenegro*, App no 66641/10 (ECtHR 19 September 2017) paras 122, 124.

[188] *Ramsahai and Others v the Netherlands* (n 182) para. 325.

[189] In *Geppa v Russia*, App no 8532/06 (ECtHR 3 February 2011) para. 72, the Chamber found that when a death occurs in State custody, the competent authorities must act with exemplary diligence and promptness. This requires them also to initiate on their own motion investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system; and, secondly, identifying the State officials or authorities involved. See also *Timurtas v Turkey*, App no 23531/94 (ECtHR 13 June 2000) paras. 87-90; *Na-*

kin to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures. [190]

3.5.3. *Duty to Investigate in Armed Conflict and Occupation*

In *Varnava and Others v Turkey*, the Grand Chamber was called to rule on the issue of effective investigations for disappearances. The applicants were relatives of nine Cypriot nationals who had disappeared during Turkish military operations in Northern Cyprus in July and August 1974. Eight of the missing men were members of the Greek-Cypriot forces who, according to the applicants, had disappeared after being captured and detained by Turkish military forces. [191] The Turkish government conversely maintained that they had died in action during the conflict. [192] The Grand Chamber declined to examine what had happened in 1974 as this fell outside the temporal jurisdiction of the ECtHR. [193] Nonetheless, it believed it was 'strongly arguable' that two of the nine missing men had disappeared in areas under the control of Turkish armed forces and similarly 'arguable' that the same had happened to the seven other missing men. [194]

The Grand Chamber distinguished between the obligation to investigate suspicious deaths and the obligation to investigate suspicious disappearances. [195] It observed that a disappearance, unlike a death, is not an instantaneous act or event. Being a continuing situation, the procedural obligation to investigate lasts as long as a person is not accounted for. Thus, a failure to carry out the requisite investigation amounts to a continuing violation of Article 2. [196] The Grand Chamber stressed that Article 2 imposed a continuing obligation on the government to account for the whereabouts and fate of the missing men: '[w]hether they died, in the fighting or of their wounds, or whether they were captured as prisoners, they must still be accounted for.' [197]

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chova and Others v Bulgaria, App nos 43577/98 and 43579/98 (ECtHR [GC] 6 July 2005) para. 111; *Angelova and Iliev v Bulgaria*, App no 55523/00 (ECtHR 26 July 2007) para. 96.

[190] See, for example, *Hugh Jordan v the United Kingdom*, App no 24746/94 (ECtHR 4 May 2001) para. 141.

[191] *Varnava and Others v Turkey*, App nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, and 16073/90 (ECtHR [GC] 18 September 2009) para. 3. See also generally ibid, paras. 22-64.

[192] Ibid, para. 65.

[193] Ibid, para. 185.

[194] Ibid.

[195] Ibid, para. 148.

[196] Ibid.

[197] Ibid, para. 185.

In defining the content of this obligation, the Grand Chamber reasoned by considering Article 2 not as a standalone provision, but as one that is part and parcel of international law. From this perspective, when a human rights norm is applied in the context of an international armed conflict where IHL also applies, it is only logical and necessary for the coherence of international law to interpret that norm in light of the other co-applicable provisions specifically crafted for the given set of circumstances. Adopting this holistic approach, the Grand Chamber stressed that 'Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law' because these rules 'play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict.' [198] Applying this thinking to the facts of this case, the Grand Chamber concurred with the reasoning of the Chamber in holding that:

> … in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so.[199]

In light of this enhanced normative framework, the Grand Chamber remarked that the Turkish government had not produced any evidence or convincing explanation to counter the applicants' claims that the missing men had disappeared in areas under the exclusive control of Turkey, notwithstanding its continuing obligation to account for the whereabouts and fate of the men under Article 2. [200] As such, the investigation had been inconclusive. While recognising the considerable difficulty in assembling evidence and mounting a case so long after the events, and the limited remit of the United Nations Committee on Missing Persons ('CMP') (which had exhumed and identified the remains, and had provided information and returned the remains to relatives), the Grand Chamber stressed that the Turkish government could not be absolved from making the requisite efforts to account for the missing persons. A politically expeditious solution could not make up for the lack of a proper investigation even if 'both sides in this conflict prefer not to attempt to bring out to the light

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[198] Ibid.

[199] Ibid.

[200] Ibid, para. 186.

of day the reprisals, extra-judicial killings and massacres that took place.' [201] According to the Grand Chamber:

> It may be that [both sides in the conflict] prefer a "politically-sensitive" approach to the missing persons problem and that the CMP with its limited remit was the only solution which could be agreed under the brokerage of the UN. That can have no bearing on the application of the provisions of the Convention. [202]

As such, there had 'been a continuing violation of Article 2' by Turkey on 'account of the failure of the respondent State to provide for an effective investigation aimed at clarifying the fate of the nine men who went missing in 1974.' [203]

In the *Al-Skeini* case cited above, the Grand Chamber made clear that the procedural obligation to investigate under Article 2 also applies in difficult security conditions, including in the context of occupation and armed conflict. [204] That judgment did not discuss, however, whether the obligations the UK had as an occupying power under IHL changed or influenced the content of its obligations under Article 2. The Grand Chamber was seemingly satisfied with considering Article 2 as fully applicable in a situation of occupation and armed conflict, and left the procedural duty to investigate normatively unchanged, as if it were peacetime.

The only difference flowing from the UK's occupation of parts of Iraq pertained to its practical ability to comply with its obligations under Article 2. The Grand Chamber acknowledged the practical problems caused to the investigatory authorities by the fact that the UK was an occupying power in a foreign and hostile region in the immediate aftermath of invasion and war. It recognised that in such circumstances the procedural duty under Article 2 had to be applied taking into account the specific problems faced by the investigators. [205] Still, the Grand Chamber remained firm in emphasising the need to comply with the fundamental requirement of independence of an investigation even in those particular circumstances. This meant that the investigating authority 'was, and was seen to be, operationally independent of the military chain of command', which required the investigation branch to decide for itself when to start and stop an investigation without deferring to the military

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[201] Ibid, paras. 189 and 191-194.

[202] Ibid, para. 193.

[203] Ibid, para. 194.

[204] *Al-Skeini and Others v the United Kingdom*, App no 55721/07 (ECtHR [GC] 7 July 2011) paras. 161-164. See also *Güleç v Turkey*, App no 21593/93 (ECtHR 27 July 1998) para. 81, *Ergı v Turkey*, App no 23818/94 (ECtHR 28 July 1998) paras. 79 and 82; *Isayeva v Russia*, App no 57950/00 (ECtHR 24 February 2005) paras. 180 and 210.

[205] Ibid, para. 168.

authorities.[206] Finding that the requirement of independence was lacking in the case of the investigation carried out by the UK forces in *Al-Skeini*, the Grand Chamber held the UK to be in breach of its obligations under Article 2 despite the difficult conditions in which the investigation had to be carried out.[207]

This line of thinking was also adhered to in the *Jaloud v the Netherlands* case. The Grand Chamber cited in its entirety the part of the *Al-Skeini* judgment that explained and recapitulated the requirements of an investigation under Article 2.[208] As in *Al-Skeini*, though unlike in *Varnava*, the Grand Chamber did not examine whether IHL norms could be relevant both to substantiate the content of Article 2 and to make it more effective in a wartime context. The Grand Chamber, unlike in *Al-Skeini*, did not take issue with the independence of the investigation. It rejected the applicant's submissions concerning the independence of the Dutch Royal Military Constabulary even though their members had shared 'their living quarters with the army personnel allegedly responsible for the death.'[209] The Grand Chamber also did not object to the fact that a civilian public prosecutor had largely relied on reports by the Royal Military Constabulary and that it was a judge of the Military Chamber of the Court of Appeal of Arnhem, the Netherlands who upheld the decision not to prosecute the Dutch army officer firing the fatal shots at Jaloud's car. According to the Grand Chamber, the military judge was only one of the three judges on the panel, and was a senior official qualified for judicial office and thus not subject to military authority and discipline.[210]

What the Grand Chamber took issue with was the lack of adequacy of the investigation. It emphasised that it was 'prepared to make reasonable allowances for the relatively difficult conditions under which the Netherlands military and investigators had to work.'[211] This was so because the Dutch authorities were 'engaged in a foreign country which had yet to be rebuilt in the aftermath of hostilities, whose language and culture were alien to them, and whose population … clearly included armed hostile elements.'[212] Nevertheless, while making these allowances, the Grand Chamber did not hesitate to fault the Netherlands for the severely flawed investigation because:

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[206] Ibid, paras. 169-175.

[207] Ibid, para. 177.

[208] *Jaloud v the Netherlands*, App no 47708/08 (ECtHR [GC] 20 November 2014) para. 186.

[209] Ibid, para. 189.

[210] Ibid, para. 196.

[211] Ibid, para. 226.

[212] Ibid.

> … documents containing important information were not made available to the judicial authorities and the applicant... no precautions were taken to prevent [the officer who fired the shots] from colluding, before he was questioned, with other witnesses... no attempt was made to carry out the autopsy under conditions befitting an investigation into the possible criminal responsibility of an agent of the State, and in that the resulting report was inadequate... [and] important material evidence … was mislaid in unknown circumstances. [213]

In so doing, the Grand Chamber made clear, in line with earlier jurisprudence, that situations of occupation and armed conflict do provide some leeway in the enforcement of Article 2 because of the objectively difficult factual circumstances the investigators could face in obtaining information in the absence of standardised procedures and roles generally present in a normal peacetime operation. That said, the Grand Chamber, following the lead of the *Al-Skeini* case, did not detract from the normative procedural content of Article 2. The requirement that an investigation is to be effective also in times of occupation and armed conflict was reaffirmed. Both aspects of independence and adequacy need to be fully adhered to regardless of the changed circumstances and context, even if the exact practical application of these concepts remains context-sensitive.

[213] Ibid, paras. 227-228.

Chapter 4
Death Penalty: From Permission to Prohibition

4.1. *The Normative Authorisations to Use the Death Penalty*

4.1.1. Soering v the United Kingdom *(1989)*

I. Summary [*]

The applicant, Mr Jens Soering, was a German national held in detention in the UK due to charges for murdering his girlfriend's parents in Virginia, US. On 8 June 1998, he lodged an application with the ECommHR to stop a decision by the UK Secretary of State for the Home Department to extradite him to the US. He did so to avoid the risk of being sentenced to death, which was (and still is) legal in Virginia. Before the ECommHR, Mr Soering claimed that subjecting him to the 'death row phenomenon' – which is the emotional distress resulting, *inter alia*, from the prolonged incarceration prior to execution and the conditions of detention on death row (such as no access to work opportunities and minimal human contact) [1] – would constitute inhuman or degrading treatment and a breach of Article 3 of the ECHR.

By six votes to five, the ECommHR rejected the application. It noted that 'extradition of a person to a country where he risks the death penalty cannot, in itself, raise an issue either under Article 2 or Article 3 of the Convention', since Article 2 'expressly permits the imposition of the death penalty'. Based on the legal reasoning cited below, the Court unanimously overruled the ECommHR's opinion. The main facts of this case are in order.

The applicant was a student at the University of Virginia together with his

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[*] Court (Plenary), *Soering v the United Kngdom*, App no 14038/88, Judgment of 7 July 1989.

[1] Patrick Hudson, 'Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law?' (2000) 11(4) EJIL 833 <http://www.ejil.org/pdfs/11/4/556.pdf> accessed 17 November 2019.

girlfriend, Miss Haysom, a Canadian national. In October 1985, the couple fled from the US to Europe; and, on 30 April 1986, they were arrested in the UK on charges of cheque fraud. The applicant was interviewed by a police investigator from the Sheriff's Department of Bedford County between 5 and 8 June 1986. In a sworn affidavit dated 24 July 1986, the investigator recorded the applicant as having admitted stabbing and killing Miss Haysom's parents in Bedford County in March 1985 because they had told him they would do anything to prevent his relationship with their daughter. The applicant was 18 years old at the time of the double homicide.

On 13 June 1986, a grand jury of the Circuit Court of Bedford County indicted him on charges of capital murder. On 11 August 1986, the US requested the applicant's extradition under the Extradition Treaty of 1972 between the US and the UK.[2] On 29 October 1986, the British Embassy sent a request to the US seeking assurance that, in the event of the applicant being surrendered and convicted for the crimes, the death penalty would not be imposed or carried out.

On 11 February 1987, in light of the applicant's nationality, a local court in Bonn, Germany also issued a warrant for the applicant's arrest in respect of the alleged murders. On 11 March 1987, the German Government requested his extradition from the UK to Germany under the Extradition Treaty of 1872 between the two States. On 23 April 1987, the US requested the applicant's extradition to the US in preference to Germany.

On 20 May 1987, the UK Government informed Germany that the US had earlier submitted a request, supported by *prima facie* evidence, for the extradition of Mr Soering. They further indicated that they had sought an assurance from the US authorities on the question of the death penalty and that 'in the event that the court commits Mr Soering, his surrender to the US authorities would be subject to the receipt of satisfactory assurances on this matter'.

On 8 June 1987, the Attorney for Bedford County, Virginia sent an assurance to the UK Government, certifying that should Mr Soering be sentenced with death penalty, a submission would be made in the name of the UK to the competent judge pointing out that the death penalty must not be imposed or carried out. The assurance was repeated in the same terms in a further sworn affidavit on 17 May 1988, together with an assurance by the US Government that the commitment of the Virginia authorities to make representations on behalf of the UK would be honoured. However, the Virginia authorities later informed the UK Government that the same Attorney for Bedford County intended to seek the death penalty in Mr Soering's case. After rejecting the ap-

[2] Miss Haysom's extradition was also requested. On 8 May 1987, she was surrendered for extradition to the US. After pleading guilty on 22 August 1987 as an accessory to the murder of her parents, she was sentenced on 6 October 1987 to 90 years' imprisonment (45 years on each count of murder).

plicant's plea for stopping the surrender procedure, on 3 August 1988, the UK Secretary of State signed a warrant ordering the applicant's surrender to the US authorities.

Convicted to life imprisonment in the US, Mr Soering was granted release on parole on 26 November 2019.

II. Proceedings in Domestic and International Jurisdictions

On 16 June 1987, committal proceedings had taken place before the Chief Stipendiary Magistrate of the Bow Street Magistrates' Court. The US Government adduced evidence regarding the commission of the homicide of Miss Haysom's parents, which included the applicant's own recorded admissions to the Bedford County police investigator. On behalf of the applicant, psychiatric evidence was adduced from a consultant forensic psychiatrist noting that he was immature and inexperienced and had lost his personal identity in a symbiotic relationship with his girlfriend – a powerful, persuasive and disturbed young woman. The Chief Magistrate found the psychiatric evidence irrelevant and committed the applicant to await the Secretary of State's order for extradition to the US.

On 20 June 1987, Mr Soering applied to the Divisional Court for a writ of habeas corpus in respect of his committal and for leave to apply for judicial review. On 11 December 1987, both applications were joined by the Divisional Court. On 30 June 1988, the House of Lords rejected the applicant's petition for leave to appeal against the decision of the Divisional Court.

On 11 August 1988, the President of the ECommHR indicated to the UK Government that, in the interests of the parties and the proper conduct of the proceedings, it was desirable not to extradite the applicant to the US before the ECommHR had had an opportunity to examine the application. This indication was subsequently prolonged by the ECommHR on several occasions until the referral of the case to the ECtHR.

On 26 January 1989, following requests for an interim measure made by the ECommHR and the applicant, the ECtHR indicated to the UK Government that 'it would be advisable not to extradite the applicant to the US pending the outcome of the proceedings'.

III. Judgment (paras. 81–111 and Concurring Opinion of Judge De Meyer)

A. Applicability of Article 3 (art. 3) in cases of extradition

81. The alleged breach derives from the applicant's exposure to the so-called

"death row phenomenon". This phenomenon may be described as consisting in a combination of circumstances to which the applicant would be exposed if, after having been extradited to Virginia to face a capital murder charge, he were sentenced to death.

82. In its report (at paragraph 94) the Commission reaffirmed "its case-law that a person's deportation or extradition may give rise to an issue under Article 3 (art. 3) of the Convention where there are serious reasons to believe that the individual will be subjected, in the receiving State, to treatment contrary to that Article (art. 3)".

The Government of the Federal Republic of Germany supported the approach of the Commission, pointing to a similar approach in the case-law of the German courts.

The applicant likewise submitted that Article 3 (art. 3) not only prohibits the Contracting States from causing inhuman or degrading treatment or punishment to occur within their jurisdiction but also embodies an associated obligation not to put a person in a position where he will or may suffer such treatment or punishment at the hands of other States. For the applicant, at least as far as Article 3 (art. 3) is concerned, an individual may not be surrendered out of the protective zone of the Convention without the certainty that the safeguards which he would enjoy are as effective as the Convention standard.

83. The United Kingdom Government, on the other hand, contended that Article 3 (art. 3) should not be interpreted so as to impose responsibility on a Contracting State for acts which occur outside its jurisdiction. In particular, in their submission, extradition does not involve the responsibility of the extraditing State for inhuman or degrading treatment or punishment which the extradited person may suffer outside the State's jurisdiction. To begin with, they maintained, it would be straining the language of Article 3 (art. 3) intolerably to hold that by surrendering a fugitive criminal the extraditing State has "subjected" him to any treatment or punishment that he will receive following conviction and sentence in the receiving State. Further arguments advanced against the approach of the Commission were that it interferes with international treaty rights; it leads to a conflict with the norms of international judicial process, in that it in effect involves adjudication on the internal affairs of foreign States not Parties to the Convention or to the proceedings before the Convention institutions; it entails grave difficulties of evaluation and proof in requiring the examination of alien systems of law and of conditions in foreign States; the practice of national courts and the international community cannot reasonably be invoked to support it; it causes a serious risk of harm in the Contracting State which is obliged to harbour the protected person, and leaves criminals untried, at large and unpunished.

In the alternative, the United Kingdom Government submitted that the application of Article 3 (art. 3) in extradition cases should be limited to those occasions in which the treatment or punishment abroad is certain, imminent and serious. In their view, the fact that by definition the matters complained of are only anticipated, together with the common and legitimate interest of all States in bringing fugi-

tive criminals to justice, requires a very high degree of risk, proved beyond reasonable doubt, that ill-treatment will actually occur.

84. The Court will approach the matter on the basis of the following considerations.

85. As results from Article 5 § 1 (f) (art. 5-1-f), which permits "the lawful ... detention of a person against whom action is being taken with a view to ... extradition", no right not to be extradited is as such protected by the Convention. Nevertheless, in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee (see, mutatis mutandis, the Abdulaziz, Cabales and Balkandali judgment of 25 May 1985, Series A no. 94, pp. 31-32, §§ 59-60 – in relation to rights in the field of immigration). What is at issue in the present case is whether Article 3 (art. 3) can be applicable when the adverse consequences of extradition are, or may be, suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State.

86. Article 1 (art. 1) of the Convention, which provides that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I", sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to "securing" ("reconnaître" in the French text) the listed rights and freedoms to persons within its own "jurisdiction". Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 (art. 1) cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 (art. 3) in particular.

In the instant case it is common ground that the United Kingdom has no power over the practices and arrangements of the Virginia authorities which are the subject of the applicant's complaints. It is also true that in other international instruments cited by the United Kingdom Government – for example the 1951 United Nations Convention relating to the Status of Refugees (Article 33), the 1957 European Convention on Extradition (Article 11) and the 1984 United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Article 3) – the problems of removing a person to another jurisdiction where unwanted consequences may follow are addressed expressly and specifically.

These considerations cannot, however, absolve the Contracting Parties from

responsibility under Article 3 (art. 3) for all and any foreseeable consequences of extradition suffered outside their jurisdiction.

87. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 90, § 239). Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, inter alia, the Artico judgment of 13 May 1980, Series A no. 37, p. 16, § 33). In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society" (see the Kjeldsen, Busk Madsen and Pedersen judgment of 7 December 1976, Series A no. 23, p. 27, § 53).

88. Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 (art. 3) enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.

The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3 (art. 3). That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that "no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture". The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 (art. 3) of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the

fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3).

89. What amounts to "inhuman or degrading treatment or punishment" depends on all the circumstances of the case (see 77paragraph 100 below). Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.

90. It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 (art. 3) by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article (art. 3) (see paragraph 87 above).

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

B. Application of Article 3 (art. 3) in the particular circumstances of the present case

92. The extradition procedure against the applicant in the United Kingdom has been completed, the Secretary of State having signed a warrant ordering his surrender to the United States authorities (see paragraph 24 above); this decision, al-

beit as yet not implemented, directly affects him. It therefore has to be determined on the above principles whether the foreseeable consequences of Mr Soering's return to the United States are such as to attract the application of Article 3 (art. 3). This inquiry must concentrate firstly on whether Mr Soering runs a real risk of being sentenced to death in Virginia, since the source of the alleged inhuman and degrading treatment or punishment, namely the "death row phenomenon", lies in the imposition of the death penalty. Only in the event of an affirmative answer to this question need the Court examine whether exposure to the "death row phenomenon" in the circumstances of the applicant's case would involve treatment or punishment incompatible with Article 3 (art. 3).

1. Whether the applicant runs a real risk of a death sentence and hence of exposure to the "death row phenomenon"

93. The United Kingdom Government, contrary to the Government of the Federal Republic of Germany, the Commission and the applicant, did not accept that the risk of a death sentence attains a sufficient level of likelihood to bring Article 3 (art. 3) into play. Their reasons were fourfold.

Firstly, as illustrated by his interview with the German prosecutor where he appeared to deny any intention to kill (see paragraph 16 above), the applicant has not acknowledged his guilt of capital murder as such.

Secondly, only a prima facie case has so far been made out against him. In particular, in the United Kingdom Government's view the psychiatric evidence (see paragraph 21 above) is equivocal as to whether Mr Soering was suffering from a disease of the mind sufficient to amount to a defence of insanity under Virginia law (as to which, see paragraph 50 above).

Thirdly, even if Mr Soering is convicted of capital murder, it cannot be assumed that in the general exercise of their discretion the jury will recommend, the judge will confirm and the Supreme Court of Virginia will uphold the imposition of the death penalty (see paragraphs 42-47 and 52 above). The United Kingdom Government referred to the presence of important mitigating factors, such as the applicant's age and mental condition at the time of commission of the offence and his lack of previous criminal activity, which would have to be taken into account by the jury and then by the judge in the separate sentencing proceedings (see paragraphs 44-47 and 51 above).

Fourthly, the assurance received from the United States must at the very least significantly reduce the risk of a capital sentence either being imposed or carried out (see paragraphs 20, 37 and 69 above).

At the public hearing the Attorney General nevertheless made clear his Government's understanding that if Mr Soering were extradited to the United States there was "some risk", which was "more than merely negligible", that the death penalty would be imposed.

94. As the applicant himself pointed out, he has made to American and British

police officers and to two psychiatrists admissions of his participation in the killings of the Haysom parents, although he appeared to retract those admissions somewhat when questioned by the German prosecutor (see paragraphs 13, 16 and 21 above). It is not for the European Court to usurp the function of the Virginia courts by ruling that a defence of insanity would or would not be available on the psychiatric evidence as it stands. The United Kingdom Government are justified in their assertion that no assumption can be made that Mr Soering would certainly or even probably be convicted of capital murder as charged (see paragraphs 13 in fine and 40 above). Nevertheless, as the Attorney General conceded on their behalf at the public hearing, there is "a significant risk" that the applicant would be so convicted.

