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The Development and Evolution of the Right to Life in The European Court of Human Rights

Introduction

The European Court of Human Rights (ECHR) or European Court of Human Rights (ECtHR) is one of the more important international tribunals. This work will explore its decisions concerning the right to life in several aspects, emphasizing on the violation of the right to life by security forces.

It is important to determine that the judgments analyzed here are of the Great Chamber and the Chamber. I chose this method because it is essential to examine what is decided about the merits of the cases. This tribunal does not have as many cases of enforced disappearance as the Inter-American Court of Human Rights. This can be explained because in Latin America there were a great number of cases of enforced disappearances whereas in Europe this crime was not judged by the ECtHR as many times. However, there are several cases of this crime where Turkey and Russia are the accused.

Furthermore, these sub-titles have been established based on what I found in texts and in the jurisprudence of the Court. These titles refer to the more relevant aspects of the right to life in the ECtHR. All these aspects are vital to understand how the right to life has been developed by the ECtHR.

I. Article 2 and the Application of this one by Security Forces

The Article 2 of the European Convention on Human Rights that protects the right to life will be examined in this subtitle. Some cases of the ECtHR will be stated as an example. Furthermore, certain characteristics of the relation between human rights and security forces will be determined.

In the case law, the ECtHR has continuously emphasized that Article 2 ranks as one of the most fundamental provisions in the Convention. Even during “time of emergency threatening the of the nation” no derogation from the obligation under Article 2 shall be made. This is documented in the article 15 of the European Convention.^{2 3} The same can be applied to Article 3 which contains the prohibition against torture.

Article 2 of the European Convention on Human Rights guarantees “*everyone’s right to life*” which shall “*be protected by the law*”. The article continues by stating that “*no one should be deprived of his (or her) life intentionally*”. The exception “*save in the execution of a sentence of a court following his (or her) conviction of a crime for which this penalty is provided by law*”.⁴ This goes back to the 1950s and can be classified as “outdated” since Article 1 of Protocol No. 6 to the

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² CRAWSHAW, RALPH. “Chapter 2: Police and Human Rights: Fundamental Questions.” In: “*The Police and International Human Rights*.” Springer. Alleweldt, Ralf; Fickensher, Guido (ed.) DSF: German foundation for peace and research. Switzerland, p.p. 45. 2018

³ COUNCIL OF EUROPE AND EUROPEAN TRIBUNAL OF HUMAN RIGHTS. “*European Convention for the Protection of Human Rights and Fundamental Freedoms*”. Strasbourg, France. Signed on November 4, 1950, in Rome, Italy. Entry into force on September 3, 1953. Article 15: “*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.*”

⁴ Ibid. Article 2

Convention and Article 1 and Article 2 of Protocol No. 13 to the Convention have abolished the death penalty even in times of war.^{5,6}

I believe that Article 4 of the European Convention on Human Rights is more complete than Article 2 of the Inter-American Court of Human Rights. However, Article 4 enumerates the occasions when violation of the right to life is allowed, and this is a significant issue of deciding the question of the condemnation of an accused person.

Chapter 4 of the book “Police and Fundamental Human Rights”, that has been analyzed through this work, as it has more points of relation to this research. The name of the chapter is: The Police and the Right to Life and is written by Robert Esser.⁷ In this chapter, the author determines that although there is a direct connection to Article 2 (Right to Life) of the European Convention, safeguarding the “right to life” is quite obvious.⁸

In its case law, the European Court of Human Rights has continuously emphasized that Article 2 European Convention of Human Rights (ECHR) ranks as one of the most fundamental provisions in the Convention.⁹

Esser skips the issue of effective investigation and focuses on the wording and scope of protection granted by Article 2 about the preventive perspective of police action.¹⁰ This is a peculiar decision of the author taking into account that the majority of the cases of the right to life of the ECtHR are condemned for the lack of an effective investigation, in its procedural aspect, instead of the substantial aspect of the loss of life.

Esser continues with restrictions on the right to life, which can be regarded as justified even under human rights standards. The death of a person described by the Convention as a “deprivation of life”-does under specific and narrowly defined circumstances, not amount to a violation of the Convention when *(lit. a)* “it results from the use of force which is no more than necessary in the defense of any person from unlawful violence”; *(lit. b)* “to effect a lawful arrest or to prevent the escape of a person lawfully detained” or *(lit. c)* “in an action lawfully taken to quell a riot or insurrection”.¹¹

⁵ ESSER, ROBERT. “Chapter 4: The Police and the Right to Life.” In: *The Police and International Human Rights*. Springer. Alleweldt, Ralf; Fickensher, Guido. (Ed). DSF: German foundation for peace and research. Switzerland. p.p: 45. 2018.

⁶ COUNCIL OF EUROPE AND EUROPEAN TRIBUNAL OF HUMAN RIGHTS. “*European Convention for the Protection of Human Rights and Fundamental Freedoms*”. Strasbourg, France. Signed on November 4, 1950, in Rome, Italy. Entry into force on September 3, 1953. Article 12.

⁷ ESSER, ROBERT. “Chapter 4: The Police and the Right to Life.” In: *The Police and International Human Rights*. Springer. Alleweldt, Ralf; Fickensher, Guido. (Ed). DSF: German foundation for peace and research. Switzerland. p.p: 45. 2018.

⁸ Ibid. P.44

⁹ ECtHR, *McCann v. United Kingdom*, judgment of the Grand Chamber of 27 September 1995, No. 18984/91, par. 147, expressly referring to ECtHR, *Soering v. United Kingdom*, judgment of 7 July 1989, No. 14038/88, par. 88, where the Court stressed these same matters in respect of Article 3 ECHR.

¹⁰ ESSER, ROBERT. “Chapter 4: The Police and the Right to Life.” In: *The Police and International Human Rights*. Springer. Alleweldt, Ralf; Fickensher, Guido. (Ed). DSF: German foundation for peace and research. Switzerland. p.p: 45. 2018.

¹¹ COUNCIL OF EUROPE AND EUROPEAN TRIBUNAL OF HUMAN RIGHTS. “*European Convention for the Protection of Human Rights and Fundamental Freedoms*”. Strasbourg, France. Signed on November 4, 1950, in Rome, Italy. Entry into force on September 3, 1953. Article 2.