95. Under Virginia law, before a death sentence can be returned the prosecution must prove beyond reasonable doubt the existence of at least one of the two statutory aggravating circumstances, namely future dangerousness or vileness (see paragraph 43 above). In this connection, the horrible and brutal circumstances of the killings (see paragraph 12 above) would presumably tell against the applicant, regard being had to the case-law on the grounds for establishing the "vileness" of the crime (see paragraph 43 above).

Admittedly, taken on their own the mitigating factors do reduce the likelihood of the death sentence being imposed. No less than four of the five facts in mitigation expressly mentioned in the Code of Virginia could arguably apply to Mr Soering's case. These are a defendant's lack of any previous criminal history, the fact that the offence was committed while a defendant was under extreme mental or emotional disturbance, the fact that at the time of commission of the offence the capacity of a defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly diminished, and a defendant's age (see paragraph 45 above).

96. These various elements arguing for or against the imposition of a death sentence have to be viewed in the light of the attitude of the prosecuting authorities.

97. The Commonwealth's Attorney for Bedford County, Mr Updike, who is responsible for conducting the prosecution against the applicant, has certified that "should Jens Soering be convicted of the offence of capital murder as charged ... a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out" (see paragraph 20 above). The Court notes, like Lord Justice Lloyd in the Divisional Court (see paragraph 22 above), that this undertaking is far from reflecting the wording of Article IV of the 1972 Extradition Treaty between the United Kingdom and the United States, which speaks of "assurances satisfactory to the requested Party that the death penalty will not be carried out" (see paragraph 36 above). However, the offence charged, being a State and not a Federal offence, comes within the jurisdiction of the Commonwealth of Virginia; it appears as a consequence that no direction could or can be

given to the Commonwealth's Attorney by any State or Federal authority to promise more; the Virginia courts as judicial bodies cannot bind themselves in advance as to what decisions they may arrive at on the evidence; and the Governor of Virginia does not, as a matter of policy, promise that he will later exercise his executive power to commute a death penalty (see paragraphs 58-60 above).

This being so, Mr Updike's undertaking may well have been the best "assurance" that the United Kingdom could have obtained from the United States Federal Government in the particular circumstances. According to the statement made to Parliament in 1987 by a Home Office Minister, acceptance of undertakings in such terms "means that the United Kingdom authorities render up a fugitive or are prepared to send a citizen to face an American court on the clear understanding that the death penalty will not be carried out ... It would be a fundamental blow to the extradition arrangements between our two countries if the death penalty were carried out on an individual who had been returned under those circumstances" (see paragraph 37 above). Nonetheless, the effectiveness of such an undertaking has not yet been put to the test.

98. The applicant contended that representations concerning the wishes of a foreign government would not be admissible as a matter of law under the Virginia Code or, if admissible, of any influence on the sentencing judge.

Whatever the position under Virginia law and practice (as to which, see paragraphs 42, 46, 47 and 69 above), and notwithstanding the diplomatic context of the extradition relations between the United Kingdom and the United States, objectively it cannot be said that the undertaking to inform the judge at the sentencing stage of the wishes of the United Kingdom eliminates the risk of the death penalty being imposed. In the independent exercise of his discretion the Commonwealth's Attorney has himself decided to seek and to persist in seeking the death penalty because the evidence, in his determination, supports such action (see paragraph 20 in fine above). If the national authority with responsibility for prosecuting the offence takes such a firm stance, it is hardly open to the Court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the "death row phenomenon".

99. The Court's conclusion is therefore that the likelihood of the feared exposure of the applicant to the "death row phenomenon" has been shown to be such as to bring Article 3 (art. 3) into play.

2. Whether in the circumstances the risk of exposure to the "death row phenomenon" would make extradition a breach of Article 3 (art. 3)

(a) General considerations

100. As is established in the Court's case-law, ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, rela-

tive; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see the above-mentioned Ireland v. the United Kingdom judgment, Series A no. 25, p. 65, § 162; and the Tyrer judgment of 25 April 1978, Series A no. 26, pp. 14-15, §§ 29 and 30).

Treatment has been held by the Court to be both "inhuman" because it was premeditated, was applied for hours at a stretch and "caused, if not actual bodily injury, at least intense physical and mental suffering", and also "degrading" because it was "such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance" (see the above-mentioned Ireland v. the United Kingdom judgment, p. 66, § 167). In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment (see the Tyrer judgment, loc. cit.). In this connection, account is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him.

101. Capital punishment is permitted under certain conditions by Article 2 § 1 (art. 2-1) of the Convention, which reads:

> "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.".

In view of this wording, the applicant did not suggest that the death penalty per se violated Article 3 (art. 3). He, like the two Government Parties, agreed with the Commission that the extradition of a person to a country where he risks the death penalty does not in itself raise an issue under either Article 2 (art. 2) or Article 3 (art. 3). On the other hand, Amnesty International in their written comments (see paragraph 8 above) argued that the evolving standards in Western Europe regarding the existence and use of the death penalty required that the death penalty should now be considered as an inhuman and degrading punishment within the meaning of Article 3 (art. 3).

102. Certainly, "the Convention is a living instrument which ... must be interpreted in the light of present-day conditions"; and, in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 (art. 3), "the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field" (see the above-mentioned Tyrer judgment, Series A no. 26, pp. 15-16, § 31). De facto the death penalty no longer exists in time of peace in the Contracting States to the Convention. In the few Contracting States which retain the death penalty in law for some peacetime offences, death

sentences, if ever imposed, are nowadays not carried out. This "virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice", to use the words of Amnesty International, is reflected in Protocol No. 6 (P6) to the Convention, which provides for the abolition of the death penalty in time of peace. Protocol No. 6 (P6) was opened for signature in April 1983, which in the practice of the Council of Europe indicates the absence of objection on the part of any of the Member States of the Organisation; it came into force in March 1985 and to date has been ratified by thirteen Contracting States to the Convention, not however including the United Kingdom.

Whether these marked changes have the effect of bringing the death penalty per se within the prohibition of ill-treatment under Article 3 (art. 3) must be determined on the principles governing the interpretation of the Convention.

103. The Convention is to be read as a whole and Article 3 (art. 3) should therefore be construed in harmony with the provisions of Article 2 (art. 2) (see, mutatis mutandis, the Klass and Others judgment of 6 September 1978, Series A no. 28, p. 31, § 68). On this basis Article 3 (art. 3) evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2 § 1 (art. 2-1).

Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 (art. 2-1) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3 (art. 3). However, Protocol No. 6 (P6), as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions, notwithstanding the special character of the Convention (see paragraph 87 above), Article 3 (art. 3) cannot be interpreted as generally prohibiting the death penalty.

104. That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3 (art. 3). The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 (art. 3). Present-day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded.

(b) The particular circumstances

105. The applicant submitted that the circumstances to which he would be ex-

posed as a consequence of the implementation of the Secretary of State's decision to return him to the United States, namely the "death row phenomenon", cumulatively constituted such serious treatment that his extradition would be contrary to Article 3 (art. 3). He cited in particular the delays in the appeal and review procedures following a death sentence, during which time he would be subject to increasing tension and psychological trauma; the fact, so he said, that the judge or jury in determining sentence is not obliged to take into account the defendant's age and mental state at the time of the offence; the extreme conditions of his future detention on "death row" in Mecklenburg Correctional Center, where he expects to be the victim of violence and sexual abuse because of his age, colour and nationality; and the constant spectre of the execution itself, including the ritual of execution. He also relied on the possibility of extradition or deportation, which he would not oppose, to the Federal Republic of Germany as accentuating the disproportionality of the Secretary of State's decision.

The Government of the Federal Republic of Germany took the view that, taking all the circumstances together, the treatment awaiting the applicant in Virginia would go so far beyond treatment inevitably connected with the imposition and execution of a death penalty as to be "inhuman" within the meaning of Article 3 (art. 3).

On the other hand, the conclusion expressed by the Commission was that the degree of severity contemplated by Article 3 (art. 3) would not be attained.

The United Kingdom Government shared this opinion. In particular, they disputed many of the applicant's factual allegations as to the conditions on death row in Mecklenburg and his expected fate there.

i. Length of detention prior to execution

106. The period that a condemned prisoner can expect to spend on death row in Virginia before being executed is on average six to eight years (see paragraph 56 above). This length of time awaiting death is, as the Commission and the United Kingdom Government noted, in a sense largely of the prisoner's own making in that he takes advantage of all avenues of appeal which are offered to him by Virginia law. The automatic appeal to the Supreme Court of Virginia normally takes no more than six months (see paragraph 52 above). The remaining time is accounted for by collateral attacks mounted by the prisoner himself in habeas corpus proceedings before both the State and Federal courts and in applications to the Supreme Court of the United States for certiorari review, the prisoner at each stage being able to seek a stay of execution (see paragraphs 53-54 above). The remedies available under Virginia law serve the purpose of ensuring that the ultimate sanction of death is not unlawfully or arbitrarily imposed.

Nevertheless, just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full. However well-intentioned and even potentially beneficial is

the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.

ii. Conditions on death row

107. As to conditions in Mecklenburg Correctional Center, where the applicant could expect to be held if sentenced to death, the Court bases itself on the facts which were uncontested by the United Kingdom Government, without finding it necessary to determine the reliability of the additional evidence adduced by the applicant, notably as to the risk of homosexual abuse and physical attack undergone by prisoners on death row (see paragraph 64 above).

The stringency of the custodial regime in Mecklenburg, as well as the services (medical, legal and social) and the controls (legislative, judicial and administrative) provided for inmates, are described in some detail above (see paragraphs 61-63 and 65-68). In this connection, the United Kingdom Government drew attention to the necessary requirement of extra security for the safe custody of prisoners condemned to death for murder. Whilst it might thus well be justifiable in principle, the severity of a special regime such as that operated on death row in Mecklenburg is compounded by the fact of inmates being subject to it for a protracted period lasting on average six to eight years.

iii. The applicant's age and mental state

108. At the time of the killings, the applicant was only 18 years old and there is some psychiatric evidence, which was not contested as such, that he "was suffering from [such] an abnormality of mind ... as substantially impaired his mental responsibility for his acts" (see paragraphs 11, 12 and 21 above).

Unlike Article 2 (art. 2) of the Convention, Article 6 of the 1966 International Covenant on Civil and Political Rights and Article 4 of the 1969 American Convention on Human Rights expressly prohibit the death penalty from being imposed on persons aged less than 18 at the time of commission of the offence. Whether or not such a prohibition be inherent in the brief and general language of Article 2 (art. 2) of the European Convention, its explicit enunciation in other, later international instruments, the former of which has been ratified by a large number of States Parties to the European Convention, at the very least indicates that as a general principle the youth of the person concerned is a circumstance which is liable, with others, to put in question the compatibility with Article 3 (art. 3) of measures connected with a death sentence.

It is in line with the Court's case-law (as summarised above at paragraph 100) to treat disturbed mental health as having the same effect for the application of Article 3 (art. 3).

109. Virginia law, as the United Kingdom Government and the Commission emphasised, certainly does not ignore these two factors. Under the Virginia Code

account has to be taken of mental disturbance in a defendant, either as an absolute bar to conviction if it is judged to be sufficient to amount to insanity or, like age, as a fact in mitigation at the sentencing stage (see paragraphs 44-47 and 50-51 above). Additionally, indigent capital murder defendants are entitled to the appointment of a qualified mental health expert to assist in the preparation of their submissions at the separate sentencing proceedings (see paragraph 51 above). These provisions in the Virginia Code undoubtedly serve, as the American courts have stated, to prevent the arbitrary or capricious imposition of the death penalty and narrowly to channel the sentencer's discretion (see paragraph 48 above). They do not however remove the relevance of age and mental condition in relation to the acceptability, under Article 3 (art. 3), of the "death row phenomenon" for a given individual once condemned to death.

Although it is not for this Court to prejudge issues of criminal responsibility and appropriate sentence, the applicant's youth at the time of the offence and his then mental state, on the psychiatric evidence as it stands, are therefore to be taken into consideration as contributory factors tending, in his case, to bring the treatment on death row within the terms of Article 3 (art. 3).

iv. Possibility of extradition to the Federal Republic of Germany

110. For the United Kingdom Government and the majority of the Commission, the possibility of extraditing or deporting the applicant to face trial in the Federal Republic of Germany (see paragraphs 16, 19, 26, 38 and 71-74 above), where the death penalty has been abolished under the Constitution (see paragraph 72 above), is not material for the present purposes. Any other approach, the United Kingdom Government submitted, would lead to a "dual standard" affording the protection of the Convention to extraditable persons fortunate enough to have such an alternative destination available but refusing it to others not so fortunate.

This argument is not without weight. Furthermore, the Court cannot overlook either the horrible nature of the murders with which Mr Soering is charged or the legitimate and beneficial role of extradition arrangements in combating crime. The purpose for which his removal to the United States was sought, in accordance with the Extradition Treaty between the United Kingdom and the United States, is undoubtedly a legitimate one. However, sending Mr Soering to be tried in his own country would remove the danger of a fugitive criminal going unpunished as well as the risk of intense and protracted suffering on death row. It is therefore a circumstance of relevance for the overall assessment under Article 3 (art. 3) in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case (see paragraphs 89 and 104 above).

(c) Conclusion

111. For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in

conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The Court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial. Facilities are available on death row for the assistance of inmates, notably through provision of psychological and psychiatric services (see paragraph 65 above).

However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 (art. 3). A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.

Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3 (art. 3).

This finding in no way puts in question the good faith of the United Kingdom Government, who have from the outset of the present proceedings demonstrated their desire to abide by their Convention obligations, firstly by staying the applicant's surrender to the United States authorities in accord with the interim measures indicated by the Convention institutions and secondly by themselves referring the case to the Court for a judicial ruling (see paragraphs 1, 4, 24 and 77 above).

[...]

CONCURRING OPINION OF JUDGE DE MEYER[3]

The applicant's extradition to the United States of America would not only expose him to inhuman or degrading treatment or punishment. It would also, and above all, violate his right to life.

Indeed, the most important issue in this case is not "the likelihood of the feared exposure of the applicant to the 'death row phenomenon'", but the very simple fact that his life would be put in jeopardy by the said extradition.

The second sentence of Article 2 § 1 (art. 2-1) of the Convention, as it was drafted in 1950, states that "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".

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[3] Footnotes omitted.

In the circumstances of the present case, the applicant's extradition to the United States would subject him to the risk of being sentenced to death, and executed, in Virginia for a crime for which that penalty is not provided by the law of the United Kingdom.

When a person's right to life is involved, no requested State can be entitled to allow a requesting State to do what the requested State is not itself allowed to do.

If, as in the present case, the domestic law of a State does not provide the death penalty for the crime concerned, that State is not permitted to put the person concerned in a position where he may be deprived of his life for that crime at the hands of another State.

That consideration may already suffice to preclude the United Kingdom from surrendering the applicant to the United States.

There is also something more fundamental.

The second sentence of Article 2 § 1 (art. 2-1) of the Convention was adopted, nearly forty years ago, in particular historical circumstances, shortly after the Second World War. In so far as it still may seem to permit, under certain conditions, capital punishment in time of peace, it does not reflect the contemporary situation, and is now overridden by the development of legal conscience and practice.

Such punishment is not consistent with the present state of European civilisation.

De facto, it no longer exists in any State Party to the Convention.

Its unlawfulness was recognised by the Committee of Ministers of the Council of Europe when it adopted in December 1982, and opened for signature in April 1983, the Sixth Protocol (P6) to the Convention, which to date has been signed by sixteen, and ratified by thirteen, Contracting States.

No State Party to the Convention can in that context, even if it has not yet ratified the Sixth Protocol, be allowed to extradite any person if that person thereby incurs the risk of being put to death in the requesting State.

Extraditing somebody in such circumstances would be repugnant to European standards of justice, and contrary to the public order of Europe.

The applicant's surrender by the United Kingdom to the United States could only be lawful if the United States were to give absolute assurances that he will not be put to death if convicted of the crime he is charged with.

No such assurances were, or can be, obtained.

The Federal Government of the United States is unable to give any undertaking as to what may or may not be decided, or done, by the judicial and other authorities of the Commonwealth of Virginia.

In fact, the Commonwealth's Attorney dealing with the case intends to seek the death penalty and the Commonwealth's Governor has never commuted a death sentence since the imposition of the death penalty was resumed in 1977.

In these circumstances there can be no doubt whatsoever that the applicant's extradition to the United States would violate his right to life.

IV. Questions for the Students

Question 1

In his concurring opinion, Judge De Meyer argues that the UK was precluded from surrendering the applicant to the US because 'when a person's right to life is involved, no requested State can be entitled to allow a requesting State to do what the requested State is not itself allowed to do'. It is difficult to disagree with the conclusion of the learned Judge from a moral point of view, as his rationale would function to prevent the circumvention of domestic obligations. In fact, domestic law in the UK did not contemplate death penalty at that time, though Article 2 of the ECHR admitted it when provide for by law. In your view, does the Judge's reasoning stands to scrutiny also from a logical and normative perspective? Why, or why not?

Question 2

Considering that it has been 'adopted, nearly forty years ago, in particular historical circumstances, shortly after the Second World War', Judge De Meyer observes that the second sentence of Article 2(1) does not reflect the 'the contemporary situation' on death penalty at the time of the proceedings, and 'is now overridden by the development of legal conscience and practice'. In your view, what is the Judge making reference to when speaking of the 'development of legal conscience and practice'? Would you be able to provide examples to this regard?

4.1.2. *Abolition of the Death Penalty within the Council of Europe*

In the not-too-distant past, the death penalty was a common feature of the penal regimes of many countries around the world. Accordingly, none of the human rights instruments adopted soon after World War II contains norms abolishing the death penalty.

Take, for instance, Article 6 of the ICCPR, which authorises the imposition of the death penalty if it respects certain limitations, namely when it is imposed 'only for the most serious crimes'; in accordance with 'the law in force at the time' of the commission of the crime; and is only 'carried out pursuant to a final judgement rendered by a competent court'.[4] Moreover, the death penalty shall not 'be imposed for crimes committed by persons below eighteen

[4] See text of Article 6 of the ICCPR in Appendix E.

years of age and shall not be carried out on pregnant women',[5] and may not be reintroduced in countries that have abolished it. Article 4 of the ACHR mirrors the wording of Article 6 of the ICCPR,[6] while Article 4 of the ACHPR and Article 2(1) of the ECHR allow for the imposition of the death penalty somewhat more indirectly.[7] These provisions provide that no one may be 'arbitrarily' or 'intentionally' deprived of their life, meaning that the death penalty may be imposed only if provided for by the law in force in a given country. Article 2(1) of the ECHR, for instance, indicates that an individual may be intentionally deprived of his or her life only 'in the execution of a sentence of a court following his conviction for a crime for which this penalty is provided for by law'.[8]

This rather permissive normative framework makes it difficult to consider capital punishment illegal under customary international law, and has allowed the death penalty to remain legal in several countries around the world.[9] These include highly populated countries such as China, India, Indonesia, Japan and the United States (though not in all of the US states), although the rate at which the death penalty is in fact imposed varies significantly from one country to another.[10]

That said, the attitude of the international community towards the death penalty has profoundly changed in recent years. The majority of contemporary States no longer provide for the death penalty within their criminal law systems. This shift towards the abolition of the death penalty gained momentum in the last decades of the 20th century, and is inherently connected to the development of democratic ideals and the affirmation and consolidation of human rights law, including the right to life and the right to be free from 'cruel, inhuman or degrading treatment or punishment'.[11] An interesting example of this political and normative movement can be found in the field of international criminal justice.

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[5] Ibid.

[6] See text of Article 4 of the ACHR in Appendix G.

[7] See text of both instruments in Appendices.

[8] See text of Article 2 of the ECHR in Appendix B.

[9] Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd ed, OUP 2019) 264.

[10] See Amnesty International Global Report, 'Death Sentences and Executions' (Amnesty International 2019) <www.amnesty.org/download/Documents/ACT5098702019ENGLISH.PDF> accessed 30 August 2019. See also the comparative analysis in Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 153-155.

[11] See Article 5 of the Universal Declaration of Human Rights in Appendix A. See also William A. Schabas, *The Abolition of the Death Penalty in International Law* (3rd ed, CUP 2002) 1-3; Nigel Rodley, 'The Death Penalty as a Human Rights Issue', in UNHCHR, *Moving Away from the Death Penalty* (United Nations 2015) 204-213; Nigel Rodley, *The Treatment of Prisoners under International Law* (OUP 2009) 279-296.

Unlike their immediate predecessors the Nuremberg and Tokyo International Military Tribunals,[12] the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda (adopted in 1993 and 1994, respectively) did not provide for the death penalty. This was notwithstanding the notable heinousness of the crimes under their mandates, and the fact that the death penalty was legal in the relevant countries at the time these crimes were committed.[13] The Extraordinary Chambers in the Courts of Cambodia followed this example, despite its jurisdiction over the extremely grave crimes (including genocide) committed between 1975 and 1979 in Cambodia, where the death penalty was also legal at the time.[14] The Rome Statute of the International Criminal Court, which has jurisdiction over international crimes committed after its entry into force, similarly provides for a maximum term of life imprisonment and does not include the death penalty.[15]

On 15 December 1989, the UN General Assembly adopted the Second Optional Protocol to the ICCPR.[16] This Protocol aims at the abolition of the death penalty. Article 1 provides that '[n]o one within the jurisdiction of a

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[12] Article 27 of the Charter of the Nuremberg International Military Tribunal ('IMT') provided that the IMT 'shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just'. See Agreement for the prosecution and punishment of the major war criminals of the European Axis (adopted and entered into force 8 August 1945) 8 UNTS 279. A similarly worded provision was also contained in Article 16 of the Charter of the International Military Tribunal for the Far East. See Special proclamation by the Supreme Commander tor the Allied Powers (adopted and entered into force 19 January 1946) TIAS 1589, 4 Bevans 20. The IMT sentenced twelve accused to death, three to life imprisonment, and four to fixed-term sentences. The IMTFE imposed seven death sentences, sixteen sentences of live imprisonment, and two of fixed- term imprisonment. Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th ed, CUP 2019) 465.

[13] As concerns, the ICTY, see Article 24 of its Statute adopted by UNSC Res 827 (25 May 1993). See also Articles 37 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (1977). As concerns the ICTR, see Article 23 of its Statute adopted by UNSC Res 955 (8 November 1994). Rwanda even voted against the establishment of the ICTR because the Statute did not include the death penalty while the Rwandan penal code still provided for it. The Rwandan Government believed that this difference established 'a disparity in sentences' whereby high-ranking individuals 'who devised, planned and organized the genocide' would escape capital punishment at trials at the ICTR, 'whereas those who simply carried out their plans would be subjected to the harshness of this sentence' in Rwandan courts. The Rwandan Government was concerned that such imbalance in sentencing was 'not conducive to national reconciliation in Rwanda'. See UNSC Verbatim Record (8 November 1994) UN Doc S/PV.3453, 15.

[14] See in this regard Nina Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar Publishing 2018) 329-330.