The Court has constructed a “positive obligation” of the State and its representatives: hence, the Contracting States are obliged to create a public order, which provides for adequate protection of the right to life for all persons.¹²

Esser states that concerning the extent of protection, the right to life has to be interpreted regardless of social or economic background, age or disease. Article 2 prohibits any kind of killing. Concerning the protection of life by police intervention, one has to consider that every killing that is attributable (as it is established in Article 1 of the Convention) to a Contracting State is regarded as interference with the right to life. This even holds for accidental killings by police forces.^{13 14}

The author establishes that the reasons justifying the deprivation of the right to life and regulated by Article 2 subsection 2 provide abstract “minimum” guidelines for their daily work. The Convention mentions “*the defense of any person from unlawful violence*”. According to the jurisprudence of the ECtHR, the situation has to be assessed *ex-ante*. The principle of proportionality must be considered seriously. The Court has not yet clearly referred to the issue of whether the killing of a person to protect material goods can be justified under Article 2 subsection 2.¹⁵ In my opinion, the answer is obvious, the protection of the right to life comes before any material good.

Another justification mentioned in Article 2 subsection 2 of the Convention is the enforcement of a “*lawful arrest or the prevention of escape of a person that is lawfully detained*”. An intentional killing has to be seen in clear contradiction with this norm. The last justification provided in the provision is an “*action lawfully taken to quell a riot or insurrection*”, which is one of the most highly debated reasons for justification. The European Court of Human Rights has made it clear that for all of those justifications of “limitations” of the right to life, the use of force must always be necessary. Therefore, whenever a State refers to some form of action that may come into conflict with the right to life, state officials must ensure that no less severe means suffice in the concrete situation. It highlights again the importance of the principle of proportionality for the Court.¹⁶ It is important to establish the significance of these exceptions of Article 2 of the European Convention on Human Rights, because when the ECtHR decides on a case, it has to apply them with criteria and proofs to not wrongly condemn or let free a person who committed a crime.

Esser states some aspects of police operations. During the planning of a police operation, measures against any form of escalation have to be considered. It is important to highlight that, over the years, the jurisprudence of ECtHR has shaped the principle of proportionality into a so-called principle of necessity. Consequently, a strict and compelling test of necessity must be applied during the stage of planning a police action as well as during its execution.¹⁷

¹² ESSER, ROBERT. “Chapter 4: The Police and the Right to Life.” In: *The Police and International Human Rights*. Springer. Alleweldt, Ralf; Fickensher, Guido. (Ed). DSF: German foundation for peace and research. Switzerland. p.p: 46. 2018.

¹³ Ibid. p.p. 46

¹⁴ COUNCIL OF EUROPE AND EUROPEAN TRIBUNAL OF HUMAN RIGHTS. “*European Convention for the Protection of Human Rights and Fundamental Freedoms*”. Strasbourg, France. Signed on November 4, 1950, in Rome, Italy. Entry into force on September 3, 1953. Article 1: “*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*”

¹⁵ ESSER, ROBERT. “Chapter 4: The Police and the Right to Life.” In: *The Police and International Human Rights*. Springer. Alleweldt, Ralf; Fickensher, Guido. (Ed). DSF: German foundation for peace and research. Switzerland. p.p: 48. 2018.

¹⁶ Ibid. p.p. 48

¹⁷ Ibid. p.p. 48

The author highlights the principle of proportionality in the necessity of the use of force. This principle derives from the text of Article 2 subsection 2 when it says, “*use of force which is no more than necessary*”.

In *McCann V. United Kingdom*, 27 September 1995, the judgment of the ECtHR, considered that the shooting was disproportionate to the aims to be achieved by the State in apprehending the suspects and defending the citizens of Gibraltar from unlawful violence. The Court found a violation of Article 2 of the Convention about the killing of three terrorists: it did not constitute a use of force that was necessary, as prescribed by Article 2 subchapter 2. It was found that the violation of this Article was not strictly proportionate to the objectives to be achieved regarding the planning and control of the operation by the authorities.¹⁸ This excessive and unnecessary use of violence was similar to what happened in the above-mentioned case of *Neira Alegría V. Peru* of the COURT IDH.

The case of *Andronicou and Constantinou V. Cyprus*, the Judgment of 9 October 1997, is another leading case of the ECtHR about Article 2. The problem at hand was to establish whether in these circumstances authorities had taken appropriate care in the planning and control of the rescue operation to minimize any risk to the lives of the couple and an appropriate assessment of alternative ways of handling the situation with the benefit of hindsight.¹⁹

In the case of *McCann*, the ECtHR underlined the right’s importance (as one of the most fundamental provisions in the Convention) stressed its essential nature (it enshrines a basic value) and situated it in a foundational and interpretive context (the democratic societies making up the Council of Europe).²⁰

In this sub-chapter, the case *McCann* is highlighted in detail as it is considered as the first case about the condemnation of the security forces for the violation of the right to life. This case was about three suspects of an act of terrorism who were killed by security forces. The ECtHR understood that it was not necessary killing, because the suspects could have been arrested without losing their life. In this case, the ECtHR decided that the procedural and substantial aspect of the right to life has been violated.

Furthermore, the Article 2 of the European Convention of Human Rights were examined, and it was established: not just the protection of the right to life, but also states situations where the death of a human being can be justified, like the legitimate defense, among other examples.

II. Definition and Concepts of the Right to Life

The right to life is examined in this work, however, to show the concept developed by the ECtHR, it is relevant to highlight some definitions and concepts about the right to life violated by security forces in this tribunal. Furthermore, the definition and concepts of the European Convention on Human Rights will also be analyzed. For this purpose, it is necessary to examine some literature about this subject and cases of the ECtHR that exemplifies the concepts of this Court.

Some important ideas about the evolution of the right to life violated by security forces in the European Court of Human Rights are established in the book “*The Police and International Human*

¹⁸ ECtHR *McCann V. United Kingdom*, judgment 27 September 1995. No. 18984/91. Par. 12

¹⁹ ECtHR *Andronicou and Constantinou V. Cyprus*, judgment of 9 October 1997. No. 25052/94, pp. 191-103, par. 5.

²⁰ SKINNER, STEPHEN. “*Lethal Force, the Right to Life and the ECHR: Narratives of Death and Democracy*”. Oxford, Hart Publishing (ed.) Bloomsbury Collections. Web. 10. p.p. 41. 2023

Rights Law” edited by Ralf Alleweldt and Guido Fickensher.²¹ These editors are the authors of the first chapter about the police and how are a key factor in human rights protection.²² They say that government authorities, including police forces, are created to provide security and protect the rights of citizens. Police officers must often act quickly and decisively to ensure that individual rights and the rule of law are respected. Each time the police interfere lawfully to protect the life and physical integrity of citizens, they contribute to the well-being and security of the citizens and the protection of human rights. To fulfil this task, police forces have special powers, including the power to use force and coercion if necessary.²³ This is a relevant idea concerning the powers that the police have to act in an event that interferes with the lawful behavior of the citizens, but they must not abuse these powers.

It is relevant to highlight that when these authors talk about police officers can be applied to every security force that deprives the life of human beings arbitrarily.

The authors continue by stating that the European Court of Human Rights has found violations of the right to life and the prohibition of torture in numerous countries all over Europe.²⁴ As was established above in this work these are the cases that are being examined in this research and they reach Article 2 of the European Convention on Human Rights (Right to Life) and Article 3 (Prohibition of Torture).

In cases where physical force or firearms are used by the police, the issue of command responsibility may arise. Human rights have a procedural side. If there is a complaint, or suspicion, that police have abused their powers, human rights require such cases to be investigated effectively. This requirement has been developed by international human rights bodies during the last decades, in particular in the case law of the European Court of Human Rights on the right to life and the prohibition of torture.²⁵ It is important to highlight that the effective investigation behind the violation of the right to life is one of the most outstanding aspects of the ECtHR regarding the condemnation of the accused country. These judgments are very interesting to study to realize how this tribunal condemns the lack of an effective investigation into the violation of this human right.

The second chapter of the book of Alleweldt and Fickensher documents a relevant topic for this research²⁶: it is about policing and human rights. The primary purposes of policing are to prevent and investigate crime, to maintain and restore public order, if it is necessary and to provide aid and assistance in emergencies. Police are state officials who exercise powers on behalf of the state to perform their functions as one of the purposes of human rights.²⁷ It is important to highlight that this research does not try to establish that all the security forces, including police forces in Europe and America, are working in a way that means violating the lives of human beings. On the contrary, the security forces that use police brutality are an exception that is the object of this research. The cases of enforced disappearances, as there is an organized state apparatus and security forces that

²¹ ALLEWELDT, RALF AND FICKENSER, GUIFO (ed.). *“The Police and International Human Rights”*. Edit: Springer. DSF: German foundation por peace and research. Switzerland, 2018.

²² ALLEWELDT, RALF AND FICKENSER, GUIFO. Chapter 1 “Introduction: The Police, a Key Actor in Human Rights Protection.” *“The Police and International Human Rights”*. Springer. DSF: German foundation por peace and research. (ed.) p.p. 1. Switzerland, 2018.

²³ Ibid. p.p.1.

²⁴ Ibid. p.p.1.

²⁵ Ibid. p.p.3.

²⁶ CRAWSHAW, RALF. “Chapter 2: Police and Human Rights: Fundamental Questions.” In: *“The Police and International Human Rights”*. Springer. Alleweldt, Ralf; Fickensher, Guido (ed). DSF: German foundation por peace and research. p.p. 23. Switzerland, 2018.

²⁷ Ibid. p.p. 8

are dedicated to making people disappear people and committing homicide to create a generalized state of horror in the country that is developing this practice.

Another author who gives important aspects about the ECtHR is Luzius Wildhaber. The author establishes that the principal and overriding aim of the system set up by the ECHR is to bring about a situation in the rights and freedoms of each and every contracting State are effectively protected. That means that the relevant structures and procedures are in place to allow individual citizens to vindicate those rights and to assert those freedoms.²⁸

Wildhaber states about the question of the evolutionary interpretation: it is the genius of the Convention that it is indeed a dynamic and living instrument. It has shown a capacity to evolve in the light of social and technological developments that its drafters could never have imagined. The Convention has shown that it is capable of growing with society. It evolves through the interpretation of the Court.²⁹

The Court is understandably wary of extending its case law on positive obligations. It has the first to be convinced not only that there has been a clear evolution in morals, but that knowledge which is reflected in the law and practice of a majority of the Contracting States. The Court will then interpret the terms of the Convention in the light of that evolution.³⁰

The author highlights that the separation of powers is a crucial element in the Convention system as one of the fundamental pillars of the rule of law. At the same time, it is a principle which has also to be applied, admittedly in a rather different way, to the functioning of the Strasbourg Court. There is no room for even the perception of external interference or of any lack of independence of the Court.³¹

Wildhaber also talks about the notion of human dignity which lies at the heart of the Convention. The Court held that if a person is imprisoned in conditions which are compatible with respect for his or her human dignity. The manner and execution of the measure should not subject him or her to distress and hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.³²

About the principle of proportionality applied by the ECtHR, Pastor Ridruejo, established that is occasionally in relation with the conformity of the Convention with certain interferences, intrusions and limitations of the national authorities in the enjoyment of determined right and freedoms. The interference is considered legitimate if it is planned by the law and constitutes a necessary measure in a democratic society for the consecution of certain purposes. The tribunal demands the requisites that show the existence of a reasonable relation of proportionality between the measure taken and the purpose pursued.³³

There is a hierarchy of legally tutelable assets. It is necessary to establish which of them is primary to protect the right to life. In a situation when a material asset is in danger, as well as human life, it is more important to protect this last right although if that means losing the material asset to save the life.

²⁸ WILDHABER, LUZIUS. “The European Court of Human Rights in action”. *Ritsumeikan Law Review*. N°1, (ed). p.p. 83-92. p.p. 83. 2004

²⁹ Ibid. p.p. 84

³⁰ Ibid. p.p. 89

³¹ Ibid. p.p. 87

³² Ibid. p.p. 88

³³ PASTOR RIDRUEJO, JOSÉ ANTONIO. “La Reciente Jurisprudencia del Tribunal Europeo de Derechos Humanos: Temas Escogidos”. p.p. 240-276. p.p. 253. 2007

III. Substantive Aspect of the Right to Life and Procedural Aspect of the Right to life

The substantial aspect of the right to life is referred to the loss of life by the victim. In this subchapter, some ideas about this component of the right are going to be established. For this part, the book by Stephen Skinner will be revised after my analysis of the topic.³⁴

In addressing the world of action, case narratives include the applicants' and state's competing versions of events, involve a process of selection of relevant evidence and make connections among facts and conduct in consequentialist terms of causation and responsibility.³⁵

In the first decision on lethal force under Article 2 in the 1995 McCann judgment, the ECtHR developed an extensive body of arguments on the right to life in the context of lethal and potentially lethal force in domestic policing and law enforcement operations. Through these judgments, the ECtHR has interpreted the right to life in the European Convention to involve two principal dimensions, one substantive and the other procedural. These two dimensions indicate how the scope of Article 2 has been enlarged by the ECtHR beyond its basic wording and establishes the minimum.³⁶

The substantive dimension concerns three aspects:

1. The resort to force by state agents in the specific incident.
2. The domestic legal, regulatory and administrative framework for state agent's action.
3. The wider issues preceding and surrounding the operation in question.