[15] See Article 77(2) of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

[16] Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414, in Appendix D.

State Party to the present Protocol shall be executed' and that each State 'shall take all necessary measures to abolish the death penalty within its jurisdiction'.[17] Although originally ratified by only 38 States, 87 countries have become party to it over the years. At the regional level, the most visible result of the process of abolition is the creation of a death penalty-free zone covering the 47 members of the Council of Europe. Abolition of the death penalty is one of the conditions for admission into the Council of Europe. This process did not occur overnight, and was rather the result of political and judicial developments. The main steps can be illustrated as follows.

On 28 April 1983, the Council of Europe adopted Protocol No. 6 to the ECHR abolishing the death penalty in time of peace while still allowing it in respect of 'acts committed in time of war or of imminent threat of war'.[18] All the Member States of the Council of Europe have ratified this Protocol, apart from the Russian Federation which has only signed it. On 7 July 1997, the ECtHR found in the above-mentioned *Soering v the United Kingdom* that extraditing a man accused of murder to the US where he could face the death penalty would expose him to a 'real risk of treatment going beyond the threshold set by Article 3' given his age and the ever-present and mounting anguish of awaiting execution.[19]

On 3 May 2002, the Council of Europe adopted Protocol No. 13, banning the death penalty in all circumstances, including for crimes committed in times of war and imminent threat of war.[20] Azerbaijan and Russia alone have not signed the Protocol; Armenia has signed, but not ratified it.

Taking stock from these and other relevant developments, on 12 May 2005 the ECtHR declared in *Öcalan v Turkey* that Europe had become a 'zone free of capital punishment' and ruled that imposing the death penalty after an unfair trial – even though it was not carried out – amounted to inhumane treatment.[21] On 2 March 2010, in *Al-Saadoon and Mufdhi v the United Kingdom*, the ECtHR reached the conclusion that Article 2 had been amended through ratifications of Protocol No. 13 and 'State practice in observing the moratorium on capital punishment' so that it must now be interpreted as excluding the

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[17] Ibid, Article 1.

[18] Articles 1 and 2 of the Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (adopted 28 April 1983, entered into force 1 March 1985) ETS 114, in Appendix C.

[19] *Soering v the United Kingdom*, App no 14038/88 (ECtHR 7 July 1989) para. 111.

[20] See 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 (adopted 3 May 2002, entered into force 1 July 2003) ETS 187, in Appendix D.

[21] *Öcalan v Turkey*, App no 46221/99 (ECtHR [GC] 12 May 2005) paras. 163 and 175.

taking of life through the death penalty 'in all circumstances'.[22] It further clarified that in light of these developments:

> [t]he Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to its interpreting the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty.[23]

More recently, on 28 October 2015 in *A.L. (X.W.) v Russia* the ECtHR further held that the ban on the death penalty extended also to the Russian Federation, despite the fact that it had not ratified Protocols Nos. 6 or 13. The Chamber found that not only had Russia undertaken to abolish the death penalty upon becoming a member of the Council of Europe, but also, crucially, that the death penalty 'has become an unacceptable form of punishment', which 'is no longer permissible under Article 2 as amended by Protocols Nos. 6 and 13 and [which] amounts to "inhuman or degrading treatment or punishment" under Article 3'.[24]

In the years following the seminal *Soering* case, the ECtHR has further clarified that the abolition of the death penalty within the States party to the Council of Europe also involves a collateral obligation not to transfer individuals from the territory of a State party to a third country where death penalty remains legal. On 8 November 2005, in *Bader and Kanbor v Sweden*, the ECtHR held that the deportation of a man sentenced to death after an unfair trial in Syria would violate not only the prohibition of torture under Article 3, but also directly the right to life under Article 2.[25]

The same rationale was confirmed almost a decade later with the holding in *Al Nashiri v Poland*, where the ECtHR held that 'Article 2 of the Convention prohibits the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there'.[26]

Al Nashiri concerned Poland's cooperation with the US in the course of the latter's 'extraordinary rendition programme' ('ERP'), which involved the preparation and execution of secret CIA rendition, detention and interrogation operations on Polish territory.[27] Given that Poland was aware of the ill-

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[22] *Al-Saadoon and Mufdhi v the United Kingdom*, App no 61498/08 (ECtHR 2 March 2010) para. 120.

[23] Ibid.

[24] *A.L. (X.W.) v Russia*, App no 44095/14 (ECtHR 29 October 2015) paras. 63-64.

[25] *Bader and Kanbor v Sweden*, App no 13284/04 (ECtHR 8 November 2005) para. 48. See also *Kaboulov v Ukraine*, App no 41015/04 (ECtHR 19 November 2009) para. 99.

[26] See *Al Nashiri v Poland*, App no 28761/11 (ECtHR 24 July 2014) paras. 576-579 and 589.

[27] Ibid, para. 517.

treatment and abuse of terrorist suspects detained by the US authorities within the ERP, the Chamber held that Poland 'ought to have known that, by enabling the CIA to detain such persons on its territory, it exposed them to a serious risk of treatment contrary to the Convention'.[28] For the applicant in the case, this risk included the substantial and foreseeable possibility that he would be transferred from Poland to face a trial for capital charges before a military commission at the US detention centre in Guantanamo Bay.[29] The Chamber found this to constitute a substantial violation of Article 2, emphatically stating that:

> Judicial execution involves the deliberate and premeditated destruction of a human being by the State authorities. Whatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering. The fact that the imposition and use of the death penalty negates fundamental human rights has been recognised by the member States of the Council of Europe. In the Preamble to Protocol No. 13 the Contracting States describe themselves as "convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings" ...[30]

Finally, in *F.G. v Sweden*, the ECtHR crystallised and reinforced the absolute nature of the duty not to expel an individual to a country where he 'would face a real risk of capital punishment, torture, or inhuman or degrading treatment or punishment' as guaranteed under Articles 2 and 3 of the ECHR.[31] In certain circumstances, this absoluteness obliges public authorities to investigate *proprio motu* circumstances that may militate against expulsion, even when an applicant fails to voluntarily provide information regarding them or to invoke them in his or her favour.[32] This does not mean that the public authorities are expected to discover new grounds for asylum themselves, but rather requires

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[28] Ibid.

[29] Ibid, para 578.

[30] Ibid, para. 577. In the subsequent *Al Nashiri v Romania* case, lodged by the same applicant, the ECtHR found that Romania had similarly violated Article 2 because it had assisted the CIA in the rendition of the applicant from its territory despite a real risk that he could face a flagrant denial of justice and the death penalty. See *Al Nashiri v Romania*, App no 33234/12 (ECtHR 31 May 2018) paras. 726-729.

[31] On the relationship between expulsion/deportation and Articles 2 and 3 of the ECHR, see, among others, *L.M. and Others v Russia*, App nos. 40081/14, 40088/14 and 40127/14 (ECtHR 14 March 2016) paras. 108 ff.

[32] *F.G. v Sweden,* App no. 43611/ 11 (ECtHR [GC] 23 March 2016) para. 127.

them to investigate the existence of potential risks of ill-treatment in the country of repatriation whenever they become aware of the possibility of such a risk in the normal course of the asylum procedure.[33] The *F.G.* case concerned an asylum application made by an Iranian citizen who had disclosed his conversion from Islam to Christianity to the Swedish Migration Board, but had chosen not to invoke his conversion as a ground for his asylum application saying that it was 'a private matter'. The Swedish authorities rejected his request for asylum.[34]

The Grand Chamber held that the Swedish authorities, being demonstrably aware that the applicant belonged to a religious group systematically exposed to serious mistreatment, were required to check *proprio motu* the risk the applicant might encounter upon returning to Iran as a result of his conversion.[35] According to the Grand Chamber, the national authorities therefore had an obligation to assess on their own initiative all the information brought to their attention, including the seriousness of the applicant's beliefs, the way he manifested his Christian faith in Sweden and how he intended to manifest it in Iran.[36] In view of the foregoing, the Grand Chamber concluded that 'there would be a violation of Article 2 and 3 of the Convention' if the applicant were to be returned to Iran 'without an *ex nunc*, assessment by the Swedish authorities of the consequences of his religious conversion'.[37]

[33] Ibid.

[34] Ibid, para. 148.

[35] Ibid, para. 156.

[36] Ibid, para 157.

[37] Ibid, para. 171.

Chapter 5
Permitted Uses of Lethal Force

5.1. *What Limits the Use of Lethal Force by State Agents?*

5.1.1. McCann and Others v the United Kingdom *(1995)*

I. Summary [*]

This case concerns the killing of Mr McCann, Ms Farrell and Mr Savage, three members of the IRA, by members of the UK security forces in Gibraltar. The applicants, all close relatives of the deceased, complained that the killings of the three individuals were premeditated, and that the related operation was planned and conducted in a manner breaching Article 2(2) of the ECHR. The UK Government responded that the deprivations of life in the applications were justified under Article 2(2)(a) of the ECHR due to a use of force that was absolutely necessary to defend the people of Gibraltar from unlawful violence. The Grand Chamber, split by ten votes to nine, found in favour of the applicants and held that there had been a violation of Article 2.

A. Events Leading to the Killings

Before 4 March 1988, and probably from at least the beginning of that year, authorities in the UK, Spain and Gibraltar had intelligence suggesting that the IRA was planning a terrorist attack in Gibraltar. The target of the attack was the assembly area south of Ince's Hall ('Assembly Area'), the place where the Royal Anglian Regiment gathered to carry out the ceremony of the changing of the guard every Tuesday at 11:00 a.m. To prevent the planned attack, prior to 4 March 1988, an advisory group had been formed to assist Mr Joseph

[*] Grand Chamber, *McCann and Others v the United Kingdom*, App no 18984/91, Judgment of 27 September 1995.

Canepa, the Gibraltar Commissioner of Police ('Commissioner'). It was composed of Soldier F (senior military adviser and officer in the SAS), Soldier E (SAS attack commander), Soldier G (bomb-disposal adviser), Mr Colombo (Acting Deputy Commissioner of Police), Detective Chief Inspector Ullger, attached to Special Branch, and various Security Service officers.

On 4 March 1988, there was a reported sighting of an IRA active service unit ('ASU') in Malaga, Spain. The Commissioner decided to mount surveillance of the ASU. On 5 March 1998, the Commissioner issued an operational order stating that a terrorist attack was being planned in Gibraltar and that the probable target of the attack was the band and guard of the First Battalion of the Royal Anglian Regiment. The same order stated that the attack was to take place during the changing of the guard at Ince's Hall on 8 March 1988 and that there were indications that the method to be used was explosives, probably a car bomb.

At midnight between 5 and 6 March 1988, the Commissioner held a meeting that was attended by officers from the Security Services (including Witnesses H, I, J, K, L, M and N from the surveillance team), military personnel (including Soldiers A, B, C, D, E, F and G) and members of the Gibraltar police (Officers P, Q and R and Detective Chief Inspector Ullger, Head of Special Branch, and Detective Constable Viagas). At this meeting, the soldiers who would later carry out the shooting (A, B, C and D) were informed that a car bomb had been set in place by a three-member ASU.

The ASU was composed of Daniel McCann, who had been previously convicted and sentenced to two years' imprisonment for possession of explosives; Sean Savage, known as an expert bomb-maker: and a third member, later identified as Mairead Farrell, who had previously been convicted and sentenced to 14 years' imprisonment for causing explosions. Those present at the meeting were further told that the bomb could have been activated by each of the three members by means of a radio-control device, perhaps concealed on their persons; that the device could be activated by pressing a button; that they would be likely to detonate the bomb if challenged, thereby causing heavy loss of life and serious injuries; and that the suspects were also likely to be armed and to resist arrest.

The operations room of the Gibraltar police ('Operations Room') opened on 6 March 1988 at 8:00 a.m. Members of the surveillance teams were on duty in the streets of Gibraltar, as were Soldiers A, B, C and D and members of the police force involved in the operation. Soldiers A, B, C and D wore civilian clothes and were armed with 9mm Browning pistols. They worked in pairs. Witness N of the Security Service team on surveillance in the car-park in the Assembly Area recalled that at 12:45 p.m. he saw a white Renault car parked near the Assembly Area and a man walking away from it after parking it there.

At 2:10 p.m., Witness N reported via radio to the Operations Room that he

had identified the man in the Assembly Area as Savage and that it was the same man who had earlier parked the car in the Assembly Area. At about 2:50 p.m., it was reported to the Operations Room that the suspects McCann and Farrell had met with a second man identified as the suspect Savage and that the three were looking at a white Renault car in the car-park in the Assembly Area. At this moment, the possibility of making an arrest was considered, but the three suspects almost immediately moved away from the car through the Southport Gate, giving rise to some discussion in the Operations Room as to whether the three suspects were just on a reconnaissance mission and might subsequently return to pick up the car. The uncertainty about the intention of the three suspects resulted in the decision not to effectuate the arrest at that stage.

After the three suspects' identities had been confirmed and they had moved away from the Assembly Area, Soldier G conducted an examination of the suspect car from the exterior, without touching it. He described it as a newish-looking white Renault. He saw nothing troublesome inside the car, or out of place or concealed under the seats, but he noted that the aerial of the car, which was rusty, did not match the age of the car. He reported to the Commissioner that the car was a 'suspect car bomb'. The Commissioner stated that, as a result of that assessment, the car was labelled as a 'possible car bomb'.

At the Inquest,[1] Soldiers G later clarified that 'suspect car bomb' was a term of art for a car parked in suspicious circumstances. He had experience of dealing with car bombs in Northern Ireland, but at the Inquest stated that he was neither a radio-communications expert nor an explosives expert. He had not thought of deactivating the suspect bomb by unscrewing the aerial from the car. When this possibility was put to him in cross-examination, he agreed that to have attempted to unscrew the aerial would have been potentially dangerous. Soldier F indicated that it was the status of the aerial that rendered the car suspicious and stated that this information was passed on to all the units on the ground. Soldier E was more categorical and stated that as far as Soldier G could tell 'from a cursory visual examination he was able to confirm our suspicion that they were dealing with a car bomb'.

After receiving the report from Soldier G, and in view of the fact that the three suspects were continuing northwards leaving the car behind, the Commissioner, at 3:40 p.m., signed a form requesting the apprehension of the three suspects on suspicion of conspiracy to commit murder.

Upon reaching the junction of Smith Dorrien Avenue and Winston Churchill Avenue, the three suspects crossed the road and stopped on the other side talking among themselves. At that point, Soldiers C and D were approaching

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[1] An inquest by the Gibraltar Coroner into the killings was opened on 6 September 1988 and lasted until 30 September. Evidence was heard from *inter alia* 79 witnesses, including the soldiers ('Inquest').

the junction from Smith Dorrien Avenue. Soldiers A and B emerging from the Landport tunnel also saw the three suspects at the junction from their position. As the soldiers converged on the junction, however, Savage split away from McCann and Farrell and turned south towards the Landport tunnel. McCann and Farrell continued north up the right-hand pavement of Winston Churchill Avenue. Savage passed Soldiers A and B, brushing against the shoulder of B. Soldier B was about to turn to arrest Savage, but Soldier A, knowing that Soldiers C and D were in the area and that they would arrest Savage, told him that they should continue towards suspects McCann and Farrell. Aware that Soldiers A and B were following suspects McCann and Farrell, Soldiers C and D crossed over from Smith Dorrien Avenue to follow Savage.

B. The Killing of McCann and Farrell

The Grand Chamber reconstructed the events that led to the death of the three suspects based on the evidence provided by the soldiers participating in the operation at the Inquest as follows. Soldiers A and B continued north up Winston Churchill Avenue after McCann and Farrell, walking at a brisk pace to close the distance. McCann was walking on the right of Farrell on the inside of the pavement. When Soldier A was approximately ten metres behind McCann on the inside of the pavement, McCann looked back over his left shoulder, apparently directly at Soldier A. He appeared to then realise who Soldier A was and that he was a threat.

Soldier A drew out his pistol, intending to shout a warning to stop at the same time, though he later stated that he was uncertain if the words actually came out of his mouth. McCann's hand moved suddenly and aggressively. Soldier A, believing that this movement was an attempt to grab a hidden button to detonate the bomb, opened fire. He shot one round into McCann's back from a distance of three metres or less. Out of the corner of his eye, Soldier A saw Farrell, who had been walking on the left of McCann, make a half turn to the right towards McCann, grabbing for her handbag under her left arm. Believing that she was also going for a button to detonate a bomb, Soldier A shot one round of bullets into her back from a distance of about one metre. Next, Soldier A turned back to McCann and shot him once more in the body and twice in the head. Soldier A fired a total of five shots, three on McCann and two on Farrell.

Soldier B was approaching directly behind Farrell on the road-side of the pavement. When they were three to four metres away, Farrell made a sharp movement to her right, drawing the bag that she had under her left arm across her body. Like Soldier A, Soldier B feared that she was going for the button and opened fire on her. Moreover, Soldier B thought that McCann was in a threatening position as he was unable to see his hands and so he decided to

switch fire against McCann. He then turned back to Farrell and continued firing until he was certain that she was no longer a threat, namely, that her hands were away from her body. He fired a total of seven shots.

Both Soldiers A and B denied that Farrell or McCann had made any attempt to surrender with their hands up in the air or that they fired at the two suspects when they were lying on the ground. At the Inquest, Soldier A stated expressly that his intention had been to kill McCann 'to stop him [from] becoming a threat and detonating that bomb'. The shooting took place on the pavement in front of a Shell petrol station on Winston Churchill Avenue on a Sunday afternoon when there were many people out on the streets and the roads were busy with traffic.

After the shooting, the soldiers put on their berets so that they would be recognised by the police. They noticed a police car, with its siren going, coming from the far side of Winston Churchill Avenue. A number of policemen jumped out of the car. Soldier A still had his pistol in his hand. He put his hands up in the air and shouted 'police!' Soldier A recalled hearing shooting from behind as the police car was approaching.

Neither of the soldiers was aware of the police car or siren until after the shooting. However, the majority of witnesses, including Police Officers P, Q and R who were in the vicinity to support Soldiers A and B in the arrest, along with a number of members of the surveillance team as well as civilian witnesses, recalled that the sound of the police siren preceded, if only by a very short time, the sound of the gunfire. Officers P and Q, who were watching from a relatively close distance, considered that Farrell and McCann reacted to the sound of the siren; Q was of the opinion that it was the siren that caused Farrell and McCann to stop and turn.

Almost all the witnesses who gave evidence at the Inquest recalled that Farrell had carried her bag under her right arm and not – as stated by Soldiers A and B – under her left arm. The Coroner commented in his summing-up to the jury that this fact might have been relevant with regard to the justification for opening fire alleged by the soldiers. More significantly, three witnesses gave evidence suggesting that McCann and Farrell had been shot while lying on the ground.

C. The Shooting of Savage

The evidence given by Soldiers C and D at the Inquest, which the Grand Chamber used to reconstruct the facts regarding the killing of the third suspect, was as follows. After the three suspects had split up at the junction, Soldiers C and D followed Savage towards the Landport tunnel. Soldier D intended to arrest Savage by getting slightly closer, drawing his pistol and shouting 'Stop. Police. Hands up'. Before Soldier D could get closer, however,

he heard the sound of gunfire in the rear. At the same time, Soldier C shouted 'Stop'. Savage spun around and his arm went down towards his right hip area.

Soldier D believed that Savage was going for a detonator and opened fire from about two to three metres away, initially aiming into the centre of Savage's body, with the last two shots at his head. He kept firing until Savage was motionless on the ground and his hands were away from his body. Soldier E, the attack commander, stated that the intention at the moment of opening fire was to kill, since this was the only way to remove the threat. He added that this was the standard practice followed by any soldier in the army who opens fire.

D. Events after the Killings

After the shooting, the bodies of the three suspects and Farrell's handbag were searched. No weapons or detonating devices were discovered. Later on, at the Assembly Area, a bomb-disposal team opened the suspect white Renault car, but found no explosive device or bomb. Inside Farrell's handbag was found a key ring with two keys and a tag bearing a car registration number MA9317AF.

The Spanish police commenced a search for the car and, during the night of 6 to 7 March, found a Ford Fiesta with that registration number in La Linea, a town in Spain to the north of Gibraltar. Inside the car they found keys for another car, registration number MA2732AJ, with a rental agreement indicating that the car had been rented by Katharine Smith, the name on a passport carried in Farrell's handbag.

On 8 March, a Ford Fiesta car with registration number MA2732AJ was discovered in a basement car-park in Marbella, Spain and was found to contain an explosive device in the boot concealed in the spare-wheel compartment. The device consisted of five packages of Semtex explosive (altogether 64 kilograms) with four detonators attached and 200 rounds of ammunition packed around them. There were two timers, marked 10 hrs 45 mins and 11 hrs 15 mins respectively. The device was not primed or connected.

II. Proceedings in Domestic and International Jurisdictions

The applicants commenced actions in the UK High Court of Justice. However, on 15 March 1990, the Secretary of State for Foreign and Commonwealth Affairs issued certificates stating that any alleged liability of the Crown arose neither in respect of Her Majesty's Government in the UK nor in respect of Her Majesty's Government in Northern Ireland, and that the relevant domestic law prevented the proceedings from being held in Northern Ireland against the Crown in respect of liability arising otherwise. On 4 October 1991, the applicants' case to the High Court was struck off.

On 14 August 1991, the applicants lodged a complaint with the ECommHR. The ECommHR referred the case to a Chamber that, on 21 September 1994, decided to relinquish jurisdiction in favour of the Grand Chamber.

III. Judgment (paras. 145–150 and 192-214)

I. ALLEGED VIOLATION OF ARTICLE 2 (art. 2) OF THE CONVENTION

145. The applicants alleged that the killing of Mr McCann, Ms Farrell and Mr Savage by members of the security forces constituted a violation of Article 2 (art. 2) of the Convention which reads:

> "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 (art. 2) 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.".

A. Interpretation of Article 2 (art. 2)

1. General approach

146. The Court's approach to the interpretation of Article 2 (art. 2) must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, inter alia, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 34, para. 87, and the Loizidou v. Turkey (Preliminary Objections) judgment of 23 March 1995, Series A no. 310, p. 27, para. 72).

147. It must also be borne in mind that, as a provision (art. 2) which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 (art. 2) ranks as one of the most fundamental provisions in the Convention - indeed one which, in peacetime, admits of no derogation under Article 15 (art. 15). Together with Article 3 (art. 15+3) of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe (see the above-mentioned Soering judgment, p. 34, para. 88). As such, its provisions must be strictly construed.

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. The use of force, however, must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c) (art. 2-2-a, art. 2-2-b, art. 2-2-c) (see application no. 10044/82, Stewart v. the United Kingdom, 10 July 1984, Decisions and Reports 39, pp. 169-71).

149. In this respect the use of the term "absolutely necessary" in Article 2 para. 2 (art. 2-2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2) of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in subparagraphs 2 (a), (b) and (c) of Article 2 (art. 2-2-a-b-c).

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.

[...]

(b) The Court's assessment

(1) Preliminary considerations

192. In carrying out its examination under Article 2 (art. 2) of the Convention, the Court must bear in mind that the information that the United Kingdom authorities received that there would be a terrorist attack in Gibraltar presented them with a fundamental dilemma. On the one hand, they were required to have regard to their duty to protect the lives of the people in Gibraltar including their own military personnel and, on the other, to have minimum resort to the use of lethal force against those suspected of posing this threat in the light of the obligations flowing from both domestic and international law.

193. Several other factors must also be taken into consideration.

In the first place, the authorities were confronted by an active service unit of the IRA composed of persons who had been convicted of bombing offences and a known explosives expert. The IRA, judged by its actions in the past, had demonstrated a disregard for human life, including that of its own members.

Secondly, the authorities had had prior warning of the impending terrorist ac-

tion and thus had ample opportunity to plan their reaction and, in co-ordination with the local Gibraltar authorities, to take measures to foil the attack and arrest the suspects. Inevitably, however, the security authorities could not have been in possession of the full facts and were obliged to formulate their policies on the basis of incomplete hypotheses.

194. Against this background, in determining whether the force used was compatible with Article 2 (art. 2), the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. The Court will consider each of these points in turn.

(2) Actions of the soldiers

195. It is recalled that the soldiers who carried out the shooting (A, B, C and D) were informed by their superiors, in essence, that there was a car bomb in place which could be detonated by any of the three suspects by means of a radio-control device which might have been concealed on their persons; that the device could be activated by pressing a button; that they would be likely to detonate the bomb if challenged, thereby causing heavy loss of life and serious injuries, and were also likely to be armed and to resist arrest (see paragraphs 23, 24-27, and 28-31 above).

196. As regards the shooting of Mr McCann and Ms Farrell, the Court recalls the Commission's finding that they were shot at close range after making what appeared to Soldiers A and B to be threatening movements with their hands as if they were going to detonate the bomb (see paragraph 132 above). The evidence indicated that they were shot as they fell to the ground but not as they lay on the ground (see paragraphs 59-67 above). Four witnesses recalled hearing a warning shout (see paragraph 75 above). Officer P corroborated the soldiers' evidence as to the hand movements (see paragraph 76 above). Officer Q and Police Constable Parody also confirmed that Ms Farrell had made a sudden, suspicious move towards her handbag (ibid.).

197. As regards the shooting of Mr Savage, the evidence revealed that there was only a matter of seconds between the shooting at the Shell garage (McCann and Farrell) and the shooting at Landport tunnel (Savage). The Commission found that it was unlikely that Soldiers C and D witnessed the first shooting before pursuing Mr Savage who had turned around after being alerted by either the police siren or the shooting (see paragraph 132 above).

Soldier C opened fire because Mr Savage moved his right arm to the area of his jacket pocket, thereby giving rise to the fear that he was about to detonate the bomb. In addition, Soldier C had seen something bulky in his pocket which he believed to be a detonating transmitter. Soldier D also opened fire believing that the suspect was trying to detonate the supposed bomb. The soldiers' version of events was corroborated in some respects by Witnesses H and J, who saw Mr Savage

spin round to face the soldiers in apparent response to the police siren or the first shooting (see paragraphs 83 and 85 above).

The Commission found that Mr Savage was shot at close range until he hit the ground and probably in the instant as or after he had hit the ground (see paragraph 132 above). This conclusion was supported by the pathologists' evidence at the inquest (see paragraph 110 above).

198. It was subsequently discovered that the suspects were unarmed, that they did not have a detonator device on their persons and that there was no bomb in the car (see paragraphs 93 and 96 above).

199. All four soldiers admitted that they shot to kill. They considered that it was necessary to continue to fire at the suspects until they were rendered physically incapable of detonating a device (see paragraphs 61, 63, 80 and 120 above). According to the pathologists' evidence Ms Farrell was hit by eight bullets, Mr McCann by five and Mr Savage by sixteen (see paragraphs 108-10 above).

200. The Court accepts that the soldiers honestly believed, in the light of the information that they had been given, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life (see paragraph 195 above). The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives.

It considers that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 (art. 2-2) of the Convention may be justified under this provision (art. 2-2) where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.

It follows that, having regard to the dilemma confronting the authorities in the circumstances of the case, the actions of the soldiers do not, in themselves, give rise to a violation of this provision (art. 2-2).

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

(3) Control and organisation of the operation

202. The Court first observes that, as appears from the operational order of the Commissioner, it had been the intention of the authorities to arrest the suspects at an appropriate stage. Indeed, evidence was given at the inquest that arrest procedures had been practised by the soldiers before 6 March and that efforts had been made to find a suitable place in Gibraltar to detain the suspects after their arrest (see paragraphs 18 and 55 above).

203. It may be questioned why the three suspects were not arrested at the border immediately on their arrival in Gibraltar and why, as emerged from the evidence given by Inspector Ullger, the decision was taken not to prevent them from entering Gibraltar if they were believed to be on a bombing mission. Having had advance warning of the terrorists' intentions it would certainly have been possible for the authorities to have mounted an arrest operation. Although surprised at the early arrival of the three suspects, they had a surveillance team at the border and an arrest group nearby (see paragraph 34 above). In addition, the Security Services and the Spanish authorities had photographs of the three suspects, knew their names as well as their aliases and would have known what passports to look for (see paragraph 33 above).

204. On this issue, the Government submitted that at that moment there might not have been sufficient evidence to warrant the detention and trial of the suspects. Moreover, to release them, having alerted them to the authorities' state of awareness but leaving them or others free to try again, would obviously increase the risks. Nor could the authorities be sure that those three were the only terrorists they had to deal with or of the manner in which it was proposed to carry out the bombing.

205. The Court confines itself to observing in this respect that the danger to the population of Gibraltar – which is at the heart of the Government's submissions in this case – in not preventing their entry must be considered to outweigh the possible consequences of having insufficient evidence to warrant their detention and trial. In its view, either the authorities knew that there was no bomb in the car – which the Court has already discounted (see paragraph 181 above) – or there was a serious miscalculation by those responsible for controlling the operation. As a result, the scene was set in which the fatal shooting, given the intelligence assessments which had been made, was a foreseeable possibility if not a likelihood.

The decision not to stop the three terrorists from entering Gibraltar is thus a relevant factor to take into account under this head.

206. The Court notes that at the briefing on 5 March attended by Soldiers A, B, C, and D it was considered likely that the attack would be by way of a large car bomb. A number of key assessments were made. In particular, it was thought that the terrorists would not use a blocking car; that the bomb would be detonated by a radio-control device; that the detonation could be effected by the pressing of a button; that it was likely that the suspects would detonate the bomb if challenged; that they would be armed and would be likely to use their arms if confronted (see paragraphs 23-31 above).

207. In the event, all of these crucial assumptions, apart from the terrorists' intentions to carry out an attack, turned out to be erroneous. Nevertheless, as has been demonstrated by the Government, on the basis of their experience in dealing with the IRA, they were all possible hypotheses in a situation where the true facts were unknown and where the authorities operated on the basis of limited intelligence information.

208. In fact, insufficient allowances appear to have been made for other as-

sumptions. For example, since the bombing was not expected until 8 March when the changing of the guard ceremony was to take place, there was equally the possibility that the three terrorists were on a reconnaissance mission. While this was a factor which was briefly considered, it does not appear to have been regarded as a serious possibility (see paragraph 45 above).

In addition, at the briefings or after the suspects had been spotted, it might have been thought unlikely that they would have been prepared to explode the bomb, thereby killing many civilians, as Mr McCann and Ms Farrell strolled towards the border area since this would have increased the risk of detection and capture (see paragraph 57 above). It might also have been thought improbable that at that point they would have set up the transmitter in anticipation to enable them to detonate the supposed bomb immediately if confronted (see paragraph 115 above).

Moreover, even if allowances are made for the technological skills of the IRA, the description of the detonation device as a "button job" without the qualifications subsequently described by the experts at the inquest (see paragraphs 115 and 131 above), of which the competent authorities must have been aware, oversimplifies the true nature of these devices.

209. It is further disquieting in this context that the assessment made by Soldier G, after a cursory external examination of the car, that there was a "suspect car bomb" was conveyed to the soldiers, according to their own testimony, as a definite identification that there was such a bomb (see paragraphs 48, and 51-52 above). It is recalled that while Soldier G had experience in car bombs, it transpired that he was not an expert in radio communications or explosives; and that his assessment that there was a suspect car bomb, based on his observation that the car aerial was out of place, was more in the nature of a report that a bomb could not be ruled out (see paragraph 53 above).

210. In the absence of sufficient allowances being made for alternative possibilities, and the definite reporting of the existence of a car bomb which, according to the assessments that had been made, could be detonated at the press of a button, a series of working hypotheses were conveyed to Soldiers A, B, C and D as certainties, thereby making the use of lethal force almost unavoidable.

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. As noted by the Coroner in his summing-up to the jury at the inquest, all four soldiers shot to kill the suspects (see paragraphs 61, 63, 80 and 120 above). Soldier E testified that it had been discussed with the soldiers that there was an increased chance that they would have to shoot to kill since there would be less time where there was a "button" device (see paragraph 26 above). Against this background, the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill.

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 (see paragraph 104, at point 1. (iii) above), 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 (see paragraphs 136 and 137 above).

This failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation.

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.

214. Accordingly, the Court finds that there has been a breach of Article 2 (art. 2) of the Convention.

IV. Questions for the Students

Question 1

The Grand Chamber found that the 'actions of the soldiers' did not 'in themselves' give rise to a violation of Article 2(2) of the ECHR. It accepted as true that the SAS soldiers 'honestly believed, in the light of the information that they had been given' that 'it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life' (paragraph 200). Moreover, the Grand Chamber believed that '[t]he actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives' (paragraph 200). These factual conclusions are based on the legal test that the Grand Chamber defines as follows (paragraph 200):

> ... [T]he use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 (art. 2-2) of the Convention may be justified under

> this provision (art. 2-2) where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.

Reflect on the test laid out by the Grand Chamber. Do you believe that the Grand Chamber set an objective test or a subjective one? Consider the expression 'good reasons'. Are you able to provide examples of what such 'good reasons' may be?

Question 2

In their joint dissenting opinion, Judges Ryssdal, Bernhardt, Thór Vilhjálmsson, Gölcüklü, Palm, Pekkanen, Freeland, Baka and Jambrek argue that there was no violation of Article 2 of the ECHR because the use of lethal force in this case was 'in the circumstances as known at the time […] absolutely necessary'. They disagree with the majority's evaluation (in paragraphs 202–214) concerning the way the control and organisation of the operation was carried out by the authorities. One aspect of this disagreement pertains to the decision not to prevent the three suspects from entering Gibraltar (paragraphs 203–205), which the majority found flawed.

According to the dissenting Judges, releasing the three suspects, after having alerted them to the state of readiness of the authorities, would have been to increase the risk that they or other IRA members could successfully mount a renewed terrorist attack on Gibraltar. In the circumstances as then known, it was accordingly not 'a serious miscalculation' for the authorities to defer the arrest rather than merely stop the suspects at the border and turn them back to Spain.

Do you think that the majority is right in holding that it was 'a serious miscalculation' to allow the three suspect terrorists to enter the territory of Gibraltar? If so, what course of action do you think the authorities of Gibraltar should have followed?

Question 3

The Grand Chamber notes that all the crucial assumptions made at the meeting held by the Commissioner on 5 March, apart from the terrorists' intentions to carry out an attack in itself, turned out to be erroneous (paragraphs 206–207). The dissenting Judges take a different view and seek to show that such assumptions were not flawed. According to the Judges, the authorities were right to launch the operation leading to the killing of the three suspects based on a 'worst-case scenario', namely that the car contained a bomb that was capable of being detonated by the suspects during their presence in the territory. The

Judges state that to do otherwise, as the Grand Chamber considered appropriate, would have been 'a reckless failure of concern for public safety'.

Reflect on the notion of 'worst-case scenario' and its possible implications. Do you think the dissenting Judges' view is correct from a legal point of view? Could a hypothetical scenario be an appropriate basis of justification for the use of lethal force under Article 2?

5.1.2. Giuliani and Gaggio v Italy *(2011)*

I. Summary [*]

The case concerns the death of the 23-year-old Carlo Giuliani, which occurred while he was taking part in an anti-globalisation demonstration in connection with the G8 summit held in Italy in 2001. The three applicants, Mr Giuliano Giuliani, Ms Adelaide Gaggio (married name Giuliani), and Ms Elena Giuliani are the father, mother, and sister of Carlo Giuliani. Under Article 2 of the ECHR, the applicants claimed: (i) that the death of Carlo Giuliani was caused by a use of force by *carabinieri* (Italian national gendarmerie) that was not 'absolutely necessary'; (ii) that there was no legislative framework in place adequate to safeguard the lives of the demonstrators during the G8 summit; and (iii) that the responsibility of the Italian State was engaged on account of the shortcomings in the planning, organisation and management of public order throughout the G8 summit. The Italian Government rejected all of these arguments. The Grand Chamber found in favour of the Italian Government, holding that neither the use of force against Carlo Giuliani nor the legislative framework and organisation of policing operations during the demonstrations gave rise to a violation of Article 2.

On 19, 20 and 21 July 2001, the G8 summit, an inter-governmental political forum composed of Canada, France, Germany, Italy, Japan, Russia, the UK and the US, took place in Genoa, Italy. Numerous groups of anti-globalisation demonstrators, involving an estimated number of 200,000 people from different parts of the world, gathered in Genoa to protest, *inter alia*, against globalisation. The Italian authorities sought to maintain public order by deploying military personnel and designating as a red zone, an area off limits to the general public, in the sector of the centre of Genoa where the G8 meetings were to take place ('Red Zone'). The Red Zone was cordoned off by a metal fence.

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[*] Grand Chamber, *Giuliani and Gaggio v Italy*, App no 23458/02, Judgment of 24 March 2011.

On 19 July 2001, the day before Carlo Giuliani's death, the officer in command of the Genoa law enforcement agencies ('*Prefetto* of Genoa') established, as an additional security measure, a line of defence within the Red Zone to repel any attempt to break through. This further precaution was thought necessary because the previous day an Italian non-governmental organisation known as the *Tute Bianche* had publicised their intention to break through the Red Zone notwithstanding the specific prohibition by the Italian authorities. Set to be a peaceful demonstration, the *Prefetto* of Genoa had authorised the march of the *Tute Bianche* scheduled for 20 July. However, because of the above-mentioned additional security measures, such a march would have been illegal if it had attempted to penetrate the Red Zone as announced by the *Tute Bianche*.

On the morning of 20 July, several pacific demonstrations took place throughout Genoa. In parallel to these peaceful demonstrations, however, various forms of violent protests broke out. Some groups of aggressive demonstrators wearing balaclavas and masks destroyed or damaged hundreds of public and private property sites, sparked numerous incidents of different kinds, and clashed with law enforcement officials. Accordingly, as the day progressed, the public situation in Genoa grew increasingly tense. Law enforcement officials had difficulty in stopping the damage and apprehending those responsible.

When the march of the *Tute Bianche*, which had set off at 1:30 p.m. from the Carlini Football Stadium, reached the junction between Via Tolemaide and Corso Torino near the entrance of a railway tunnel, it had to stop. A battalion of *carabinieri*, commanded by Mr Mondelli, blocked the possibility for the march to go forward. Suddenly, the *carabinieri* fired tear gas on the demonstrators. The battalion of *carabinieri* led by Mr Mondelli charged forward against the demonstrators, making use of their batons. Because of the charge of the *carabinieri*, panic spread. Some demonstrators fled towards the seafront, while others sought refuge in Via Invrea and then in the area around Piazza Alimonda. Some demonstrators responded by throwing hard objects, such as glass bottles or rubbish bins. At 3:22 p.m., the police control room (where the *Prefetto* of Genoa was based) gave the order to Mr Mondelli to allow the marchers to go forward and continue with their demonstration. Nonetheless, the atmosphere at that time was particularly tense – in part due to the law enforcement officials' prolific use of tear gas. Demonstrators retaliated against the *carabinieri* with violence. At around 3:40 p.m., a group of demonstrators attacked an armoured *carabinieri* van and set it on fire.

At approximately 5:00 p.m., the *carabinieri* of the Sicilia battalion, consisting of around fifty *carabinieri* stationed in Piazza Alimonda (some 300 metres from the area where the charge of the carabinieri against the *Tute Bianche* had taken place), noted the presence of a group of apparently very aggressive demonstrators. Police officer Lauro ordered the carabinieri to charge the group.

The carabinieri charged on foot, followed by two Jeeps. The demonstrators succeeded in pushing back the charge, and the carabinieri were forced to withdraw in a disorderly fashion in the vicinities of Piazza Alimonda. Consequently, the two Jeeps attempted to reverse away from the scene. One succeeded in moving off, while the other found its exit blocked by an overturned refuse container. Several demonstrators wielding stones, sticks and iron bars suddenly surrounded the blocked vehicle, smashed some of its rear windows, and threw stones and a fire extinguisher at it.

There were three *carabinieri* inside the Jeep: Filippo Cavataio ('FC'), who was driving, Mario Placanica ('MP') and Dario Raffone ('DR'). MP and DR had been ordered to mount and rest on the Jeep by Captain Cappello (commander of a company of *carabinieri*), who considered the two *carabinieri* to be mentally exhausted ('*a terra*') and no longer physically fit for duty. MP, who was suffering from the effects of the tear-gas grenades he had thrown during the day, was crouching down in the back of the Jeep, injured and panicking, and seeking to protect himself from the violence of the demonstrators. Shouting at the demonstrators to leave 'or he would kill them,' MP drew his 9 mm pistol, pointed it in the direction of the smashed rear window of the vehicle and, after tens of seconds, fired two shots.

Carlo Giuliani was close to the rear of the Jeep and had just picked an empty fire extinguisher off the ground and raised it up in the direction of the Jeep. One of the two shots fired by MP struck Carlo Giuliani under his left eye. Giuliani fell to the ground near the left-side rear wheel of the vehicle. Shortly afterwards, FC managed to restart the engine and, in an attempt to move off, reversed, driving over Carlo Giuliani's body in the process. He then drove over the body a second time as he left the scene. At 5:27 p.m., a police officer present at the scene called the control room to request an ambulance. The doctor who arrived at the scene pronounced Carlo Giuliani dead.

Within 24 hours, the public prosecutor's office ordered an autopsy to establish the cause of Carlo Giuliani's death. The expert report submitted on 6 November 2001 found that Carlo Giuliani had been struck below the left eye by a bullet that had passed through the skull and exited through the rear of the skull on the left. The person firing the shot had been facing the victim and slightly to his right. The bullet injury to the head had resulted in death within a few minutes; the Jeep being driven over the body had caused only insignificant minor injuries to the organs in the thorax and the abdomen.

II. Proceedings in Domestic and International Jurisdictions

In a judgment of 9 October 2009, the Genoa Court of Appeal confirmed the findings of the District Court that the attack by *carabinieri* on the *Tute Bianche*

marchers had been unlawful and arbitrary, and, therefore, had justified the resistance of the demonstrators until the order to let the demonstrators pass was issued (at 3:30 p.m.). It also held that the attack on the *carabinieri* Jeep and its occupants had not constituted a defensive act, but a criminal offence.

On 6 February 2007, a Chamber of the ECtHR declared admissible the application against Italy. On 25 August 2009, the same Chamber found that there had been a violation of Article 2 of the ECHR in its procedural dimension. It also awarded, in respect of non-pecuniary damage, 15,000 euros each to the applicants Giuliano Giuliani and Adelaide Gaggio and 10,000 euros to the applicant Elena Giuliani. On 24 November 2009, both the Government and the applicants requested, in accordance with Article 43 of the ECHR and Rule 73 of the Rules of ECtHR, that the case be referred to the Grand Chamber. On 1 March 2010, a panel of the Grand Chamber granted the requests.

III. Judgment (paras. 174–197, 208-219, and 244-262)

2. The Court's assessment

(a) General principles

174. The Court reiterates that Article 2 ranks as one of the most fundamental provisions in the Convention, one which, in peace time, admits of no derogation under Article 15. Together with Article 3, it enshrines one of the basic values of the democratic societies making up the Council of Europe (see, among many other authorities, *Andronicou and Constantinou v. Cyprus*, 9 October 1997, § 171, *Reports of Judgments and Decisions* 1997VI, and *Solomou and Others v. Turkey*, no. 36832/97, § 63, 24 June 2008).

175. The exceptions delineated in paragraph 2 indicate that Article 2 extends to, but is not concerned exclusively with, intentional killing. The text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c) (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 148, Series A no. 324, and *Solomou and Others*, cited above, § 64).

176. The use of the term "absolutely necessary" indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2. Furthermore, in keeping with the im-

portance 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 (see *McCann and Others*, cited above, §§ 147-150, and *Andronicou and Constantinou*, cited above, § 171; see also *Avşar v. Turkey*, no. 25657/94, § 391, ECHR 2001VII, and *Musayev and Others v. Russia*, nos. 57941/00, 58699/00 and 60403/00, § 142, 26 July 2007).

177. The circumstances in which deprivation of life may be justified must be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also require that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see *Solomou and Others*, cited above, § 63). In particular, the Court has held that the opening of fire should, whenever possible, be preceded by warning shots (see *Kallis and Androulla Panayi v. Turkey*, no. 45388/99, § 62, 27 October 2009; see also, in particular, paragraph 10 of the UN Principles, paragraph 154 above).

178. The use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others (see *McCann and Others*, cited above, § 200, and *Andronicou and Constantinou*, cited above, § 192).

179. When called upon to examine whether the use of lethal force was legitimate, the Court, detached from the events at issue, cannot substitute its own assessment of the situation for that of an officer who was required to react in the heat of the moment to avert an honestly perceived danger to his life (see *Bubbins v. the United Kingdom*, no. 50196/99, § 139, ECHR 2005II).

180. The Court must also be cautious in taking on the role of a first instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see, for example, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them (see, among many other authorities, *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no. 247B, and *Klaas v. Germany*, 22 September 1993, § 29, Series A no. 269). Though the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts (see *Avşar*, cited above, § 283, and *Barbu Anghelescu v. Romania*, no. 46430/99, § 52, 5 October 2004).

181. To assess the factual evidence, the Court adopts the standard of proof "beyond reasonable doubt", but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained may also be taken into account (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25, and *Orhan v. Turkey*, no. 25656/94, § 264, 18 June 2002). Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (see *Ribitsch v. Austria*, 4 December 1995, § 32, Series A no. 336; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 26, ECHR 2004VII; *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005VII; and *Solomou and Others*, cited above, § 66).

182. The Court must be especially vigilant in cases where violations of Articles 2 and 3 of the Convention are alleged (see, *mutatis mutandis*, *Ribitsch*, cited above, § 32). When there have been criminal proceedings in the domestic courts concerning such allegations, it must be borne in mind that criminal law liability is distinct from the State's responsibility under the Convention. The Court's competence is confined to the latter. Responsibility under the Convention is based on its own provisions which are to be interpreted in the light of the object and purpose of the Convention, taking into account any relevant rules or principles of international law. The responsibility of a State under the Convention, arising for the acts of its organs, agents and servants, is not to be confused with the domestic legal issues of individual criminal responsibility under examination in the national criminal courts. The Court is not concerned with reaching any findings as to guilt or innocence in that sense (see *Tanlı v. Turkey*, no. 26129/95, § 111, ECHR 2001III, and *Avşar*, cited above, § 284).