As the framework through which the ECtHR has applied the right to life in substantive terms, these aspects provide the grounds on which an applicant may base a claim.³⁷

Skinner brings again the judgment of McCann because it is considered like the angular stone, which means the beginning of the judgments of the ECtHR about the violation of the right to life in general. This Court has always reiterated that Article 2 enshrines a basic value of democratic societies to emphasize the right's importance and for that reason has "strictly construed" its provisions to restrict the permissible exceptions in Article 2 (2).^{38,39}

The emphasis on the importance of the right to life in democratic society has enabled the ECtHR to enlarge its conception of what is relevant to its narrative in forensic and temporal terms, by extending its analysis to the prior and parallel elements of state planning and control.⁴⁰

³⁴ SKINNER, STEPHEN. *"Lethal Force, the Right to Life and the ECHR: Narratives of Death and Democracy"*. Oxford, Hart Publishing (ed.) Bloomsbury Collections. Web. 10. p.p. 50 2023.

³⁵ On the 'forensic paradigm' note Sanneke Kuipers and Paul 't Hart, 'Accounting for Crises' in Mark Bovens, Robert E Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford, Oxford University Press, 2014) p.p. 589, 592.

³⁶ SKINNER, STEPHEN. *"Lethal Force, the Right to Life and the ECHR: Narratives of Death and Democracy"*. Oxford, Hart Publishing (ed.) Bloomsbury Collections. Web. 10. p.p. 51. 2023

³⁷ Ibid. p.p. 70

³⁸ Ibid. p.p. 71

³⁹ COUNCIL OF EUROPE AND EUROPEAN TRIBUNAL OF HUMAN RIGHTS. *"European Convention for the Protection of Human Rights and Fundamental Freedoms"*. Strasburg, France. Signed on November 4, 1950, in Rome, Italy. Entry into force on September 3, 1953. Article 2. 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 defense of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

⁴⁰ SKINNER, STEPHEN. *"Lethal Force, the Right to Life and the ECHR: Narratives of Death and Democracy"*. Oxford, Hart Publishing (ed.) Bloomsbury Collections. Web. 10. p.p. 83 2023. 3

Skinner added a part about the homicide in reunions and protests. Although riot and insurrection may involve protest against the state order, the assumption seems to be that protest in European democracies should be peaceful, so that activities fit the autonomous definition of riot and insurrection.⁴¹

Although the right to life about the uses of lethal and potentially lethal force is said to enshrine a basic value of European democratic societies, the protection of which is a fundamental provision of the European Convention, Article 2 nevertheless explicitly provides for proportionate balance about collective interests and concerns.⁴²

The ECtHR has found a breach of Article 2 where state agents have resorted to force in circumstances where the possibility of making allowances for mistake, human error or stress is questionable and where the degree of force used is disproportionate to an aim falling within Article 2 (2). Whereas the ECHR does take mistakes and stress into account, it opens the possibility of bringing in killings that were not objectively necessary within the ambit of Article 2 (2) exception. This arguably reduces the high level of protection that the right to life in Article 2 in principle requires and introduces the difficult dimension of making allowances for putative defensive action.

Moreover, in the broader ECHR schema, lawful arrest in terms of Article 5 requires the aim of bringing the arrestee before a court for trial.⁴³

The ECtHR confirmed the factual and temporal expansion of the scope of its analysis under Article 2, allowing it to extend its narrative of causality and responsibility into various aspects of state planning and control, including in some cases the interconnection between

this substantive aspect and the domestic legal and regulatory framework. This approach has continued in numerous subsequent decisions, which have gradually indicated the range of factors that the ECtHR is prepared to scrutinize and that will be required for state planning and control to satisfy Article 2.⁴⁴

Where the ECtHR does take mistakes and stress into account, it opens the possibility of bringing killings that were not objectively absolutely necessary within the ambit of Article 2(2) exceptions.⁴⁵ This arguably reduces the high level of protection that the right to life in Article 2 in principle requires and introduces the difficult dimension of making allowances for putative defensive action.⁴⁶

From this section it is possible to understand why the ECtHR does not usually condemn the substantial aspect in the cases related to the violation of the right to life. This is also connected to the exceptions that Article 2 established about the possibility of justifying the violation of the right to life.

In my opinion the ECtHR is more inclined to condemn the procedural aspect. One idea that can be proposed is that the ECtHR normally does not have the proper proof to condemn the substantial aspect and is more careful in this context with the condemnation of the States. Nevertheless, it is

⁴¹ RUSSELL HANNAH, ‘Understanding “Quelling a Riot or Insurrection” under Article 2 of the ECHR’ *European Human Rights Law Review*” p.p. 495. 2015.

⁴² SKINNER, STEPHEN. *“Lethal Force, the Right to Life and the ECHR: Narratives of Death and Democracy”*. Oxford, Hart Publishing (ed.) Bloomsbury Collections. Web. 10. p.p. 84. 2023.

⁴³ HARRIS, DAVID. ‘The Right to Life under the European Convention on Human Rights’ In: *Maastricht Journal of European and Comparative Law* 122, p.p. 136. 2004

⁴⁴ DICKSON, BRYCE, ‘The Planning and Control of Operations Involving the Use of Lethal Force’ in Lawrence Early, Anna Austin, Clare Ovey and Olga Chemishova (eds), *The Right to Life under Article 2 of the European Convention on Human Rights: Twenty Years of Legal Developments since McCann v the United Kingdom* (Oisterwijk, Wolf Legal Publishers) p.p. 47. 2015

⁴⁵ WICKS, ELIZABETH. “The Right to Life and Conflicting Interests”. *Oxford, Oxford University Press*, (ed.) 2010.

⁴⁶ Note Giuliani and Gaggio (2011) par.182.

very prone to condemn how the States has developed the investigation and in the majority of the cases that has been presented so far, this tribunal has condemned the lack of an impartial and effective investigation of the State in the violation of the right to life by security forces.

The procedural dimension of the right to life has to do with the effective investigation of the perpetrators of the violation of this right.

The procedural dimension has been developed by the ECtHR based on the same declaration about the importance of the right to life in the ECHR and the democratic societies making up the Council of Europe. To make the protection of that right practical and effective, the ECtHR has similarly interpreted the scope of Article 2 as going beyond its original terms by reading a duty on the state to investigate a suspicious death into it, especially from incidents in which lethal or life-threatening force has been used.⁴⁷

The procedural dimension of the Article can be seen to have a dual significance, as an end in itself and a means to an end. The duty to investigate has been developed into a key part of the ECtHR's narrative about what a High Contracting Party has done in response to an incident of lethal or potentially lethal force, establishing important standards for state investigations and forming a distinct ground for liability under Article 2. Yet, at the same time, the procedural dimension is also concerned with the extent to which the state's investigation is sufficiently reliable for the ECtHR to use its findings as the source of information and forensic interpretation underpinning its assessment of the substantive aspects of Article 2.⁴⁸

Skinner establishes that the procedural dimension of the right to life, stating the duty to investigate is not to be found in the wording of Article 2 itself. The author highlights once more the case of McCann which demonstrates the application of the living instrument principle and overlapping concerns with systemic needs and functional objectives. Under this duty, a High Contracting Party must investigate any suspicious death occurring in its jurisdiction that may engage its responsibility in a satisfactory way, a requirement that is especially important where such an outcome has resulted from the force used by the state. On that basis the duty has become an essential aspect of Article 2, both as a key dimension on its terms, establishing the requisite investigatory steps where this fundamental right is in question, and as a crucial element of the ECtHR ability to evaluate the substantive dimensions of the right to life.⁴⁹

The crucial points in this aspect of the McCann judgment were matters of principle and practicality. This implied that the duty to investigate was introduced as an additional positive obligation, but stressing the effectiveness of Article 2 by requiring it to be actively supported by the State through an ex post facto learning process.⁵⁰

The author states that the procedural dimension has been developed by the ECtHR since McCann encompasses a range of criteria. After this case, the ECtHR's outline of the duty to investigate was relatively limited but identified the importance of independence and publicity, as well as the requirement that the investigation be capable of determining whether or not the force

⁴⁷SKINNER, STEPHEN. *"Lethal Force, the Right to Life and the ECHR: Narratives of Death and Democracy"*. Oxford, Hart Publishing (ed.) Bloomsbury Collections. Web. 10. p.p. 96. 2023.

⁴⁸ Ibid. p.p. 97

⁴⁹ Ibid. p.p. 98

⁵⁰ CHEVALIER-WATS, JULIET. 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?' *European Journal of International Law* (eds). p.p.701, 703, drawing on Mowbray, 'The Creativity of the European Court of Human Rights' p.p.78. 2010.

used was justified. The importance of the duty to investigate shows that the ECtHR emphasizes both the principle of accountability and the practical need for evidence-gathering by the state.⁵¹

Since the removal of the Commission from the ECHR procedure in the 1998 reform, the ECtHR was left with limited investigatory capability. Due to resource restrictions, it needed to be able to rely on information provided by state parties, even though it was not its only source of information. In particular, the ECtHR relies on factual evidence as established and confirmed by domestic courts. The duty to investigate has thus continued to be important not only as a mechanism for supporting justice and seeking to make Article 2 effective at the state level but also as the means for trying to ensure that state processes are good enough for the Court to rely on. This could appear to involve a potentially problematic circularity, in where ECtHR must determine a state's compliance with human rights standards essentially based on evidence predominantly in the control of and provided by the state. The procedural standards set by the ECtHR are intended to provide an inherent guarantee of quality and reliability.⁵²

Skinner establishes that where a state investigation is not reliable, provided that the apparent procedural shortcoming made a material difference, there can be a procedural breach of Article 2 separately from a decision about the substantive elements, or a finding that an investigation by the state was inadequate may serve to support the view that a substantive dimension of Article 2 has also been breached. In the post-1998 period of the full-time ECtHR, the duty to investigate is thus a crucial part of the accountability process under Article 2, constituting both a means and an end in the legal protection of the right to life. In that sense as an independent ground for state liability, it represents a significant extension of the right to life, due to the need for practical and effective protection of that right and its importance in a democratic society, as well as a crucial foundation for the ECtHR ability to address the substantive dimensions of Article 2.⁵³

The Grand Chamber's confirmation of the existence of a duty to investigate under Article 2 in *McCann*, focusing on effective protection and requiring High Contracting Parties to support the evidence-gathering process in Article 2 cases, had also been influenced by other practical issues arising within the Council of Europe. These involved investigatory problems in cases against Turkey, which had been hampered by insufficient evidence.⁵⁴

The procedural dimension of Article 2, as applied to cases of lethal and potentially lethal force in the domestic policing and law enforcement context, has been developed by the ECtHR to involve several elements. In terms of outcomes, a deficiency in any one of these elements, assessed by the ECtHR as undermining the duty to investigate can lead to a finding that it has been breached. About each of the procedural elements, as with substantive dimensions of Article 2, the ECtHR relies on the importance of the right to life in a democratic society as the compelling rationale for seeking

⁵¹SKINNER, STEPHEN. *“Lethal Force, the Right to Life and the ECHR: Narratives of Death and Democracy”*. Oxford, Hart Publishing (ed.) Bloomsbury Collections. Web. 10. p.p. 103. 2023.

⁵² Ibid. p.p. 105

⁵³ Ibid. p.p. 106

⁵⁴ REIDY, AISLING; HAMPSON FRANCOISE AND BOYLE KEVIN. ‘Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey’ (1997) 15. 2 *Netherlands Quarterly of Human Rights* p.p.161, p.p.167 – 69,1997; MOWBRAY, ALASTAIR, *“The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford, Hart, 2004) p.p. 228; and BAKIRCIOGLU, ONDER AND DICKSON, BRICE *‘The European Convention in Conflicted Societies: The Experience of Northern Ireland and Turkey’* 66 *International and Comparative Law Quarterly* p.p. 263, p.p.281 – 82. 2017.

to achieve practical and effective protection of the right to life, but also recognizes that the procedural dimension may require some proportionate circumscription in the democratic context.⁵⁵

There can be a procedural breach of Article 2 separately from a decision about the substantive elements.⁵⁶

Skinner establishes some requisites of an effective investigation. First, its adequacy. The adequacy limb of the effectiveness of an investigation reflects the fundamental importance of evidence-gathering in supporting the construction of an account of events that can accurately represent what occurred.⁵⁷ The second limb of effectiveness concerns independence, in principle and practice. This requires an investigation to be carried out by an authority that is separate from those involved in the accident, in terms of legal structure and hierarchy, as well as actual activity and operational ability.⁵⁸ The third requisite is transparency and scrutiny. In the procedural dimension of Article 2, the ECtHR has determined that domestic investigations must involve some degree of transparency, by requiring family involvement and more general public scrutiny, but within limits. Thus, as with other elements of Article 2 protection, the ECtHR view this important aspect of the procedural dimension of the right to life as a crucial aspect of state accountability under the rule of law, as well as justice for victims and their families, but must still be considered on balance in the context of competing priorities in a democratic society.⁵⁹