(b) Application of these principles to the present case

183. The Court deems it appropriate to begin its analysis on the basis of the following facts, which are not disputed between the parties. On 20 July 2001, during the day, numerous clashes had taken place between demonstrators and the law-enforcement agencies: in particular, Marassi Prison had come under attack (see paragraph 134 above), the *carabinieri* had charged the *Tute Bianche* march (see paragraphs 18-19, 122-124 and 132-136 above) and an armoured vehicle belonging to the *carabinieri* had been set on fire (see paragraph 20 above). Following these incidents, at around 5 p.m., when the situation was relatively calm, a battalion of *carabinieri* took up positions on Piazza Alimonda, where two Defender jeeps were located; on board one of the jeeps were two *carabinieri*, M.P. and D.R., who were unfit to remain on duty (see paragraphs 21, 23 and 29 above).

184. Shortly afterwards, the *carabinieri* left their positions to confront a group of

aggressive demonstrators; the jeeps followed the *carabinieri*. However, the latter were forced to retreat rapidly as the demonstrators succeeded in repelling the charge. The jeeps then tried to reverse away, but the one in which M.P. and D.R. were travelling found its way blocked by an overturned refuse container and was unable to leave the scene rapidly as its engine had stalled (see paragraphs 21-22 above).

185. This is one of those rare cases in which the moments leading up to and following the use of lethal force by a State agent were photographed and filmed. Accordingly, the Court cannot but attach considerable importance to the video footage produced by the parties, which it had the opportunity to view (see paragraphs 9 and 139 above) and the authenticity of which has not been called into question.

186. This footage and the photographs in the file show that, as soon as it became hemmed in by the refuse container, the jeep driven by F.C. was attacked and at least partially surrounded by the demonstrators, who launched an unrelenting onslaught on the vehicle and its occupants, tilting it sideways and throwing stones and other hard objects. The jeep's rear window was smashed and a fire extinguisher was thrown into the vehicle, which M.P. managed to fend off. The footage and photographs also show one demonstrator thrusting a wooden beam through the side window, causing shoulder injuries to D.R., the other *carabiniere* who had been taken off duty (see paragraph 84 above).

187. This was quite clearly an unlawful and very violent attack on a vehicle of the law-enforcement agencies which was simply trying to leave the scene and posed no threat to the demonstrators. Whatever may have been the demonstrators' intentions towards the vehicle and/or its occupants, the fact remains that the possibility of a lynching could not be excluded, as the Genoa District Court also pointed out (see paragraph 128 above).

188. The Court reiterates in that regard the need to consider the events from the viewpoint of the victims of the attack at the time of the events (see paragraph 179 above). It is true, for instance, that other *carabinieri* were positioned nearby who could have intervened to assist the jeep's occupants had the situation degenerated further. However, this fact could not have been known to M.P., who, injured and panic-stricken, was lying in the rear of the vehicle surrounded by a large number of demonstrators and who therefore could not have had a clear view of the positioning of the troops on the ground or the logistical options available to them. As the footage shows, the jeep was entirely at the mercy of the demonstrators shortly before the fatal shooting.

189. In the light of the foregoing, and bearing in mind the extremely violent nature of the attack on the jeep, as seen on the images which it viewed, the Court considers that M.P. acted in the honest belief that his own life and physical integrity, and those of his colleagues, were in danger because of the unlawful attack to which they were being subjected. M.P. was accordingly entitled to use appropriate means to defend himself and the other occupants of the jeep.

190. The photographs show, and the statements made by M.P. and some of the demonstrators confirm (see paragraphs 36, 39 and 45 above), that before firing, M.P. had shown his pistol by stretching out his hand in the direction of the jeep's

rear window, and had shouted at the demonstrators to leave unless they wanted to be killed. In the Court's view, M.P'.s actions and words amounted to a clear warning that he was about to open fire. Moreover, the photographs show at least one demonstrator hurrying away from the scene at that precise moment.

191. In this extremely tense situation Carlo Giuliani decided to pick up a fire extinguisher which was lying on the ground, and raised it to chest height with the apparent intention of throwing it at the occupants of the vehicle. His actions could reasonably be interpreted by M.P. as an indication that, despite the latter's shouted warnings and the fact that he had shown his gun, the attack on the jeep was not about to cease or diminish in intensity. Moreover, the vast majority of the demonstrators appeared to be continuing the assault. M.P'.s honest belief that his life was in danger could only have been strengthened as a result. In the Court's view, this served as justification for recourse to a potentially lethal means of defence such as the firing of shots.

192. The Court further notes that the direction of the shots was not established with certainty. According to one theory supported by the prosecuting authorities' experts (see paragraphs 60-62 above), which was contested by the applicants (see paragraphs 80 and 159 above) but accepted by the Genoa investigating judge (see paragraphs 87-91 above), M.P. had fired upwards and one of the bullets had hit the victim after being accidentally deflected by one of the numerous stones thrown by the demonstrators. Were it to be proven that the events occurred in this manner, it would have to be concluded that Carlo Giuliani's death was the result of a stroke of misfortune, a rare and unforeseeable occurrence having caused him to be struck by a bullet which would have otherwise have disappeared into the air (see, in particular, *Bakan v. Turkey*, no. 50939/99, §§ 52-56, 12 June 2007, in which the Court ruled out any violation of Article 2 of the Convention, finding that the fatal bullet had ricocheted before hitting the applicants' relative).

193. However, in the instant case the Court does not consider it necessary to examine the well-foundedness of the "intermediate object theory", on which there was disagreement between the experts who conducted the third set of ballistics tests, the applicants' experts and the findings of the autopsy report (see paragraphs 60-62, 66 and 50 above). It simply observes that, as the Genoa investigating judge rightly remarked (see paragraph 92 above), and as shown by the photographs, M.P'.s field of vision was restricted by the jeep's spare wheel, since he was half-lying or crouched on the floor of the vehicle. Given that, in spite of his warnings, the demonstrators were persisting in their attack and that the danger he faced – in particular, a likely second attempt to throw a fire extinguisher at him – was imminent, M.P. could only fire, in order to defend himself, into the narrow space between the spare wheel and the roof of the jeep. The fact that a shot fired into that space risked causing injury to one of the assailants, or even killing him, as was sadly the case, does not in itself mean that the defensive action was excessive or disproportionate.

194. In the light of the foregoing, the Court concludes that in the instant case the use of lethal force was absolutely necessary "in defence of any person from

unlawful violence" within the meaning of Article 2 § 2 (a) of the Convention (see paragraph 176 above).

195. It follows that there has been no violation of Article 2 in its substantive aspect in this regard.

196. This finding makes it unnecessary for the Court to consider whether the use of force was also unavoidable "in action lawfully taken for the purpose of quelling a riot or insurrection" within the meaning of subparagraph (c) of paragraph 2 of Article 2.

B. Whether the respondent State took the necessary legislative, administrative and regulatory measures to reduce as far as possible the adverse consequences of the use of force

197. As they had done before the Chamber, the applicants also complained of deficiencies in the domestic legislative framework. The Government contested their arguments. The Chamber did not address these issues.

[...]

3. The Court's assessment

(a) General principles

208. Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998III, and *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports* 1998VIII).

209. The primary duty on the State to secure the right to life entails, in particular, putting in place an appropriate legal and administrative framework defining the limited circumstances in which law enforcement officials may use force and firearms, in the light of the relevant international standards (see *Makaratzis v. Greece* [GC], no. 50385/99, §§ 57-59, ECHR 2004XI, and *Bakan*, cited above, § 49; see also the relevant paragraphs of the UN Principles, paragraph 154 above). In line with the principle of strict proportionality inherent in Article 2 (see paragraph 176 above), the national legal framework must make recourse to firearms dependent on a careful assessment of the situation (see, *mutatis mutandis*, *Nachova and Others*, cited above, § 96). Furthermore, the national law regulating policing operations must secure a system of adequate and effective safeguards against arbitrariness and abuse of force and even against avoidable accident (see *Makaratzis*, cited above, § 58).

210. Applying these principles, the Court has, for instance, characterised as deficient the Bulgarian legal framework which permitted the police to fire on any

fugitive member of the armed forces who did not surrender immediately in response to an oral warning and the firing of a warning shot in the air, without containing any clear safeguards to prevent the arbitrary deprivation of life (see *Nachova and Others*, cited above, §§ 99-102). The Court also identified deficiencies in the Turkish legal framework, adopted in 1934, which listed a wide range of situations in which a police officer could use firearms without being liable for the consequences (see *Erdoğan and Others v. Turkey*, no. 19807/92, §§ 77-78, 25 April 2006). On the other hand, it held that a regulation setting out an exhaustive list of situations in which gendarmes could make use of firearms was compatible with the Convention. The regulation specified that the use of firearms should only be envisaged as a last resort and had to be preceded by warning shots, before shots were fired at the legs or indiscriminately (see *Bakan*, cited above, § 51).

(b) Application of these principles to the present case

211. The Court notes that the Genoa investigating judge took the view that the legitimacy of the use of force by M.P. should be assessed in the light of Articles 52 and 53 of the CC. It therefore considers that these provisions constituted, in the instant case, the legal framework defining the circumstances in which the use of firearms was authorised.

212. The first of these provisions concerns the ground of justification of self-defence, a common concept in the legal systems of the Contracting States. It refers to the "need" for defensive action and the "real" nature of the danger, and requires the defensive response to be proportionate to the attack (see paragraph 144 above). Even though the terms used are not identical, this provision echoes the wording of Article 2 of the Convention and contains the elements required by the Court's case-law.

213. Although Article 53 of the CC is couched in vaguer terms, it nevertheless refers to the person concerned being "obliged" to act in order to repel an act of violence (see paragraph 143 above).

214. It is true that from a purely semantic viewpoint the "need" mentioned in the Italian legislation appears to refer simply to the existence of a pressing need, whereas "absolute necessity" for the purposes of the Convention requires that, where different means are available to achieve the same aim, the means which entails the least danger to the lives of others must be chosen. However, this is a difference in the wording of the law which can be overcome by the interpretation of the domestic courts. As is clear from the decision to discontinue the case, the Italian courts have interpreted Article 52 of the CC as authorising the use of lethal force only as a last resort where other, less damaging, responses would not suffice to counter the danger (see paragraph 101 above, which mentions the references made by the Genoa investigating judge to the Court of Cassation's case-law in this sphere).

215. It follows that the differences between the standards laid down and the term "absolutely necessary" in Article 2 § 2 are not sufficient to conclude on this

basis alone that no appropriate domestic legal framework existed (see *Perk and Others v. Turkey*, no. 50739/99, § 60, 28 March 2006, and *Bakan*, cited above, § 51; see also, conversely, *Nachova and Others*, cited above, §§ 96-102).

216. The applicants next complained of the fact that the lawenforcement agencies had not been equipped with non-lethal weapons, and in particular with guns firing rubber bullets. However, the Court notes that the officers on the ground had available to them means of dispersing and controlling the crowd which were not life-threatening, in the form of tear gas (see, conversely, *Güleç*, cited above, § 71, and *Şimşek*, cited above, §§ 108 and 111). In general terms, there is room for debate as to whether law-enforcement personnel should also be issued with other equipment of this type, such as water cannons and guns using non-lethal ammunition. However, such discussions are not relevant in the present case, in which a death occurred not in the course of an operation to disperse demonstrators and control a crowd of marchers, but during a sudden and violent attack which, as the Court has just observed (see paragraphs 185-189 above), posed an imminent and serious threat to the lives of three *carabinieri*. The Convention, as interpreted by the Court, provides no basis for concluding that law-enforcement officers should not be entitled to have lethal weapons at their disposal to counter such attacks.

217. Lastly, as to the applicants' submission that some *carabinieri* had used non-regulation weapons such as metal batons (see paragraph 201 above), the Court does not discern any connection between this circumstance and the death of Carlo Giuliani.

218. It follows that there has been no violation of Article 2 of the Convention in its substantive aspect as regards the domestic legislative framework governing the use of lethal force or as regards the weapons issued to the law-enforcement agencies during the G8 summit in Genoa.

C. Whether the organisation and planning of the policing operations were compatible with the obligation to protect life arising out of Article 2 of the Convention

219. The applicants submitted that the State's responsibility was also engaged on account of shortcomings in the planning, organisation and management of the public-order operations. The Government contested that argument.

[...]

3. The Court's assessment

(a) General principles

244. According to the Court's case-law, Article 2 may imply in certain well-defined circumstances a positive obligation on the authorities to take preventive

operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see *Mastromatteo v. Italy* [GC], no. 37703/97, § 67 *in fine*, ECHR 2002VIII; *Branko Tomašić and Others v. Croatia*, no. 46598/06, § 50, ECHR 2009...; and *Opuz v. Turkey*, no. 33401/02, § 128, ECHR 2009...).

245. That does not mean, however, that a positive obligation to prevent every possibility of violence can be derived from this provision. The obligation in question must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources (see *Osman*, cited above, § 116, and *Maiorano and Others v. Italy*, no. 28634/06, § 105, 15 December 2009).

246. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. The Court has held that a positive obligation will arise where the authorities knew or ought to have known of the existence of a real and immediate risk to the life of an identified individual or individuals and failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (see *Bromiley v. the United Kingdom* (dec.), no. 33747/96, 23 November 1999; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 55, ECHR 2002II; and *Branko Tomašić*, cited above, §§ 50-51).

247. In this connection it should be pointed out that in *Mastromatteo* (cited above, § 69), the Court drew a distinction between cases concerning the requirement of personal protection of one or more individuals identifiable in advance as the potential target of a lethal act (see *Osman* and *Paul and Audrey Edwards*, both cited above; see also the judgments adopted in the wake of *Mastromatteo*, namely *Branko Tomašić*, cited above, and *Opuz*, cited above), and those in which the obligation to afford general protection to society was in issue (see *Maiorano and Others*, cited above, § 107).

248. Furthermore, for the State's responsibility under the Convention to be engaged, it must be established that the death resulted from a failure on the part of the national authorities to do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge (see *Osman*, cited above, § 116; *Mastromatteo*, cited above, § 74; and *Maiorano and Others*, cited above, § 109).

249. According to its case-law, the Court must examine the planning and control of a policing operation resulting in the death of one or more individuals in order to assess whether, in the particular circumstances of the case, the authorities took appropriate care to ensure that any risk to life was minimised and were not negligent in their choice of action (see *McCann and Others*, cited above, §§ 194 and 201, and *Andronicou and Constantinou*, cited above, § 181). The use of lethal force by police officers may be justified in certain circumstances. Nonetheless, Article 2 does not grant a *carte blanche*. Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that

policing operations must be sufficiently regulated by national law, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force. Accordingly, the Court must take into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination. Police officers should not be left in a vacuum when performing their duties: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect (see *Makaratzis*, cited above, §§ 58-59).

250. In particular, law-enforcement agents must be trained to assess whether or not there is an absolute necessity to use firearms, not only on the basis of the letter of the relevant regulations, but also with due regard to the pre-eminence of respect for human life as a fundamental value (see *Nachova and Others*, cited above, § 97; see also the Court's criticism of the "shoot to kill" instructions given to soldiers in *McCann and Others*, cited above, §§ 211-214).

251. Lastly, it should not be overlooked that Carlo Giuliani's death occurred in the course of a mass demonstration. While it is the duty of Contracting States to take reasonable and appropriate measures with regard to lawful demonstrations to ensure their peaceful conduct and the safety of all citizens, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used. In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved (see *Plattform "Ärzte für das Leben" v. Austria*, 21 June 1988, § 34, Series A no. 139; *Oya Ataman v. Turkey*, no. 74552/01, § 35, ECHR 2006XIII; and *Protopapa v. Turkey*, no. 16084/90, § 108, 24 February 2009). However, it is important that preventive security measures such as, for example, the presence of first aid services at the site of demonstrations, be taken in order to guarantee the smooth conduct of any event, meeting or other gathering, be it political, cultural or of another nature (see *Oya Ataman*, cited above, § 39). Moreover, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance (see *Patyi and Others v. Hungary*, no. 5529/05, § 43, 7 October 2008). On the other hand, interferences with the right guaranteed by that provision are in principle justified for the prevention of disorder or crime and for the protection of the rights and freedoms of others where demonstrators engage in acts of violence (see *Protopapa*, cited above, § 109).

(b) Application of these principles to the present case

252. The Court notes first of all that the demonstrations surrounding the G8 summit in Genoa degenerated into violence. On 20 July 2001 numerous clashes took place between the law-enforcement agencies and a section of the demonstra-

tors. This is amply demonstrated by the video footage produced by the parties. These images also show violence being perpetrated by some police officers against demonstrators (see paragraph 139 above).

253. The fact remains, however, that the present application does not concern the organisation of the public-order operations during the G8 as a whole. It is confined to examining, among other things, whether, in the organisation and planning of that event, failings occurred which can be linked directly to the death of Carlo Giuliani. In that connection it should be noted that violent incidents had been observed well before the tragic events on Piazza Alimonda. In any event, there are no objective grounds for believing that, had those violent incidents not occurred, and had the *Tute Bianche* march not been charged by the *carabinieri*, M.P. would not have fired shots to defend himself against the unlawful violence to which he was being subjected. The same conclusion must be reached as regards the changes to the instructions issued to the *carabinieri* on the eve of the events and the choice of communications system.

254. The Court observes in that regard that the intervention of the *carabinieri* on Via Caffa (see paragraphs 42-44 above) and the attack on the jeep by demonstrators took place at a time of relative calm when, following a long day of clashes, the detachment of *carabinieri* had taken up position on Piazza Alimonda in order to rest, regroup and allow the injured officers to board the jeeps. As the footage shows, the clash between demonstrators and law-enforcement officers occurred suddenly and lasted only a few minutes before the fatal shooting. It could not have been predicted that an attack of such violence would take place in that precise location and in those circumstances. Moreover, the reasons which drove the crowd to act as it did can only be speculated upon.

255. It should also be noted that the Government had deployed considerable numbers of personnel to police the event (18,000 officers – see paragraphs 141 and 237 above) and that all the personnel either belonged to specialised units or had received *ad hoc* training in maintaining order during mass gatherings. M.P., in particular, had taken part in training courses in Velletri (see paragraphs 108-109 and 237 above; contrast *Makaratzis*, cited above, § 70). In view of the very large numbers of officers deployed on the ground, they could not all be required to have lengthy experience and/or to have been trained over several months or years. To hold otherwise would be to impose a disproportionate and unrealistic obligation on the State. Furthermore, as the Government rightly stressed (see paragraph 233 above), a distinction has to be made between cases where the law-enforcement agencies are dealing with a precise and identifiable target (see, for instance, *McCann and Others* and *Andronicou and Constantinou*, both cited above) and those where the issue is the maintenance of order in the face of possible disturbances spread over an area as wide as an entire city, as in the instant case. Only in the first category of cases can all the officers involved be expected to be highly specialised in dealing with the task assigned to them.

256. It follows that no violation of Article 2 of the Convention can be found solely on the basis of the selection, for the G8 summit in Genoa, of a *carabiniere*

who, like M.P., was only twenty years and eleven months of age at the material time and had been serving for only ten months (see paragraph 35 above). The Court also points out that it has already held that M.P'.s actions during the attack on the jeep did not amount to a breach of Article 2 in its substantive aspect (see paragraphs 194-195 above). It has not been established that he took unconsidered initiatives or acted without proper instructions (contrast *Makaratzis*, cited above, § 70).

257. It therefore remains to be ascertained whether the decisions taken on Piazza Alimonda immediately before the attack on the jeep by the demonstrators were in breach of the obligation to protect life. To that end the Court must take account of the information available to the authorities at the time the decisions were taken. There was nothing at that juncture to indicate that Carlo Giuliani, more than any other demonstrator or any of the persons present at the scene, was the potential target of a lethal act. Hence, the authorities were not under an obligation to provide him with personal protection, but were simply obliged to refrain from taking action which, in general terms, was liable to clearly endanger the life and physical integrity of any of the persons concerned.

258. The Court considers it conceivable, in an emergency situation such as that prevailing after the clashes of 20 July 2001, that the law-enforcement agencies might have to use non-armoured logistical support vehicles to transport injured officers. Likewise, it does not appear unreasonable not to have required the vehicles concerned to travel to hospital immediately, as this would have placed them at risk of crossing, without protection, a part of the city where further disturbances could have broken out. Before the attack in Via Caffa which, as the Court has just observed, was entirely sudden and unforeseeable (see paragraph 254 above), everything seemed to indicate that the jeeps were better protected on Piazza Alimonda, where they were next to a contingent of *carabinieri*. Furthermore, there is nothing in the file to suggest that the physical condition of the *carabinieri* in the jeep was so serious that they needed to be taken to hospital straightaway as a matter of urgency; the officers concerned were for the most part suffering from the effects of prolonged exposure to tear gas.

259. The jeeps next followed the detachment of *carabinieri* when the latter moved off towards Via Caffa; the reasons for this decision are not clear from the file. It may be that the move was made to avoid being cut off, which, as subsequent events demonstrated, could have been extremely dangerous. Furthermore, when the move was made, there was no reason to suppose that the demonstrators would be able to force the *carabinieri*, as they did, to withdraw rapidly and in disorderly fashion, thereby prompting the jeeps to retreat in reverse gear and leading to one of them becoming hemmed in. The immediate cause of these events was the violent and unlawful attack by the demonstrators. It is quite clear that no operational decision previously taken by the law-enforcement agencies could have taken account of this unforeseeable element. Moreover, the fact that the communications system chosen apparently only allowed information to be exchanged between the police and *carabinieri* control centres, but not direct radio contact between the police officers and *carabinieri* themselves (see paragraph 222

above), is not in itself sufficient basis for finding that there was no clear chain of command, a factor which, according to the Court's case-law, is liable to increase the risk of some police officers shooting erratically (see *Makaratzis*, cited above, § 68). M.P. was subject to the orders and instructions of his superior officers, who were present on the ground.

260. Moreover, the Court does not see why the fact that M.P. was injured and deemed unfit to remain on duty should have led those in command to take his weapon from him. The weapon was an appropriate means of personal defence with which to counter a possible violent and sudden attack posing an imminent and serious threat to life, and was indeed used for that precise purpose.

261. Lastly, as regards the events following the fatal shooting (see paragraph 229 above), the Court observes that there is no evidence that the assistance afforded to Carlo Giuliani was inadequate or delayed or that the jeep drove over his body intentionally. In any case, as demonstrated by the autopsy report (see paragraph 50 above), the brain injuries sustained as a result of the shot fired by M.P. were so severe that they resulted in death within a few minutes.

262. It follows that the Italian authorities did not fail in their obligation to do all that could reasonably be expected of them to provide the level of safeguards required during operations potentially involving the use of lethal force. There has therefore been no violation of Article 2 of the Convention on account of the organisation and planning of the policing operations during the G8 summit in Genoa and the tragic events on Piazza Alimonda.

IV. Questions for the Students

Question 1

In a joint, partly dissenting opinion, Judges Tulkens, Zupančič, Gyulumyan and Karakaş argue that the use of force by MP was not absolutely necessary as he fired shots at chest height without prior warning shots. Rather, only the firing of warning shots would have been justified under Article 2 of the ECHR. According to these Judges, the shots fired by MP were motivated by his attempts to defend himself against the overall danger created by the assailants on the Jeep and not against Carlo Giuliani's unlawful action (namely, Giuliani's approaching the Jeep brandishing a fire extinguisher above his chest, prompting fears that he might use it as a blunt instrument) as suggested in the judgment by the majority (paragraphs 189–191).