The fourth and last requisite is temporal aspects. Due to the importance of Article 2 in democratic societies and the need to ensure its effective protection, the ECtHR has developed the procedural dimension to evaluate state conduct after the events in question, extending the temporal application of the right to life to subsequent investigatory issues. The ECHR has also held that it is the state's responsibility to initiate the process of investigating death and has linked that responsibility with questions of temporality in investigations. In evaluating the degree to which a state fulfils that responsibility and provides effective protection of the right to life through the procedural dimension of Article 2, the ECtHR has focused on two related temporal questions. These are the importance of when an investigation starts and how long it lasts, holding that an investigation must be commenced and undertaken by the state without excessive delay.⁶⁰

The ECtHR has found that delays in commencing and managing proceedings have contributed to a breach of the procedural dimension of Article 2 in several cases and has approached this requirement strictly.⁶¹ The requirement of timing, including the need for the state to take the initiative, can partly be understood as being related to the underlying concern with effectiveness and adequacy in the investigatory process.⁶²

It is important to highlight the significance of the duty to investigate per se and its role in supporting the ECtHR's substantive analysis, the main element of the procedural dimension is its

⁵⁵ SKINNER, STEPHEN. *Lethal Force, the Right to Life and the ECHR: Narratives of Death and Democracy*. Oxford, Hart Publishing (ed.) Bloomsbury Collections. Web. 10. p.p. 107. 2023.

⁵⁶ O' BOYLE AND BRADY, *Investigatory Powers*, p.p.383. For example, in *Abik c Turquie* (2013), in which the applicant's son and another person had been shot dead by the police in unclear circumstances, in par. 37, 42 – 50 the ECtHR found a procedural breach of Article 2 when it could not determine the substantive dimension due to an inadequate state investigation; see also *Akpinar and Altun v Turkey* (2007) par. 60 – 61; *Beh ç et S ö ğ ü t c Turquie* (2015) par. 57 – 66; *Hak i m İ pek c Turquie* (2015) par. 67 – 69.

⁵⁷ SKINNER, STEPHEN. *Lethal Force, the Right to Life and the ECHR: Narratives of Death and Democracy*. Oxford, Hart Publishing (ed.) Bloomsbury Collections. Web. 10. p.p. 107. 2023.

⁵⁸ *Ibid.* p.p. 113

⁵⁹ *Ibid.* p.p. 115, 117

⁶⁰ *Ibid.* p.p. 116.

⁶¹ *Ibid.* p.p. 117

⁶² *Ibid.* p.p. 118

effectiveness, which encompasses questions of adequacy and independence, but the procedural dimension also includes elements relating to the transparency and the timing of an investigation.⁶³

This text of Skinner has the vital importance to determine the standards of the ECHR in the violation of the right to life by security forces, considering that this tribunal has condemned this aspect of the right to life in the majority of the judgments without condemning the substantive aspect. This will be shown in the second chapter of this thesis when the cases are analyzed. The ECtHR takes very seriously the effective and correct investigation, which means the procedural aspect of the right to life of Article 2.

IV. Evolution of Enforced Disappearances in the European Court of Human Rights

A special section should be dedicated to enforced disappearances and how this court decides in this question. Enforced disappearance is carried out by security forces with the acquiescence of the State and there is a whole State apparatus behind this crime. The ECtHR has ruled since 1998 about several cases of enforced disappearances mostly in Turkey and Russia.

Ophelia Claude establishes that the ECtHR determines three different State obligations.

- 1) The State must refrain from unlawful killings.
- 2) The State bears the positive obligation to take steps to prevent avoidable loss of life.
- 3) The State must investigate suspicious deaths.⁶⁴

The first two obligations are related to the substantial aspect of the right to life while the last obligation concerns the procedural aspect of this right. The first case about enforced disappearances of the ECtHR was Kurt V. Turkey, the judgment of 25 May 1998. It was a relevant judgment for this tribunal because the Organization *Amnesty International* took part in the defense of the rights of the victim and gave visibility to the case worldwide.⁶⁵

Another key case for enforced disappearances is the case Timurtas V. Turkey, the judgment of 13 June 2000. This is a key case that oriented the activity of the ECtHR concerning enforced disappearances since the year 2000. The ECtHR established in this judgment that “*when the State has not provided a plausible explanation for the disappearance and there is sufficient circumstantial evidence, the Court will make the finding that the individual died in State custody.*”⁶⁶

López Guerra establishes that the cases presented before the ECtHR about enforced disappearances can be divided into four different areas: 1) The Turkish-Kurdish conflict; 2) Greek Cypriot clashes; 3) Clashes in the Caucasus between Russian forces and other nationalities; 4) Armed conflicts of the dissolution of Yugoslavia.⁶⁷

⁶³ WICKS, RAINEY AND JACOBS, OVEY. “*The European Convention on Human Rights*”, p.p. 168 – 77. 2009; SEIBERT-FOHR, ANJA. “Prosecuting Serious Human Rights Violations” (*Oxford, Oxford University Press*) p.p. 132 – 41; CHEVALIER-WATTS. “*Effective Investigations*” p.p. 707; MOWBRAY, ‘Duties of Investigation p.p.437; RUSSELL, “*The Use of Force and Article 2 of the ECHR in Light of European Conflicts*”, p.p. 121 – 54.

⁶⁴ CLAUDE, OPHELIA. “A comparative approach to enforced disappearances in the Inter-American Court of Human Rights and the European.” In: *Intercultural Human Rights Law Review* (ed). Vol. 5. p.p. 407-461

⁶⁵ ECtHR Kurt V. Turkey, judgment of 25 May of 1998. No. 24276/94.

⁶⁶ ECtHR Timurtas V. Turkey, judgment of 13 of June 2000. No. 23531/94.

⁶⁷ LÓPEZ GUERRA, LUIS. “Desapariciones Forzadas en la del Tribunal Europeo de Derechos Humanos”.. In: *Instituto de Estudios Constitucionales del Estado de Querétaro*. Biblioteca Jurídica (ed). Virtual del Instituto de Investigaciones Jurídicas de la UNAM. P.431-452. 2020

Encarnación Fernández establish that since 1990 the ECtHR had to attend a great quantity of lawsuits about committed abuses by the security forces in situations of conflict or a serious internal instability, extrajudicial executions, tortures, illegal detentions, enforced disappearances, among others, first in the South-East of Turkey later in Chechnia. The International Convention for the Protection of all people against Forced Disappearances tries to unify all the complexity of the phenomenon of the enforced disappearances. This document imposes the obligation of classifying the crime of enforced disappearances.⁶⁸

The Council of Europe was born 60 years ago with the objectives of peace and respect for human rights. However, during the decades it was integrated only by a part of the European countries. Only after the fall of the Berlin Wall in 1989, with the access to the countries of Central and Western Europe, this became an authentic Pan-European organization, and it was able to aspire to a united Europe in the respect of the preeminence of human rights. Precisely this was the decisive argument to the admission of Russia, in spite of no meet the admission conditions and in a moment in which the conflict with Chechnya was already broken out.⁶⁹

However, the time and experience has proven the huge difficulties to make this aspiration a reality.⁷⁰

As far as the victim is subtracted from the protection of the law, violate several rights, among others, the right to recognition of legal personality, right to liberty and security of the person, and the right to not being submitted to torture or other penalties of treatment cruel, inhuman or degrading. Violates the right to life or puts this in grave danger.⁷¹ It is important to highlight that this crime violates the right to personal integrity, personal liberty (Article 3 and 5) and the right to life (Article 2) that are interlinked.