Although admitting that 'the jeep was surrounded by demonstrators and that various objects were being thrown at it', the dissenting Judges stressed that 'no one with the exception of Carlo Giuliani' was attacking MP directly. It follows that, if MP did not see Giuliani approaching with a fire extinguisher and was therefore only seeking to defend himself against the demonstrators'

assault on the jeep rather than against Carlo Giuliani individually, it 'cannot be concluded' that there was a threat to MP's person 'of such imminence that only shots fired at chest height could have averted it'. Hence the firing of shots into the air would probably have been enough to disperse the assailants. Reflect on this articulated reasoning. Does the view of the dissenting Judges persuade you? How does the majority's approach towards proportionality under Article 2(2) differ from that of the dissenting Judges?

Question 2

The Grand Chamber observes that the Italian Government had deployed a considerable number of personnel to police the event (18,000 officers) and that all the personnel either belonged to specialised units or had received specific training concerning public order operations. It further added, however, that '[i]n view of the very large numbers of officers deployed on the ground, they could not all be required to have lengthy experience and/or to have been trained over several months or years'. Hence, no violation of Article 2 of the ECHR could be found solely on the basis of the selection for the G8 summit in Genoa of a *carabiniere* who, like MP, was only twenty years old and had been serving for only ten months (paragraphs 255–256).

By contrast, the dissenting Judges argue that there was a lack of organisation imputable to the State and triggering responsibility under Article 2 of the ECHR. According to these Judges:

> ... [G]iven his [of MP] youth and lack of experience, it is difficult to accept the fact that he did not receive more support from his superior officers and, above all, that he was not given particular attention once he had been judged unfit to continue on active duty because of his physical and mental state. In these circumstances, moreover, the fact that he was left in possession of a gun loaded with live ammunition is especially problematic. [...] [T]he failings in the organisation of the law-enforcement operations should be assessed from the standpoint of both the criteria for selecting the armed carabinieri deployed in Genoa and the failure to give proper consideration to the particular situation of M.P., who, despite being in a state of distress and panic, had been left in a vehicle which was not adequately protected, with a lethal weapon as his only means of defence.

Do you agree with the argument of the dissenting Judges? Was the Grand Chamber too lenient in its appraisal of the circumstances concerning the organisation of the G8?

Question 3

In their joint, partly dissenting opinion, Judges Rozakis, Tulkens, Zupančič, Gyulumyan, Ziemele, Kalaydjieva and Karakaş disagree with the majority by

arguing that the shortcomings in the organisation and planning of the G8, which included the lack of an appropriate legislative framework governing the use of firearms, and the shortcomings in the preparation of the policing operations and in the training of the law enforcement personnel, were linked directly to the death of Carlo Giuliani. They suggest that, if the appropriate measures had been taken, the chances of the demonstrators' attack on the Jeep ending so tragically could have been significantly reduced. Do you find the suggestion of the dissenting Judges convincing?

5.2. *The Identification of a Proportional Response in Counter-Terrorism Operations*

Paragraph 2 of Article 2 of the ECHR sets out the parameters within which the use of potentially lethal force by public authorities may be justified. The text of Article 2, read as a whole, demonstrates that Article 2(2) does not primarily define instances where intentional deprivation of life is permitted as Article 2(1) does. Instead, it describes the exceptional situations where it is permitted to "use force" which may result in the deprivation of life.[2] For a given use of force to be permitted under these exceptions it must also be no more than 'absolutely necessary'. The standard of absolute necessity is stricter than that employed when determining whether State action is considered 'necessary in a democratic society' under Articles 8 to 11 of the Convention.[3] It must be strictly proportionate to the achievement of one or more of the aims set out in Article 2(2) of the ECHR.[4] This means that, 'in keeping with the importance of this provision in a democratic society', the ECtHR subjects deprivations of life to the most careful scrutiny.[5] It does not mean, however, that the conduct

[2] *Giuliani and Gaggio v Italy*, App no. 23458/02 (ECtHR [GC] 24 March 2011) para. 175. See also *Stewart v the United Kingdom*, App no. 10044/82 (ECommHR 10 July 1984) para. 15; *McCann and Others v the United Kingdom*, App no 18984/91 (ECtHR [GC] 27 September 1995) para. 148; *Oğur v Turkey*, App no 21594/93 (ECtHR [GC] 20 May 1999) para. 78; *Makaratzis v Greece*, App no 50385/99 (ECtHR [GC] 20 December 2004) para. 49; *Ramsahai and Others v the Netherlands,* App no. 52391/99 (ECtHR [GC] 15 May 2007) para. 286; *Makaratzis v Greece*, App no 50385/99 (ECtHR [GC] 20 December 2004) para. 49; *Al-Skeini and Others v the United Kingdom*, App no. 55721/07 (ECtHR [GC] 7 July 2011) para. 162.

[3] *McCann and Others v the United Kingdom*, App no 18984/91 (ECtHR [GC] 27 September 1995) para. 149. See also *Cangöz and Others v Turkey*, App no 7469/06 (ECtHR 26 April 2016) paras. 105-106.

[4] *McCann and Others v the United Kingdom*, App no 18984/91 (ECtHR [GC] 27 September 1995) para. 149.

[5] Ibid, para. 150. Article 2 may cover not only uses of force resulting in death, but also physical ill-treatment by State agents inflicting injury short of death. This, however, can occur only in 'ex-

of public authorities can be assessed with the benefit of hindsight, but rather that it should be reviewed in light of all the information reasonably available to them at the critical date. Being detached from the events at issue, the ECtHR cannot substitute its own assessment of the situation for that of an officer forced to react in the heat of the moment.[6] The scrutiny of the ECtHR extends to both the conduct of State agents using force in a given situation and that of those in charge of managing and planning operations where force is or may be employed. In the latter case, the ECtHR reviews the planning and control of a policing operation to assess whether the 'authorities took appropriate care to ensure that any risk to life was minimised and were not negligent in their choice of action'.[7]

As a part of the reasoning to determine whether the standard of absolute necessity has been complied with, the jurisprudence of the ECtHR has relied on the principle of proportionality. Proportionality is a principle used in many areas of public international law (though not necessarily with the same meaning), and is employed by the ECtHR in the application of several provisions of the ECHR.[8] It may be described as a legal tool that oils the wheels of a legal system, tempering, when needed, its rigidity. It helps the interpreter to identify what the outcome should be and whose rights should prevail in difficult factual scenarios, when competing rights and expectations equally recognised by that system pull in different directions and thus would lead to different outcomes if compromise could not be reached. Proportionality involves identifying an appropriate balance between the legitimate aims pursued and the means employed to achieve them.

Note, however, that there is no 'magic' – let alone predetermined – formula to determine what proportionate means in a given case, that is, what an appropriate balance between the competing expectations is. Determining what is proportionate is a fact-sensitive matter that falls within the discretion of judges. It is a subjective evaluation and, yet, it is not unfettered. In cases concern-

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ceptional circumstances'. Whether a case of assault or ill-treatment falls under Article 2 of the ECHR (and not Article 3 as typical) depends on, for instance, the degree and type of force used and the intention or aim behind the use of force, among others. See *Makaratzis v Greece*, App no 50385/99 (ECtHR [GC] 20 December 2004) para. 51.

[6] *Bubbins v the United Kingdom*, App no. 50196/99 (ECtHR 17 March 2005) para. 139.

[7] *McCann and Others v the United Kingdom*, App no 18984/91 (ECtHR [GC] 27 September 1995) paras. 194 and 201; *Andronicou and Constantinou v Cyprus*, App no. 25052/94 (ECtHR 9 October 1997) para. 181; *Giuliani and Gaggio v Italy*, App no. 23458/02 (ECtHR [GC] 24 March 2011) para. 249.

[8] See Emily Crawford, 'Proportionality', in Rüdiger Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law* (OUP 2012). See also Enzo Cannizzaro and Francesca de Vittor, 'Proportionality in the European Convention on Human Rights', in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013) 125-138.

ing the use of force, it involves appraising whether the amount and kind of force (such as the number of agents or the kind of weapons employed in a given operation) deployed to respond to a given threat in the pursuit of a legitimate objective is absolutely necessary to achieve that objective. It also requires giving due consideration to all the relevant facts of the case and taking into account the information available to the author of the conduct in question at the time of the given measure or operation. Some examples of proportionality assessments by the ECtHR are in order.

In *Andronicou and Constantinou v Cyprus*, the Chamber dealt with the case of a young man who was holding his fiancée hostage at gunpoint in their flat, when the police stormed the flat to rescue the fiancée and killed them both. The Chamber found that the killings were 'strictly proportionate'.[9] By five votes to four, it found it not to be disproportionate for the police to have opened fire on a legitimate target, that is, the identified hostage-taker who was known to be in possession of a gun and who had already fired at an officer.[10] By contrast, in *Gül v Turkey*, the Chamber found the massive force employed by the police when breaking into the flat of a suspected terrorist to be disproportionate. The Chamber found that while the suspect 'was unlocking the door, the three police officers opened fire in one long, continuous burst'.[11] The Chamber concluded that the 'firing of at least 50-55 shots at the door was not justified by any reasonable belief of the officers that their lives were at risk from the occupants of the flat'.[12] The conduct of the police was held to be 'grossly disproportionate' to what was reasonably needed in self-defence.[13]

Along these lines, in *Nachova and Others v Bulgaria* the Grand Chamber pointed out that the legitimate aim of carrying out a lawful arrest could only justify a risk of death in circumstances of absolute necessity.[14] The Grand Chamber rebuked the Bulgarian Government for firing in order to arrest fugitives who were not suspected of having committed a violent offence and posed no threat to life. It found that the use of firearms to effectuate an arrest constituted, given the circumstances, 'grossly excessive' use of force.[15]

Even more complex is the determination of a proportionate response when the attackers are numerous and resort to massive uses of force, and the lives of

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[9] *Andronicou and Constantinou v Cyprus*, App no 25052/94 (ECtHR 9 October 1997) paras. 171 and 193.

[10] Ibid, para. 194 and Disposition.

[11] *Gül v Turkey*, App no 22676/93 (ECtHR 14 December 2000) para. 81.

[12] Ibid, para. 82.

[13] Ibid.

[14] *Nachova and Others v Bulgaria*, App nos 43577/98 and 43579/98 (ECtHR [GC] 6 July 2005) para. 107.

[15] Ibid, para. 109.

many people are at stake, as the cases below show. In these kinds of scenarios, the determination of proportionality includes factoring in the possibility that there could be casualties on both sides.

Within the field of IHL, proportionality assessments are routine and include the calculation of the acceptable 'collateral damage' to achieve a legitimate military objective.[16] This is so because IHL permits uses of force directed at a military target as long as it is proportionate in the sense that the incidental civilian harm is not 'excessive in relation to the concrete and direct military advantage anticipated'.[17] By contrast, in the field of human rights law the notion of collateral damage is anathema because it postulates that all human beings have the same rights. Unlike IHL, human rights law does not distinguish between categories of individuals, such as combatants or civilians or 'protected persons', whose rights are different on account of their status. Yet, the more human rights law is applied in situations similar or amounting to armed conflicts, the more the thinking and standards of IHL may, by necessity rather than choice, influence human rights law. Note, however, that also in particularly violent scenarios, the assessment that the ECtHR undertakes remains confined to that of compliance with the ECHR, not IHL, even though the former might be interpreted more flexibly on account of the context.

In *Finogenov and Others v Russia*, the Chamber examined the legality of the use of force during an operation to liberate more than 900 people who had been held hostage at gunpoint by Chechen militants in the Dubrovka theatre in Moscow for more than three days.[18] The theatre building had been booby-trapped and eighteen suicide bombers were positioned in the hall among the hostages.[19] The terrorists demanded the 'withdrawal of Russian troops from the Chechen Republic and direct negotiations involving the political leadership of the federal authorities and the separatist movement'.[20] In the early morning of 26 October 2002, Russian security forces stormed the building after injecting 'an unknown narcotic gas into the main auditorium through the building's ventilation system'.[21] As a result of the operation, approximately

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[16] See, among others, Jean-Marie Henckaerts and Louise Doswald-Beck, *ICRC Customary International Humanitarian Law: Volume I* (CUP 2012) 46-50; Michael Bothe et al, *New Rules for Victims of Armed Conflicts* (2nd ed, Martinus Nijhoff Publishers 2013) 350-351; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd ed, CUP 2016) 149-164.

[17] Ibid. See also Articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1125 UNTS 3.

[18] *Finogenov and Others v Russia*, App nos 18299 and 27311/03 (ECtHR 20 December 2011) para. 8.

[19] Ibid.

[20] Ibid, para. 9.

[21] Ibid, para. 22.

730 people (the exact number is unknown) were released and 129 died. Most of the deaths were caused by 'acute respiratory and cardiac deficiency' induced by the combination of a number of factors.[22]

While the Chamber stressed that any use of lethal force must be no more than 'absolutely necessary', it interpreted this standard rather leniently. Using somewhat imprecise language considering the importance of the standard and the necessity of ensuring consistency in its application, the Chamber stated that 'the Court may occasionally depart from that rigorous standard of 'absolute necessity', because it may simply be impossible to adhere to it 'where certain aspects of the situation lie far beyond the Court's expertise and where the authorities had to act under tremendous time pressure and where their control of the situation was minimal'.[23] Moreover, the Chamber stressed that 'it is acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence'[24] and that 'the magnitude of the crisis of 23-26 October 2002 [had] made that situation truly exceptional'.[25] Hence, it accepted that:

> … in such a situation … agonising decisions had to be made by the domestic authorities. It [the Chamber] is prepared to grant them a margin of appreciation, at least in so far as the military and technical aspects of the situation are concerned, even if now, with hindsight, some of the decisions taken by the authorities may appear open to doubt.[26]

Considering its stance in the passage just cited, the Chamber, not surprisingly, found that the decision to storm the theatre building was justified. The Chamber accepted the Government's argument that 'the concern of the Russian forces was to preserve the lives of the hostages' and not to prevent 'the erosion of the prestige of Russia on the international arena' as submitted by the applicants.[27] To the argument that 'nobody would have been killed' if 'the au-

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[22] The Chamber notes that almost all of the deceased hostages died as a result of:

'... acute respiratory and cardiac deficiency, induced by the fatal combination of negative factors existing ... on 23-26 October 2002, namely severe and prolonged psycho-emotional stress, a low concentration of oxygen in the air of the building (hypoxic hypoxia), prolonged forced immobility, which is often followed by the development of oxygen deprivation of the body (circulatory hypoxia), hypovolemia (water deprivation) caused by the prolonged lack of food and water, prolonged sleep deprivation, which exhausted compensatory mechanisms, and respiratory disorders caused by the effects of an unidentified chemical substance (or substances) applied by the law-enforcement authorities in the course of the special operation to liberate the hostages on 26 October 2002'. See ibid, para. 99.

[23] Ibid, para. 211.

[24] Ibid, para. 212.

[25] Ibid, para. 213.

[26] Ibid.

[27] Ibid, para. 218.

thorities had pursued the negotiations', the Chamber responded that 'the Court must take into account the information available to the authorities at the time of the events'.[28] It determined that the decision to storm the building pursued all three of the legitimate aims listed in Article 2(2). This was because the negotiations had failed in light of unrealistic demands, the risk of massive casualties, and the authorities' correct belief that a forced intervention was the 'lesser evil' in the circumstances.[29]

The Chamber further determined that the decision to use gas against the terrorists, despite the risk of simultaneously poisoning the hostages, was legal. The applicants' argument that the gas was a 'lethal weapon which was used indiscriminately against both terrorists and innocent hostages' was dismissed.[30] The Chamber considered that in the case at hand, the Russian forces had not breached the limit of proportionality and distinguished the situation from the *Isayeva v Russia* case.[31]

In the latter case, the use of force had been found disproportionate because it was held to be incompatible with the standard of care prerequisite to an operation involving the use of lethal force by State agents.[32] The ECtHR had condemned the Russian forces' use of 'airborne bombs to destroy a rebel group which was hiding in a village full of civilians' without taking all feasible precautions to avoid and minimise incidental loss of civilian life.[33] By contrast, in *Finogenov*, the dosage of gas employed was not found to be excessive because it had left the hostages 'a high chance of survival' depending on the efficiency of the authorities' rescue effort.[34] Moreover, the Chamber determined that 'the use of gas was capable of facilitating the liberation of the hostages and reducing the likelihood of explosion, even if it did not remove that risk completely'.[35]

In *Tagayeva and Others v Russia*, the Chamber faced another mass hostage-taking case. This case concerned more than 1,000 people – the majority of whom were children – held hostage by Chechen terrorists in a school in Beslan, North Ossetia. 350 people, including 180 children, were killed by the terrorists and state security forces after unexplained explosions in the school

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[28] Ibid, para. 219.

[29] Ibid, para. 226.

[30] Ibid, paras. 231-236.

[31] Ibid, para. 232.

[32] *Isayeva v Russia*, App no 57950/00 (ECtHR 24 February 2005) para. 191.

[33] *Finogenov and Others v Russia*, App nos 18299 and 27311/03 (ECtHR 20 December 2011) para. 323. See also *Isayeva v Russia*, App no 57950/00 (ECtHR 24 February 2005) paras. 176 and 179-200.

[34] *Finogenov and Others v Russia*, App nos 18299 and 27311/03 (ECtHR 20 December 2011) para. 232.

[35] Ibid, para. 234.

had led Russian military forces, using flame-throwers, grenade launchers and tanks, to storm the school.[36] The Chamber found a violation of the obligation to protect life under Article 2. The Chamber took care, albeit implicitly, to qualify what it had said in *Finogenov*. Rather than repeating verbatim what it had said in *Finogenov* concerning the standard of 'absolute necessity' as the ECtHR so often does, the Chamber elaborated upon the distinction between political choice and operational determinations. It put it thus:

> As the body tasked with supervision of the human rights obligations under the Convention, the Court would need to differentiate between the political choices made in the course of fighting terrorism, that remain by their nature outside of such supervision, and other, more operational aspects of the authorities' actions that have a direct bearing on the protected rights.[37]

It therefore went on to clarify that:

> The absolute necessity test formulated in Article 2 is bound to be applied with different degrees of scrutiny, depending on whether and to what extent the authorities were in control of the situation and other relevant constraints inherent in operative decision-making in this sensitive sphere.[38]

In so doing, the Chamber injected a dose of realism into the interpretation of the 'absolute necessity' test when exceptional circumstances so demand, without stating openly that it could depart from this standard, as it had done in *Finogenov*.

In line with this test, the Chamber in *Tagayeva* did not fault the Russian forces' initial decision to use force.[39] Rather, considering that the Russian authorities had had information about an impending attack involving hostage-taking at a school, the Chamber rebuked them for allowing the terrorists 'to successfully gather, prepare, travel to and seize their target, without encountering any preventive security arrangement' despite the known 'real and immediate risk to the lives of the potential target population'.[40]

Moreover, the Chamber found flaws in the Russian authorities' choice of means and methods during the security operation, given that they had failed to ensure that everything feasible was done to 'minimis[e] incidental loss of ci-

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[36] *Tagayeva and Others v Russia*, App nos 26562/07, 14755/08 and 49339/08 (ECtHR 13 April 2017) para. 100. See also the description of the hostage situation ibid, paras. 21-97.

[37] Ibid, para. 481.

[38] Ibid.

[39] Ibid, paras. 591 and 611.

[40] Ibid, paras. 491-493.

vilian life'.[41] The Chamber rebuked the Russian authorities for exposing to acute danger more than 1,000 people, including hundreds of children, with an indiscriminate choice of weapons. Some of these weapons were, in fact, 'extremely powerful and capable of inflicting heavy damage upon the terrorists and hostages, without distinction'.[42] While conceding that it could not 'substitute its own opinion of the situation for that of security officers who were required to intervene to save human lives', it remained firm in concluding that 'such use of explosive and indiscriminate weapons, with the attendant risk for human life' amounted to 'a massive use of lethal force' that could not be justified under the 'absolute necessity' test of Article 2 of the ECHR.[43]

5.3. *The Criteria for the Exercise of Putative Self-Defence*

In *Armani Da Silva v the United Kingdom*, the Grand Chamber examined the legal consequences of the fatal shooting by two Special Firearms Officers ('SFOs') of Jean Charles de Menezes, a Brazilian national, who had been mistakenly identified as a suicide bomber. The shooting occurred at the Stockwell London Underground Station on 22 July 2005, two weeks after a terrorist attack hit the London public transport system on 7 July 2005.[44] Because of the earlier terrorist attack, in which more than 50 people had died, security forces in London had been put on maximum alert.[45] Mr de Menezes lived in an apartment building sharing a common doorway with the apartment building where two men suspected of the terrorist attacks were thought to live.[46]

At 9:33 a.m. on 22 July 2005, Mr de Menezes left his apartment building through the common doorway to go to work.[47] The Metropolitan Police Ser-

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[41] Ibid, paras. 573-574.

[42] Ibid, para. 608. The Chamber detailed the kind of weapons that had been used, including 'twelve and seventeen RPO-A *Shmel* … about forty charges for a portable flame-thrower LPO-97, at least twenty-eight charges for grenade launchers and eight high-fragmentation shells for a tank cannon.… 7,000 cartridges for automatic and machine guns, over 2,000 tracer bullets, 450 armour-piercing incendiary cartridges for large-calibre machine guns and ten hand grenades … an unknown quantity of other powerful explosive and thermobaric weapons is mentioned in the documents contained in the case file…'.

[43] Ibid, paras. 609-610.

[44] *Armani Da Silva v the United Kingdom*, App no 5878/08 (ECtHR [GC] 30 March 2016) paras. 12 and 15-16.

[45] Ibid, paras. 13-14.

[46] See ibid, paras. 16, 23 and 29.

[47] Ibid, para. 29.

vice ('MPS') had started surveillance of those buildings on that same day. An officer in the surveillance van saw Mr de Menezes and suggested 'it would be worth someone else having a look'.[48] At 9:59 a.m., the surveillance teams were asked to give a percentage indication of the likelihood that Mr de Menezes was the suspect and concluded that it was 'impossible [to do so] but thought that it was [the] suspect'.[49] SFOs were dispatched to the scene with orders to prevent Mr de Menezes from boarding any underground trains. However, by the time they arrived, he had already entered the Stockwell underground station.[50] There, Mr de Menezes was followed onto a train, pinned down and shot several times in the head.[51] The Government's Independent Police Complaints Commission determined that Mr de Menezes was killed due to very serious and avoidable mistakes.[52] The Office of the Commissioner of the Police of the Metropolis ('OCPM') was prosecuted under the Health and Safety Act 1974,[53] but no action was taken against the single individuals who had fired the shots, let alone their commanders.

The applicant, a cousin of Mr de Menezes, complained that the British authorities' failure to prosecute those individuals responsible for her cousin's death gave rise to a violation of the procedural limb of Article 2.[54] The British Prosecutor had decided not to commence criminal prosecutions and had issued two decisions in this regard.[55] The essential point made by the Prosecutor in the first decision was that its task consisted of proving 'beyond reasonable doubt that these two officers did not honestly and genuinely believe that they were facing a lethal threat'.[56] There was not sufficient evidence, however, 'to disprove that they [the State agents] had such an honest and genuine belief'.[57] This conclusion was based on the legal standard applicable in cases of self-defence under English criminal law and practice.[58]

The second decision confirmed the position taken earlier notwithstanding the request for review made by the victim's family.[59] The Grand Chamber de-

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[48] Ibid.

[49] Ibid, para. 34.

[50] Ibid, para. 35.

[51] Ibid, paras. 37 and 44.

[52] See ibid, paras. 52-58 and 136.

[53] Ibid, paras 100-101.

[54] Ibid, para. 186.

[55] Ibid, paras. 76-78 and 132-141.

[56] Ibid, para. 78.

[57] Ibid.

[58] See ibid, paras. 148-154.

[59] Ibid, para. 135.

ferred to the Prosecutor's decisions under the doctrine of the margin of appreciation. It did not consider intervening because it found nothing wrong with the approach followed at the domestic level as that test was not significantly different from the standard applied by the ECtHR. [60]

In *McCann*, the ECtHR had found that the use of force in self-defence against a perceived threat could be justified where it was based on an 'honest belief which is perceived, for good reasons, to be valid at the time [even if it] subsequently turns out to be mistaken'. [61] Similarly, in *Armani Da Silva*, the Grand Chamber found no violation of Article 2 because the officers who shot Mr de Menezes 'honestly believed, in the light of the information that they had been given … that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life'. [62]

Interestingly, the Grand Chamber interpreted the test in a manner that prioritised its subjective dimension, that is, making clear that the existence of 'good reasons' should be determined only subjectively from 'the position of the person who used lethal force'. [63] For the Grand Chamber the principal factor was whether the 'person had an honest and genuine belief that the use of force was necessary'.[64] It fell on the Grand Chamber therefore 'to consider whether the belief was subjectively reasonable, having full regard to the circumstances that pertained at the relevant time'. These elements of subjective reasonability and good reasons were necessary indicators for the Grand Chamber to accept that the belief was honestly and genuinely held.[65]

Notably, three judges in *Armani Da Silva* dissented from the above rationale and its emphasis on subjective belief. The dissenting Judges argued that under the standard set in *McCann*, acts committed in putative self-defence may be exempted from criminal liability when the two conditions of subjective honest belief and objective good reasons are met concurrently.[66] As such, the dissenting Judges believed that the decisive factor in assessing the use of force against Mr de Menezes ought to have been 'whether the police officers' belief that a bomb was about to be detonated was justified in the circumstanc-

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[60] Ibid, para. 252.

[61] *McCann and Others v the United Kingdom*, App no 18984/91 (ECtHR [GC] 27 September 1995) para. 200.

[62] *Armani Da Silva v the United Kingdom*, App no 5878/08 (ECtHR [GC] 30 March 2016) para. 246, citing *McCann and Others v United Kingdom*, App no 18984/91 (ECtHR [GC] 27 September 1995) para. 200.

[63] See *Armani Da Silva v the United Kingdom*, App no 5878/08 (ECtHR [GC] 30 March 2016) paras. 245-248.

[64] Ibid, para. 248.

[65] Ibid.

[66] Ibid, Joint Dissenting Opinion of Judges Karakaş,Wojtyczek and Dedov para. 5.

es' also in an objective sense.[67] They, therefore. criticised the majority for re-interpreting the existing case law by diminishing the importance of this objective element, with the worrying consequence that 'acts committed by the police in putative self-defence as a result of gross negligence may become immune from criminal liability'.[68]

As demonstrated by the view of the dissenting Judges, the interpretative approach adopted in *Armani Da Silva* is very significant. The Grand Chamber indicates that the conduct of a police agent carried out in self-defence should not be evaluated against some general standards of professional conduct or, for instance, on the basis of how a detached observer would have expected the police to behave. Rather, the principal question to be determined under the *McCann* test was whether the person had an 'honest and genuine' belief in the correctness of what he or she was doing in self-defence, regardless of whether that assessment could later turn out to be mistaken. Building on the similarity between the European and the British approaches, the Grand Chamber consequently found no fault with the decision not to prosecute the agents involved in killing Mr de Menezes. [69]

Under the approach adopted by the Grand Chamber in *Armani Da Silva*, a genuine belief in the absolute necessity of the use of force by police agents therefore seems to be sufficient to validate and justify their conduct. The Grand Chamber did not, however, discuss what the concept of 'good reasons' employed in *McCann* really entailed in light of the whole, strongly articulated, reasoning in that judgment. The Grand Chamber also did not clarify what the *McCann* judgment meant by stipulating that the good reasons had 'to be valid at the time', [70] particularly in terms of whether such validity ought also to be assessed from an objective perspective. *Armani Da Silva* simply equated the concept of 'good reasons' with that of 'subjective reasons' without discussing whether the former could also involve a mix of subjective and objective reasons, as a reading of the *McCann* judgment might suggest.

The concern raised here is that the approach in *Armani Da Silva* may turn out to be excessively lax towards public authorities. In principle, the number of instances where uses of force could be potentially justified on the basis of an honest belief of absolute necessity by State agents is countless. As a result, the Grand Chamber in *Armani Da Silva* might have tilted the balance excessively in favour of the right of States to commit genuine mistakes, to the potential detriment of the rights of victims unjustly suffering from those mistakes.

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[67] Ibid, para. 6.

[68] Ibid, para. 5.

[69] Ibid, paras. 277-281 and 286.

[70] See *McCann and Others v the United Kingdom*, App no 18984/91 (ECtHR [GC] 27 September 1995) para. 200.

Appendices

A. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (Preamble and Arts. 1–5)

B. European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5

C. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (adopted 28 April 1983, entered into force 1 March 1985) ETS 114

D. 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 (adopted 3 May 2002, entered into force 1 July 2003) ETS 187

E. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (Preamble and Arts. 1–6)

F. Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414

G. American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (Preamble and Arts. 1–5)

H. African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (Preamble and Arts. 1–5)

I. *Judgment in the Case of the "Street Children" (Villagran-Morales et al) v Guatemala*, IACtHR Series C No 63, IHRL 1446 (IACtHR 19 November 1999)

A. *Universal Declaration of Human Rights*, 10 December 1948 (Preamble and Arts. 1–5)

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are en-

dowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

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

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

B. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

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.

SECTION I
RIGHTS AND FREEDOMS

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.

ARTICLE 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 4

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term "forced or compulsory labour" shall not include:
   (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
   (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
   (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
   (d) any work or service which forms part of normal civic obligations.

ARTICLE 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
   (a) the lawful detention of a person after conviction by a competent court;
   (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and facilities for the preparation of his defence;
   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7

No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9
Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10
Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11
Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

ARTICLE 12

Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

ARTICLE 13

Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

ARTICLE 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

ARTICLE 15

Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

ARTICLE 16
Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

ARTICLE 17
Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

ARTICLE 18
Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

SECTION II
EUROPEAN COURT OF HUMAN RIGHTS

ARTICLE 19
Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as “the Court”. It shall function on a permanent basis.

ARTICLE 20
Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

ARTICLE 21
Criteria for office

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. The judges shall sit on the Court in their individual capacity.
3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

ARTICLE 22
Election of judges

The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

ARTICLE 23
Terms of office and dismissal

1. The judges shall be elected for a period of nine years. They may not be re-elected.
2. The terms of office of judges shall expire when they reach the age of 70.
3. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.
4. No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.

ARTICLE 24
Registry and rapporteurs

1. The Court shall have a Registry, the functions and organisation of which shall be laid down in the rules of the Court.
2. When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's Registry.

ARTICLE 25
Plenary Court

The plenary Court shall

(a) elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
(b) set up Chambers, constituted for a fixed period of time;
(c) elect the Presidents of the Chambers of the Court; they may be re-elected;
(d) adopt the rules of the Court;
(e) elect the Registrar and one or more Deputy Registrars;
(f) make any request under Article 26, paragraph 2.

ARTICLE 26
Single-judge formation, Committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.
2. At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.
3. When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.
4. There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.
5. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.

ARTICLE 27

Competence of single judges

1. A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination.
2. The decision shall be final.
3. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination.

ARTICLE 28

Competence of Committees

1. In respect of an application submitted under Article 34, a committee may, by a unanimous vote,
   (a) declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or
   (b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.
2. Decisions and judgments under paragraph 1 shall be final.
3. If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.(b).

ARTICLE 29

Decisions by Chambers on admissibility and merits

1. If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.
2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

ARTICLE 30
Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

ARTICLE 31
Powers of the Grand Chamber

The Grand Chamber shall

(a) determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43;
(b) decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46, paragraph 4; and
(c) consider requests for advisory opinions submitted under Article 47.

ARTICLE 32
Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.
2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

ARTICLE 33
Inter-State cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.

ARTICLE 34
Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or

the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

ARTICLE 35
Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that
   (a) is anonymous; or
   (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
   (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
   (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.
4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

ARTICLE 36
Third party intervention

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.
2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.
3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.

ARTICLE 37
Striking out applications

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
   (a) the applicant does not intend to pursue his application; or
   (b) the matter has been resolved; or
   (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
2. However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.
3. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

ARTICLE 38
Examination of the case

The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

ARTICLE 39
Friendly settlements

1. At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.
2. Proceedings conducted under paragraph 1 shall be confidential.
3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.
4. This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

ARTICLE 40

Public hearings and access to documents

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.
2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

ARTICLE 41

Just satisfaction

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

ARTICLE 42

Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

ARTICLE 43

Referral to the Grand Chamber

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.
2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.
3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

ARTICLE 44

Final judgments

1. The judgment of the Grand Chamber shall be final.
2. The judgment of a Chamber shall become final
   (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or
   (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or

(c) when the panel of the Grand Chamber rejects the request to refer under Article 43.

3. The final judgment shall be published.

ARTICLE 45

Reasons for judgments and decisions

1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.
2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

ARTICLE 46

Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the committee.
4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph1.
5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

ARTICLE 47

Advisory opinions

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.
2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and

the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the committee.

ARTICLE 48

Advisory jurisdiction of the Court

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

ARTICLE 49

Reasons for advisory opinions

1. Reasons shall be given for advisory opinions of the Court.
2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.
3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

ARTICLE 50

Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

ARTICLE 51

Privileges and immunities of judges

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

SECTION III

MISCELLANEOUS PROVISIONS

ARTICLE 52

Inquiries by the Secretary General

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in

which its internal law ensures the effective implementation of any of the provisions of the Convention.

ARTICLE 53

Safeguard for existing human rights

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

ARTICLE 54

Powers of the Committee of Ministers

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

ARTICLE 55

Exclusion of other means of dispute settlement

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

ARTICLE 56

Territorial application

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-

governmental organisations or groups of individuals as provided by Article 34 of the Convention.

ARTICLE 57

Reservations

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.
2. Any reservation made under this Article shall contain a brief statement of the law concerned.

ARTICLE 58

Denunciation

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.
2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.
3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.
4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

ARTICLE 59

Signature and ratification

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.
2. The European Union may accede to this Convention.
3. The present Convention shall come into force after the deposit of ten instruments of ratification.

4. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.
5. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

DONE AT ROME THIS 4TH DAY OF NOVEMBER 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

C. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, 28 April 1983

THE MEMBER STATES OF THE COUNCIL OF EUROPE, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty;

Have agreed as follows:

ARTICLE 1
Abolition of the death penalty

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

ARTICLE 2
Death penalty in time of war

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

ARTICLE 3
Prohibition of derogations

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

ARTICLE 4
Prohibition of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

ARTICLE 5
Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the date of receipt of such declaration by the Secretary General.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

ARTICLE 6
Relationship to the Convention

As between the States Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.

ARTICLE 7
Signature and ratification

The Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

ARTICLE 8
Entry into force

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.
2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the

month following the date of the deposit of the instrument of ratification, acceptance or approval.

ARTICLE 9

Depositary functions

The Secretary General of the Council of Europe shall notify the member States of the Council of:

(a) any signature;
(b) the deposit of any instrument of ratification, acceptance or approval;
(c) any date of entry into force of this Protocol in accordance with Articles 5 and 8;
(d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT STRASBOURG, THIS 28TH DAY OF APRIL 1983, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

D. 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, 3 May 2002

THE MEMBER STATES OF THE COUNCIL OF EUROPE, signatory hereto,

Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;

Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows:

ARTICLE 1
Abolition of the death penalty

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

ARTICLE 2
Prohibition of derogations

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

ARTICLE 3
Prohibition of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

ARTICLE 4
Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

ARTICLE 5
Relationship to the Convention

As between the States Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

ARTICLE 6
Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

ARTICLE 7
Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 6.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

ARTICLE 8

Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

(a) any signature;
(b) the deposit of any instrument of ratification, acceptance or approval;
(c) any date of entry into force of this Protocol in accordance with Articles 4 and 7;
(d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT VILNIUS, THIS 3RD DAY OF MAY 2002, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

E. *International Covenant on Civil and Political Rights*, 16 December 1966 (Preamble and Arts. 1–6)

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall re-

spect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
   (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
   (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
   (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination sole-

ly on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

F. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 15 December 1989

The States Parties to the present Protocol,

Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,

Recalling article 3 of the Universal Declaration of Human Rights, adopted on 10 December 1948, and article 6 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966,

Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable,

Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,

Desirous to undertake hereby an international commitment to abolish the death penalty,

Have agreed as follows:

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.
2. The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.
3. The State Party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory.

Article 3

The States Parties to the present Protocol shall include in the reports they submit to the Human Rights Committee, in accordance with article 40 of the Covenant, information on the measures that they have adopted to give effect to the present Protocol.

Article 4

With respect to the States Parties to the Covenant that have made a declaration under article 41, the competence of the Human Rights Committee to receive and consider communications when a State Party claims that another State Party is not fulfilling its obligations shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 5

With respect to the States Parties to the first Optional Protocol to the International Covenant on Civil and Political Rights adopted on 16 December 1966, the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 6

1. The provisions of the present Protocol shall apply as additional provisions to the Covenant.
2. Without prejudice to the possibility of a reservation under article 2 of the present Protocol, the right guaranteed in article 1, paragraph 1, of the present Protocol shall not be subject to any derogation under article 4 of the Covenant.

Article 7

1. The present Protocol is open for signature by any State that has signed the Covenant.
2. The present Protocol is subject to ratification by any State that has ratified the Covenant or acceded to it. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified the Covenant or acceded to it.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States that

have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 8

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 9

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 10

The Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:

(a) Reservations, communications and notifications under article 2 of the present Protocol;
(b) Statements made under articles 4 or 5 of the present Protocol;
(c) Signatures, ratifications and accessions under article 7 of the present Protocol:
(d) The date of the entry into force of the present Protocol under article 8 thereof.

Article 11

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.

G. *American Convention on Human Rights*, 22 November 1969 (Preamble and Arts. 1–5)

Preamble

The American states signatory to the present Convention,

Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states;

Considering that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope;

Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights; and

Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters,

Have agreed upon the following:

PART I – STATE OBLIGATIONS AND RIGHTS PROTECTED

CHAPTER I – GENERAL OBLIGATIONS

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, politi-

cal or other opinion, national or social origin, economic status, birth, or any other social condition.
2. For the purposes of this Convention, "person" means every human being.

Article 2. Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

CHAPTER II – CIVIL AND POLITICAL RIGHTS

Article 3. Right to Juridical Personality

Every person has the right to recognition as a person before the law.

Article 4. Right to Life

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be reestablished in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offenses or related common crimes.
5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

Article 5. Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading pun-

ishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

H. African Charter on Human and Peoples' Rights, 27 June 1981 (Preamble and Arts. 1–5)

Preamble

The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples' Rights",

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a "preliminary draft on an African Charter on Human and Peoples' Rights providing inter alia for the establishment of bodies to promote and protect human and peoples' rights";

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations. and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone; Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination,

particularly those based on race, ethnic group, color, sex. language, religion or political opinions;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instrument adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and people' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

Have agreed as follows:

Part I: Rights and Duties

Chapter I: Human and Peoples' Rights

Article 1

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 4

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

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

I. Judgment in the Case of the "Street Children" (*Villagran–Morales et al.*) v. *Guatemala*, Judgment of 19 November 1999

III. Judgment (paras. 137–98)

IX
VIOLATION OF ARTICLE 4

(Right to Life)

137. In the application, the Commission maintained that Guatemala had violated Article 4 of the Convention because two National Police Force agents murdered Henry Giovanni Contreras, Federico Clemente Figueroa Túnchez, Julio Roberto Caal Sandoval, Jovito Josué Juárez Cifuentes and Anstraum Aman Villagrán Morales. The Commission emphasized that "[t]he right to life cannot be annulled" and that "[t]he violation of that norm [...] has not been the object of any corrective".

138. The State did not offer any defense on this point in its answer to the application (*supra*, paras. 67 and 68).

139. In its final arguments, the Commission underscored the *ius cogens* nature of the right to life and the fact that it is the essential basis for the exercise of the other rights. The Commission stated that compliance with Article 4 in relation to Article 1.1 of the Convention, not only presumes that no person shall be deprived of his life arbitrarily (negative obligation), but also requires the States to take all necessary measures to protect and preserve the right to life (positive obligation). It concluded, therefore, that the State had violated two aspects of the said right because, when the events took place, the "street children" were the object of different types of persecution, including threats, harassment, torture and murder. In consequence, there were a great many complaints to which the State should have responded with effective investigations, prosecutions and punishment; however, the State agents who were responsible were rarely investigated or convicted, and this gave rise to the *de facto* impunity that allowed, and even encouraged, the continuation of these violations against the "street children", increasing their vulnerability.

140. The State kept silent on this point in the final arguments (*supra*, paras. 67 and 68).

141. Article 4.1 of the Convention stipulates:

> Every person has the right to have his life respected. This right shall be pro-

tected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

142. In the instant case there is extensive concurring evidence that it was State agents and, more specifically, members of the National Police Force, who murdered Henry Giovanni Contreras, Federico Clemente Figueroa Túnchez, Julio Roberto Caal Sandoval, Jovito Josué Juárez Cifuentes and Anstraum Aman Villagrán Morales. Indeed:

– State agents arrested the four youths whose bodies appeared in the San Nicolás Woods. The events following their seizure, which culminated in the murder of the four youths, involved the use of means of mobilization and aggression that were very similar, if not identical, to those used to carry out the abduction;

– according to several witnesses, those who murdered Anstraum Aman Villagrán Morales – like those who abducted the four youths – acted in the city streets, without hiding their faces, moving discreetly in the sight of numerous persons, to the point that, after having killed the victim, they remained in the neighborhood drinking beer and then returned to the place where the body was lying and threatened potential witnesses, before finally leaving the site.

– Anstraum Aman Villagrán Morales was a friend of the four youths who were abducted and was often with them. On the night of the facts, he had been warned in threatening terms that he would be killed also, by the administrator of the kiosk, who was a friend of the murderers;

– various witnesses who gave declarations to the domestic judges and investigators, some of whom also declared before this Court, stated that the abductors of the four youths and the murderers of Anstraum Aman Villagrán Morales were the same persons;

– parts of bullets fired by police firearms were found, both where the bodies of the first four youths were discovered and where Anstraum Aman Villagrán Morales was killed. In the case of the elements found near the body of Villagrán Morales, tests established that this bullet had been fired by a revolver issued to one of the police agents recognized by the witnesses as the perpetrator of the act;

– investigations conducted by the National Police Force, on the orders of the domestic judges, which were presented during the corresponding judicial proceedings, concluded that the murderers of the youths whose bodies were discovered in the San Nicolás Woods and of Anstraum Aman Villagrán Morales were the two agents identified by witnesses; and

– trustworthy information about the general environment, which has been mentioned above (*supra*, para. 59.c), regarding a generalized pattern of vio-

lence against "street children" by agents of State security units, including, in particular, acts of collective and individual homicide and abandonment of bodies in uninhabited areas.

143. As State agents perpetrated the five homicides, the Court must necessarily conclude that they may be attributed to the State.

144. The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it.

145. As the Human Rights Committee created by the United Nations International Covenant on Civil and Political Rights has stated,

> [t]he protection against arbitrary deprivation of life, which is explicitly required by the third paragraph of Article 6.1 [of the International Covenant on Civil and Political Rights] is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of utmost gravity. Therefore, [the State] must strictly control and limit the circumstances in which [a person] may be deprived of his life by such authorities.

146. The Court wishes to indicate the particular gravity of the instant case since the victims were youths, three of them children, and because the conduct of the State not only violated the express provision of Article 4 of the American Convention, but also numerous international instruments, that devolve to the State the obligation to adopt special measures of protection and assistance for the children within its jurisdiction (*infra*, para. 191).

147. Based on the foregoing, the Court concludes that the State violated Article 4 of the American Convention on Human Rights, in relation to Article 1.1 of the Convention, to the detriment of Henry Giovanni Contreras, Federico Clemente Figueroa Túnchez, Julio Roberto Caal Sandoval, Jovito Josué Juárez Cifuentes and Anstraum Aman Villagrán Morales.

X
VIOLATION OF ARTICLE 5

(Right to Humane Treatment)

148. In the application, the Commission alleged that the State had violated Article 5 of the American Convention against Henry Giovanni Contreras, Federico Clemente Figueroa Túnchez, Julio Roberto Caal Sandoval and Jovito Josué Juárez Cifuentes because they had been abducted by State agents who "were responsible for the physical integrity of the victims while they were [in] their custody".

149. The Commission observed that, when the facts in this case occurred, the socalled "street children" were subject to different forms of "abuse and persecution" by "agents from certain [State] security forces", and this inter-American body had already pointed out this circumstance in several of its reports.

150. When answering the application during the proceeding, the State did not offer any defense regarding the violation of the right to humane treatment embodied in the American Convention and, in particular, did not contest that the victims had been tortured *(supra*, paras. 67 and 68).

151. In its final arguments, the Commission declared that the four young victims of torture were retained incommunicado, a situation which, in itself, clearly results in "great anxiety and suffering".

152. In continuation, it made special reference to the tender age of the victims of torture, two of them minors, Julio Roberto Caal Sandoval, 15 years of age, and Jovito Josué Juárez Cifuentes, 17 years of age, and the fact that they lived on the streets.

153. Furthermore, the Commission added that the circumstances surrounding the death of these youths had caused a great deal of suffering to the families of the victims. The way in which the bodies were abandoned and the lack of answers about what happened caused the families anxiety and fear. In the Commission's opinion, the evidence makes it clear that the authorities did not try to communicate with the families or provide them with further information once the proceedings were

underway.

154. In its final arguments, the State did not refer to the issue *(supra*, paras. 67 and 68).

155. Article 5 of the American Convention stipulates that

> 1. Every person has the right to have his physical, mental, and moral integrity respected.
>
> 2. No one shall be subjected to torture or to cruel, inhuman, or degrading pun-

> ishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
>
> […]

156. The Court considers that the violation of this Article should be examined from two angles. First, whether or not Article 5.1 and 5.2 have been violated to the detriment of the youths Contreras, Figueroa Túnchez, Juárez Cifuentes and Caal Sandoval should be analyzed. Second, the Court should evaluate whether the families of the victims were, themselves, subjected to cruel, inhuman and degrading treatment.