The first cases of enforced disappearances that were interposed before the European Commission on Human Rights were in the beginning of the nineties. These cases were resolved by the ECtHR at the end of this decade. There are two big groups of cases of enforced disappearances in this tribunal. The first one is about the conflict Kurdish in the south-east of Turkey between the government and the Labor Party (party of the workers) of Kurdistan. The second group is the cases of Chechens after of the entry into force in Russia of the European Convention of Human Rights in 1998 and the subsequent access to the right to the individual lawsuit. This corresponds to the second war of Chechnya in which the enforced disappearances of persons took place at a big scale.⁷²

⁶⁸ FERNÁNDEZ, ERCARNACIÓN. “Nuevos Retos para el Tribunal Europeo de Derechos Humanos: La Jurisprudencia sobre Desapariciones Forzadas”. (New Challenges for the European Court of Human Rights: The Case-Law on Forced Disappearances). In: *Persona y Derecho*, 61 (ed) p.p. 195-226. p.p. 197. 2009

⁶⁹ CHATZIVASSILIOU, D.. "L'adhésion de la Russie au Conseil de l'Europe", Schneider, C.(ed.). *Le Conseil de l'Europe acteur de la recomposition du territoire européen*, CESIDE, Grenoble, pp.27-59. 2007

⁷⁰ JÁGERS, N. AND ZWAAK L. "The Russian Federation and Human Rights. How Should the Council of Europe Deal with the Problems Posed by Its Largest Member State?" In: *Netherlands Quarterly of Human Rights* (ed.) p.p. 3-7. 2008

⁷¹ GENERAL ASSEMBLY OF THE UNITED NATIONS. “*International Convention for the Protection of All Persons from Enforced Disappearances.*” Resolution 47/133.20 December 2010. Article 1.

⁷²FERNÁNDEZ, ERCARNACIÓN. “Nuevos Retos para el Tribunal Europeo de Derechos Humanos: La Jurisprudencia sobre Desapariciones Forzadas”. (New Challenges for the European Court of Human Rights: The Case-Law on Forced Disappearances). In: *Persona y Derecho*, 61 (ed) p.p. 195-226. p.p. 200. 2009

Fernández establish that the cases of enforced disappearances depend on the facts. There is a difficulty in showing proofs. As a last resort, the result of a lawsuit about the detention and disappearance of a relative will not depend of abstruse legal aspect, but on the available evidence.⁷³

The problem is that the disappearance of a person is a crime that is not known as such because there is no body, the victims are missing, and the perpetrators are anonymous and there is lack of evidence. In the cases that the ECHR has deliberate, the usual answer of the authorities has been denied any responsibility of the agents of security of the State and if there is no body, deny that the person has died or that may be presumed dead. In the majority of the cases, it is established that it was not possible to determine the responsibility of the State.⁷⁴

The first case that the ECHR ruled about enforced disappearance was Kurt V. Turkey, judgment of 25 May 1998. In this case the tribunal was not willing to accept the presumption of death.⁷⁵ An important case that change what the court understood about enforced disappearances was Timurtas V. Turkey, judgment of 13 June 2000⁷⁶. In the later cases of Timurtas, the ECHR has shown more willing to examine from the point of view of Article 2 the cases of enforced disappearances, giving a progressive entrance to the presumption of death.⁷⁷

In different Turkish matters it is underlined that the obligation of investigating exists even in situations of “violent armed conflicts” when the Tribunal talks about “armed conflicts” is no necessarily armed conflicts in the strict sense of International Humanitarian Law.⁷⁸

Fernández states that the consolidated jurisprudence of the ECtHR the first phrase of Article 2.1 (“The Right to life of every person is protected by the law”) impose to the State the obligation of refrain of attempt against the life in an intentional or illegal, but also to adopt adequate measures to protect the life of the people that are found under its jurisdiction.⁷⁹ These are the negative and positive obligations of the State respect.

When the ECtHR infers the lack of cooperation of the government and that the person was detained by State’s agents, in cases in which there are indications in that sense but there is no definitive proofs.⁸⁰

Fernández highlights, as other authors, the case McCann and Others V. United Kingdom, Judgment of 27 of September of 1995. It is understood that the obligation to protect the right to life that establishes Article 2 demands also to carry out an official and effective investigation when a person dies as a consequence of the use of the force.⁸¹

⁷³ LEACH, P., "The Chechen Conflict: Analyzing the Oversight of the European Court of Human Rights". In: *European Human Rights Law Review*, issue 6 (ed.), p.p.743. 2008

⁷⁴ FERNÁNDEZ, ERCARNACIÓN. “Nuevos Retos para el Tribunal Europeo de Derechos Humanos: La Jurisprudencia sobre Desapariciones Forzadas”. (New Challenges for the European Court of Human Rights: The Case-Law on Forced Disappearances). In: *Persona y Derecho*, 61 (ed) p.p. 195-226. p.p. 200. 2009

⁷⁵ ECtHR Kurt V. Turkey, judgment of 25 May of 1998. No. 24276/94.

⁷⁶ ECtHR Timurtas V. Turkey, judgment of 13 of June 2000. No. 23531/94

⁷⁷ FERNÁNDEZ, ERCARNACIÓN. “Nuevos Retos para el Tribunal Europeo de Derechos Humanos: La Jurisprudencia sobre Desapariciones Forzadas”. (New Challenges for the European Court of Human Rights: The Case-Law on Forced Disappearances). In: *Persona y Derecho*, 61 (ed) p.p. 195-226. p.p. 206. 2009.

⁷⁸ SASSOLI, M. "La Cour européenne des droits de l'homme et les conflits armés". In: *Breitmoser, S. et al., (eds.). In: Human rights, democracy and the rule of law*, Dike/Nomos, Zürich/Baden-Baden, p.p. 725. 2007

⁷⁹ ECtHR. LC.B. V. United Kingdom, 9-6-1998, par. 36.