157. In the instant case, there is considerable, concurring evidence that the physical integrity of these four youths was violated and that, before they died, they were victims of serious ill-treatment and physical and psychological torture by the State agents and, more specifically, members of the National Police Force.

158. The bodies of the youths were found dead with signs of serious physical violence that the State has been unable to explain. The file contains photographs of the faces and necks of the bodies of the youths. Different injuries are very visible in these photographs, including those made by the bullets that were the cause of death and other signs of physical violence. The four autopsies mention the approximate location of the shot wounds and, in two case, refer to other injuries that can be clearly seen in the photographs, or are located in other parts of the bodies, attributing them generically to "animal bites". The size of the wounds is not specified or their depth, the type of animal that could have produced them, or whether they occurred before or after death. The autopsies of the other two youths provide no explanation of the injuries to their bodies.

159. An Amnesty International report, included with the file (*supra*, para. 59.c), which was not contested by the State, mentions that

> the bodies presented signs of torture: the ears and tongues had been cut off, and the eyes had been burned or extracted. Furthermore, it appears that some kind of burning liquid had been thrown on the chest and chin of [Caal Sandoval]. According to the Prosecutor-General's office, the mutilations to which the four had been subjected correspond to the treatment that the police usually use on those who inform against this security force. The mutilation of the ears, eyes and tongue signifies that the person had heard or seen or spoken of something inadvisable.

160. One of the expert witnesses who appeared before this Court *(supra*, para. 66.a) observed that there were no photographs of the whole body of any of the four victims. Regarding the injuries to the eyes, the expert witness stated that, based on what could be seen in the photographs, in all cases they were produced by the shots received in the head; and, about the tongue of Clemente

Figueroa Túnchez, the only one that was visible in the photographs, although "a little our of focus", he stated that he could not affirm that it had been mutilated at all. With regard to two bodies, the expert witness stressed that "there [were] wounds here that were not [found] in the autopsy and […that they were] clearly in the photo[graphs]". Moreover, he stated that there were no signs that the youths had tried to defend themselves.

161. A witness who declared in the domestic proceedings, and whose records form part of the probative material in the instant case, referred to facts that, taken in conjunction with the statements of the witnesses and elements from other related documents, allow us to infer the existence of a general pattern of violence against the "street children". This witness described an abduction prior to the one that is the subject of this case, of which she was a victim together with two of the youths whose bodies were found in the San Nicolás Woods, Juárez Cifuentes and Caal Sandoval. In her declaration, she related that they were taken to a cemetery and she provided information on the painful mistreatment to which they were submitted (*supra*, para. 59.a).

162. It should be remembered that the youths were retained clandestinely by their captors for between 10 and 21 hours. This lapse of time occurred between two extremely violent circumstances: forced seizure and death due to the impacts of a firearm while defenseless, which the Court has already declared proved (*supra*, para. 82). It is reasonable to conclude that the treatment they received during those hours was extremely aggressive, even if there was no other evidence in this regard.

163. While they were retained, the four youths were isolated from the external world and certainly aware that their lives were in danger. It is reasonable to infer that, merely owing to this circumstance, they experienced extreme psychological and moral suffering during those hours.

164. In this respect, it is relevant to recall that the Court has previously stated that the mere fact of being placed in the trunk of a car

> constitutes an infringement of Article 5 of the Convention relating to humane treatment, inasmuch as, even if no other physical or ill treatment occurred, that action alone must clearly be considered to contravene the respect due to the inherent dignity of the human person.

And that in the events under which the deprivation of liberty is lawful

> [o]ne of the reasons that incommunicado detention is considered to be an exceptional instrument is the grave effects it has on the detained person. Indeed, isolation from the outside world produces moral and psychological suffering in any person, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in prisons.

165. Similarly, the European Court has stated that the mere threat of a behavior that is prohibited by the provision of the European Convention (Article 3), which corresponds to Article 5 of the American Convention, when it is sufficiently real and imminent, may in itself be in conflict with the respective norm. In other words: creating a threatening situation or threatening an individual with torture may, at least in some circumstances, constitute inhuman treatment.

166. Furthermore, it is worth recalling, as this Court has already stated, that a persons who is unlawfully detained (*supra*, para. 134) is in an exacerbated situation of vulnerability creating a real risk that his other rights, such as the right to humane treatment and to be treated with dignity, will be violated.

167. Lastly, from the documents and testimonies that are included in the probative material, it is clear, as we have already stated, that the facts in this case occurred in a context of great violence against children and youths who lived on the streets (*supra*, para. 79), violence that very often included different types of torture and illtreatment.

168. Having proved the fact that the physical and mental integrity of the youths, Contreras, Figueroa Túnchez, Caal Sandoval and Juárez Cifuentes was violated and that they were victims of ill-treatment and torture, the Court proceeds to determine the facts relating to the attribution of responsibility.

169. The Court believes that the ill treatment and torture was practiced by the same persons that abducted and killed the youths. Since the Court has established that those responsible for these acts were member of the National Police Force (*supra*, paras. 128 and 142), it is pertinent to conclude that the perpetrators of the ill-treatment and torture carried out in the time between the seizure and the murders, were State agents, whether they were those investigated and charged in the domestic proceedings or others.

170. In this respect, we should recall the presumption established by the European Court when considering that the State is responsible for ill-treatment exhibited by a person who has been in the custody of State agents, if the authorities are incapable of demonstrating that those agents did not incur in such behavior.

171. In its final written arguments, the Commission indicated that the circumstances of the death of the victims together with the lack of action by the State had caused the victims' next of kin "anxiety and also considerable fear". The Court considers that the fact that this point has only been raised during the final arguments, does not, *per se*, prevent examining it and deciding on it.

172. From the records of the proceedings and, in particular, from the statements of witnesses who intervened in the domestic proceedings and before this Court, it may be deduced that

– Matilde Reyna Morales García, mother of Anstraum Aman Villagrán Morales, heard of his death through her daughter, Lorena, and the body of her

son had not been identified until she went to the morgue. She could only bury him on June 27, 1990. She was pregnant at the time of the facts and feared for her life and that of her other children, although she denied that she had ever been threatened. Furthermore, she asserted that she has not received official information about the case;

– Ana María Contreras, mother of Henry Giovanni Contreras, heard about the death of her son about 15 days after it occurred because she went to look for him with a photograph. When she heard, he had been buried as XX; at that time, she began the exhumation process but "she was already suffering from health problems in the head that later began to get worse" (*supra*, para. 65.a) and could not conclude it. She developed facial paralysis and had to be hospitalized for a year, losing "everything". She states that she was threatened by an anonymous letter in which she was advised "to leave things be". She also declared that she was not officially informed about the evolution of the judicial proceedings.

– Rosa Carlota Sandoval, mother of Julio Roberto Caal Sandoval, heard about what had occurred eight days after the events through the version of two other minors. The file shows that Mrs. Sandoval carried out the necessary exhumation measures, since her son had also been buried as XX, and she was the private prosecutor in the case until she died on July 25, 1991. Julio Roberto Caal Sandoval used to live with his grandmother, Margarita Sandoval Urbina, who also took part in the domestic proceedings.

– Marta Isabel Túnchez Palencia, mother of Federico Clemente Figueroa Túnchez, she heard about the abduction of her son from two children, on June 15. On June 18, 1990 learned from the newspapers that several minors had been found dead and she went to the Identification Office of the National Police Force in order to make the corresponding identification;

– there is nothing in the proceedings about measures taken by the next of kin of Jovito Josué Juárez Cifuentes.

173. Furthermore, it is evident that the national authorities did not take any measures to establish the identity of the victims, who remained registered as XX until their next of kin came in person to identify them, even though three of the youths (Henry Giovanni Contreras, Federico Clemente Figueroa Túnchez and Jovito Josué Juárez Cifuentes) had a criminal record in the "criminal archives". This evident negligence of the State should be added to the fact that the authorities did not make adequate efforts to locate the victims' immediate next of kin, notify them of their death, deliver the bodies to them and provide them with information on the development of the investigations. All these omissions delayed and, in some cases, denied the next of kin the opportunity to bury the youths according to their traditions, values and beliefs and, therefore, increased their suffering. Added to this is the feeling of insecu-

rity and impotence caused to the next of kin by the failure of the public authorities to fully investigate the corresponding crimes and punish those responsible.

174. Among the actions of the State agents who intervened in the facts of the case that produced an impact on the families, the Court must stress the treatment of the corpses of the youths whose bodies were discovered in the San Nicolás Woods, Henry Giovanni Contreras, Federico Clemente Figueroa Túnchez, Julio Roberto Caal Sandoval and Jovito Josué Juárez Cifuentes. They were not only victims of extreme violence resulting in their physical elimination, but also, their bodies were abandoned in an uninhabited spot, they were exposed to the inclemency of the weather and the action of animals, and they could have remained thus during several days, if they had not been found by chance. In the instant case, it is clear that the treatment given to the remains of the victims, which were sacred to their families and particularly their mothers, constituted cruel and inhuman treatment for them.

175. In a recent case, the Court has stated that

> the burning of Mr. Nicholas Blake's mortal remains to destroy all traces that could reveal his whereabouts is an assault on the cultural values prevailing in Guatemalan society, which are handed down from generation to generation, with regard to respecting the dead. [This action] increased the suffering of Mr. Nicholas Blake's relatives.

176. The European Court has had the opportunity to issue an opinion on the condition of victim of inhuman and degrading treatment of the mother as a result of the detention and disappearance of her daughter at the hands of the authorities. In order to determine if Article 3 of the European Convention, corresponding to Article 5 of the American Convention, has been violated or not, the European Court evaluated the circumstances of the case, the gravity of the ill-treatment and the fact of not having official information to clarify the case. In the light of these considerations and that it was the mother of the victim of a human rights violation, the European Court concluded that she was also a victim and that the State had violated the said Article 3.

177. Owing to the foregoing, the Court concludes that the State violated Article 5.1 and 5.2 of the American Convention on Human Rights, in relation to Article 1.1 of the Convention, to the detriment of Henry Giovanni Contreras, Federico Clemente Figueroa Túnchez, Jovito Josué Juárez Cifuentes and Julio Roberto Caal Sandoval, and violated Article 5.2 of the Convention, in relation to its Article 1.1, to the detriment of their mothers, María Contreras, Matilde Reyna Morales García, Rosa Carlota Sandoval, Margarita Sandoval Urbina, Marta Isabel Túnchez Palencia and Noemí Cifuentes.

XI
VIOLATION OF ARTICLE 19

(Rights of the Child)

178. In the application, the Commission alleged that Guatemala had violated Article 19 of the American Convention by omitting to take adequate prevention and protection measures in favor of Julio Roberto Caal Sandoval, 15 years of age, Jovito Josué Juárez Cifuentes, 17 years of age and Anstraum Aman Villagrán Morales, also 17 years of age.

179. The Commission stated that the crimes committed against these minors "are an example of the serious human rights violations that Guatemalan street children suffered at the time the complaint in the case was made".

180. To this should be added, according to the Commission, the "serious risk for their development and even for their life […] itself" to which "street children" were exposed, in view of their abandonment and social exclusion, a situation that "was exacerbated in some cases by the extermination and torture to which they were subjected by death squadrons or by the Police Force itself".

181. In particular, the Commission believes that the State omitted to take measures destined to "safeguard the development and the life of the victims", to investigate and end the abuse, to punish those responsible, and "to train and impose adequate disciplinary measures and penalties on its agents". All this, despite being aware that "street children" were the object of acts of violence, particularly by members of the police force, based on reports presented to the State by several international organizations and complaints submitted by non-governmental organizations.

182. In its answer to the application, the State remained silent on this point (*supra*, paras. 67 and 68).

183. In its final arguments, the Commission indicated that Guatemala signed the United Nations Convention on the Rights of the Child (hereinafter "Convention on the Rights of the Child") on January 26, 1990, and deposited the respective instrument of ratification on June 9, 1990 – this Convention entered into force on September 2, 1990. In 1995, during the hearings before the Committee on the Rights of the Child, a supervisory body created by this Convention, Guatemala presented a report in which it stated that "it could only provide information on the situation [of "street children"] as of 1994" and added that "although the number of complaints about police brutality suffered by street children had declined, the problem had not been resolved and the police force had not been completely restructured". Moreover, it stated that, in Guatemala, there was "a violent culture and that the police force did not receive training on how to deal with these children'". Lastly,

the State "acknowledged that 84 children had been murdered in the first three months of 1996 and that, according to available information, there had only been seven [convictions]". The Commission asserted that this declaration was a unilateral acknowledgement of facts generating international responsibility.

184. The Commission described the three child victims of the facts of this case as persons who lived in extremely precarious socio-economic conditions and who fought to survive alone and fearful of a society that did not include them, but rather excluded them. Furthermore, it stated that, as the State abstained from taking effective measures to investigate and prosecute the perpetrators, it exacerbated the risk of violations of the rights of "street children" in general, and the victims of this case, in particular.

185. The Commission stated that the reason for Article 19 of the Convention arose from the vulnerability of children and their incapacity to personally ensure the respect of their rights. It also declared that while the consequent protection responsibilities correspond to the family in principle, State measures are necessary in the case of at risk children. According to the Commission, this special State obligation encompasses the protection of a wide range of social, economic, civil and political interests of the child.

186. The State did not refer to this issue in its final arguments (*supra*, paras. 67 and 68).

187. Article 19 of the Convention stipulates that "[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State".

188. Article 19 of the American Convention does not define what is meant by "child". However, the Convention on the Rights of the Child (Article 1) considers every human being who has not attained 18 years of age to be a child, "unless, by virtue of an applicable law, he shall have attained his majority previously". According to the Guatemalan legislation in force at the time of the facts of this case, those who had not attained 18 years of age were also minors. Using this criteria, only three of the victims, Julio Roberto Caal Sandoval, Jovito Josué Juárez Cifuentes and Anstraum Villagrán Morales, were children. However, in this judgment, the Court is using the colloquial expression "street children" to refer to the five victims in this case, who lived on the streets, in a risk situation.

189. In this judgment, the Court has also recognized as a notorious and public fact that, at the time the facts of this case occurred, there was a systematic practice of aggression against 'street children' in Guatemala carried out by members of State security forces; this included threats, persecution, torture, forced disappearance and homicide (*supra*, paras. 59.c and 79).

190. Based on the different reports on the issue of "street children" in Gua-

temala, and the characteristics and circumstances of this case, the Court believes that the events that culminated in the death of the minors, Caal Sandoval, Juárez Cifuentes and Villagrán Morales, are linked to the prevailing pattern of violence against "street children" in Guatemala at the time the facts occurred.

191. In the light of Article 19 of the American Convention, the Court wishes to record the particular gravity of the fact that a State Party to this Convention can be charged with having applied or tolerated a systematic practice of violence against at risk children in its territory. When States violate the rights of at-risk children, such as "street children", in this way, it makes them victims of a double aggression. First, such States do not prevent them from living in misery, thus depriving them of the minimum conditions for a dignified life and preventing them from the "full and harmonious development of their personality", even though every child has the right to harbor a project of life that should be tended and encouraged by the public authorities so that it may develop this project for its personal benefit and that of the society to which it belongs. Second, they violate their physical, mental and moral integrity and even their lives.

192. This Court has said that "when interpreting a treaty, not only the agreements and instruments formally related to it should be taken into consideration (Article 31.2 of the Vienna Convention), but also the system within which it is (inscribed) (Article 31.3)". In accordance with this position, the Court has also declared that

> by means of an authoritative interpretation, the member States of the Organization have signaled their agreement that the [American] Declaration contains and defines the fundamental human rights referred to in the Charter [of the Organization]. Thus, [the latter] cannot be interpreted and applied, as far as human rights are concerned, without relating its norms […] to the corresponding provisions of the Declaration.

193. The Court has previously indicated that this focus is particularly important for international human rights law, which has advanced substantially by the evolutive interpretation of international protection instruments. On this point, this Court has understood that

> [t]his evolutive interpretation is consequent with the general rules of the interpretation of treaties embodied in the 1969 Vienna Convention. Both this Court […] and the European Court [...] have indicated that human rights treaties are living instruments, the interpretation of which must evolve over time in view of existing circumstances.

194. Both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention.

195. The Convention on the Rights of the Child contains various provisions that relate to the situation of the "street children" examined in this case and, in relation with Article 19 of the American Convention, it throws light on the behavior that the State should have observed towards them. These provisions appear below:

ARTICLE 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

ARTICLE 3

[…]

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

ARTICLE 6

* States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

ARTICLE 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

[…]

ARTICLE 27

1. States Parties recognize the right of every child to a standard of living ade-

quate for the child's physical, mental, spiritual, moral and social development.

[…]

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

ARTICLE 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

196. These provisions allow us to define the scope of the "measures of protection" referred to in Article 19 of the American Convention, from different angles. Among them, we should emphasize those that refer to non-discrimination, special assistance for children deprived of their family environment, the guarantee of survival and development of the child, the right to an adequate standard of living, and the social rehabilitation of all children who are abandoned or exploited. It is clear to the Court that the acts perpetrated against the victims in this case, in which State agents were involved, violate these provisions.

197. The file contains documentary references to the fact that one of the three children in this case, Jovito Josué Juárez Cifuentes, was registered in the "criminal archives" of the Identification Office of the National Police Force. In this respect, the Court considers that it is relevant to stress that, if the State had elements to believe that "street children" are affected by factors that may

induce them to commit unlawful acts, or has elements to conclude that they have committed such acts, in specific cases, it should increase measures to prevent crimes and recurrence. When the State apparatus has to intervene in offenses committed by minors, it should make substantial efforts to guarantee their rehabilitation in order to "allow them to play a constructive and productive role in society". In this case, it is clear that the State seriously infringed these directives.

198. In view of the foregoing, the Court concludes that the State violated Article 19 of the American Convention on Human Rights, in relation to its Article 1.1, to the detriment of the minors, Julio Roberto Caal Sandoval, Jovito Josué Juárez Cifuentes and Anstraum Aman Villagrán Morales.

[...]

JOINT CONCURRING OPINION OF JUDGES A.A. CANÇADO TRINDADE AND A. ABREU-BURELLI

1. By will of fate the last Judgment of the Inter-American Court of Human Rights this year, on the eve of the year 2000, was to fall upon a situation which affects a particularly vulnerable sector of the population of the countries of Latin America: that of the sufferings of the children in the streets. Paragraph 144 of the present Judgment, in our view, faithfully reflects the current state of evolution of the right to life in the framework of the International Law of Human Rights in general, and under the American Convention on Human Rights (Article 4) in particular. It affirms the fundamental character of the right to life, which, besides being non-derogable, requires positive measures of protection on the part of the State (Article 1.1 of the American Convention).
2. The right to life implies not only the negative obligation not to deprive anyone of life arbitrarily, but also the positive obligation to take all necessary measures to secure that that basic right is not violated. Such interpretation of the right to life, so as to comprise positive measures of protection on the part of the State, finds support nowadays in international case-law as well as doctrine. There can no longer be any doubt that the fundamental right to life belongs to the domain of *jus cogens*.
3. The right to life cannot keep on being conceived restrictively, as it was in the past, by reference only to the prohibition of the arbitrary deprivation of physical life. We believe that there are distinct ways to deprive a person arbitrarily of life: when his death is provoked directly by the unlawful act of homicide, as well as when circumstances are not avoided which likewise

lead to the death of persons as in the *cas d'espèce*. In the present *Villagrán Morales versus Guatemala* case (Merits), pertaining to the death of children by police agents of the State, there is the aggravating circumstance that the life of the children was already devoid of any meaning; that is, the victimized children were already deprived of creating and developing a project of life and even to seek out a meaning for their own existence.

4. The duty of the State to take positive measures *is stressed* precisely in relation to the protection of life of vulnerable and defenseless persons, in situation of risk, such as the children in the streets. The arbitrary deprivation of life is not limited, thus, to the illicit act of homicide; it extends itself likewise to the deprivation of the right to live with dignity. This outlook conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, as well as economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights.
5. The Inter-American Court has pointed out, in the present Judgment (par. 193) as well as in its 16th. Advisory Opinion, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), that the interpretation of an international instrument of protection ought to "accompany the evolution of times and the present-day conditions of life", and that such evolutive interpretation, in accordance with the general rules of interpretation of treaties, has contributed decisively to the advances of the International Law of Human Rights.
6. Our conception of the right to life under the American Convention (Article 4, in connection with Article 1.1) is a manifestation of this evolutive interpretation of the international norms of protection of the rights of the human being. In the last years, the conditions of life of large segments of the population of the States Parties to the American Convention have deteriorated notoriously, and an interpretation of the right to life cannot make abstraction of this reality, above all when dealing with children in situation of risk in the streets of our countries of Latin America.
7. The needs of protection of the weaker, - such as the children in the streets, - require definitively an interpretation of the right to life so as to comprise the minimum conditions of life with dignity. Hence the inexorable link which we find, in the circumstances of the present case, between Articles 4 (right to life) and 19 (rights of the child) of the American Convention, so well articulated by the Court in paragraphs 144 and 191 of the present Judgment.
8. We believe that the project of life is consubstantial of the right to existence, and requires, for its development, conditions of life with dignity, of security and integrity of the human person. In our Joint Separate Opinion in the *Loayza Tamayo versus Peru* case (Reparations, 1998) we sustained that the

damage to the project of life ought to be integrated to the conceptual universe of reparations under Article 63.1 of the American Convention. We expressed therein that "The project of life is ineluctably linked to freedom, as the right of each person to choose her own destiny. (...) The project of life encompasses fully the ideal of the American Declaration [of the Rights and Duties of Man] of 1948 of proclaiming the spiritual development as the supreme end and the highest expression of human existence".

9. A person who in his childhood lives, as in so many countries of Latin America, in the humiliation of misery, without even the minimum condition of creating his project of life, experiences a state of suffering which amounts to a spiritual death; the physical death which follows to this latter, in such circumstances, is the culmination of the total destruction of the human being. These offences render victims not only those who suffered them directly, in their spirit and in their body; they project themselves painfully into the persons dear to them, in particular into their mothers, who usually also endure the state of abandonment. To the suffering of the violent loss of their sons is added the indifference with which the mortal remains of these latter are treated.
10. In circumstances such as those of the present case, as this Court has acknowledged (pars. 174-177), it is impossible not to include, in the enlarged notion of victim, the mothers of the murdered children. The outlook which we sustain corresponds to beliefs which are deeply-rooted in the cultures of the peoples of Latin America, in the sense that the definitive death of a human being in the spiritual order is only consumed with the oblivion. The children murdered in a street and in a wood (ironically the wood of San Nicolás, of so much symbolism to many children), did not have the opportunity to reconcile themselves with the idea of their surrender to eternity; the respect to the mortal remains of the children contributes to provide their mothers, at least, with the opportunity to maintain alive, within themselves, the memory of the sons prematurely disappeared.
11. In the face of the imperative of the protection of human life, and of the concerns and thoughts aroused by death, it is very difficult to separate dogmatically the considerations of juridical order from those of moral order: we are before an order of superior values, – *substratum* of legal norms, – which help us to seek out the meaning of the existence and of the destiny of each human being. The International Law of Human Rights, in its evolution, on the eve of the year 2000, definitively ought not to remain insensible or indifferent to these questions.

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