⁸⁰ BARRET, J. "Chechnya's last hope? Enforced disappearances and the European Court of Human Rights". In: *Harvard Human Rights Journal* (ed.), p.p. 137-142.2009

⁸¹ FERNÁNDEZ, ERCARNACIÓN. “Nuevos Retos para el Tribunal Europeo de Derechos Humanos: La Jurisprudencia sobre Desapariciones Forzadas”. (New Challenges for the European Court of Human Rights: The Case-Law on Forced Disappearances). In: *Persona y Derecho*, 61 (ed) p.p. 195-226. p.p. 214. 2009

In ulterior matters, many of the relatives to the situation of the south-east of Turkey, the ECtHR has precise the characteristics that this investigation must have. The essential purpose of this is to ensure the effective application of the internal law that protects the right to life. In the cases that State agents and organs guarantee that they are accountable of the deaths that occurred under their responsibility. The authorities must act by their own initiative once they have knowledge of the matter. The investigation must be carried out by independent and impartial organs.⁸² Fernández establishes that the authorities must have adopted the reasonable to their reach for the obtaining of proves related to the incident. Any irregularity decreases the capacity of establishing the cause of death or identify to the responsible, can contribute an infraction of the processual obligation of Article 2.⁸³

The author continues by establishing that in many cases of disappearances the applicant alleges that before of the death the victim has suffered bad treatment. Such allegations generally are rejected because of the lack of proof. Because there is no body is very difficult to prove bad or ill treatment or torture.⁸⁴

The enforced disappearances are flagrant violation of broad range of human rights which is acknowledged in the international instruments of protections of human rights (Universal Declaration of Human Rights, International covenant on Civil and Political Rights, and the European Convention on Human Rights) in particular of the rights to life, to liberty and personal security, the right to not be submitted to torture, the prohibition of arbitrary detention and arrest and the right to a just and public trial.⁸⁵

Fernández states the problem of the enforced disappearances that were interposed before the ECtHR through the mechanism of individual lawsuits. In consequence the tribunal has not addressed this phenomenon globally but has examined the enforced disappearances case by case. In these circumstances, the tribunal has looked different ways to make justice in the concrete assumptions: the inferences of the lack of cooperation of the government, often decisive to establish the responsibility of the State, the presumption of death, the positive obligations of protecting life and the liberty, when it was not possible to prove that were responsible were state agents, the recognition of the relatives of the indirect victims in the enforced disappearances.⁸⁶

From this part it is possible to establish the differences between the ruling in cases related to enforced disappearances in the ECtHR and the COURT IDH. This last tribunal has a vast number of judgments of this crime condemning the majority of the countries of Latin America. Also, in Europe, where dictatorships were held for a long a time, but not many cases of enforced disappearances have achieved the interposition before the ECtHR. Mostly, the cases of enforced disappearances are against Russia and Turkey. This understandable, because as López Guerra states these cases are related with the Turkish-Kurdish conflict and clashes in the Caucasus between Russian forces and other nationalities. This makes sense because the Soviet Union kept a dictatorship in the eastern part of Europe for at least 40 years. Other cases that will be examined in the next chapter about enforced disappearances are the ones that named López Guerra about Greek

⁸² Ibid. p.p. 215

⁸³ Ibid. p.p. 215

⁸⁴ Ibid. p.p. 218, 219.

⁸⁵ ESTEVE MOLTO, JOSÉ ELÍAS. “La desaparición forzada de personas en la jurisprudencia del Tribunal EDH: entre avances y limitaciones”, in Ríos Vega, Luis Efrén and Spino, Irene. In: *Estudios de casos líderes interamericanos y europeos*, México, Tirant lo Blanch, p.p. 203-237. p.p. 206. 2016

⁸⁶FERNÁNDEZ, ERCARNACIÓN. “Nuevos Retos para el Tribunal Europeo de Derechos Humanos: La Jurisprudencia sobre Desapariciones Forzadas”. (New Challenges for the European Court of Human Rights: The Case-Law on Forced Disappearances). In: *Persona y Derecho*, 61 (ed) p.p. 195-226. p.p. 224. 2009.

Cypriot clashes and Armed conflicts of the dissolution of Yugoslavia, where there were several crimes against humanity.

V. Police Brutality in the ECtHR and Effective Investigation in the European Court of Human Rights

There are several cases of police brutality in practice of the European Court of Human Rights. Here some examples will be examined. This part is included as this is another category of the violation of the right to life by security forces, and the approach that the ECtHR has established about this category in its cases is peculiar. Moreover, there are several authors that have analyzed the subject as well, which could be an indicator of the importance of the issue.

A case to highlight is *Makaratzis V. Greece*, Judgment of 20 December 2004, where some of the police officers left the scene without revealing their identity and disclosing all necessary information concerning the weapons used. Makaratzis complained, under Article 2 that the police officers had used excessive firepower against him, putting his life at risk. However, because the applicant had had criminal conduct, the Court accepted that the use of force against him had been based on an honest belief that had been perceived to be valid at the time. The Court criticized the chaotic way the firearms had been used by the police. Serious questions arose as to the conduct and the organization of the police operation. The Court concluded that irrespective of whether or not the police had intended to kill him, the applicant had been the victim of conduct that, by its very nature, had put his life at risk even though, in the event, he had survived. For this, Article 2 has been violated.⁸⁷

Another example of a case of police brutality in the ECtHR is *Affaire Mocanu and Other V. Romania* 24 May 2006. The ECtHR noted that a criminal investigation was opened by the authorities' motion shortly after the events. It was considered that the authorities responsible for the investigation, in this case, did not take all the measures reasonably capable of leading to the identification and punishment of those responsible for the crime. The Tribunal decided that the wife of the victim did not have the benefit of an effective investigation as required by Article 2 of the Convention. The ECtHR ruled that there has been a breach of the procedural aspect of this article.⁸⁸

In the case, *Wasilewska and Kalucha V. Poland*, 23 February 2010, the Court found a violation of Article 2. This was because the Polish government had failed to submit any comment regarding the proportionality of the level of force used by the police, the organization of the police action, and whether an adequate legislative and administrative framework had been put in place to safeguard people against arbitrariness and abuse of force.⁸⁹

Then, there is the case of *Giuliani and Gaggio V. Italy* 24 March 2011, where the ECtHR found no violation of Article 2 about the use of lethal force, although a young man died during a protest. However, 7 of the 17 judges of the Grand Chamber dissented, especially to many aspects of the decision regarding the right to life. The Court held that there was no violation of Article 2 about the domestic legislative framework governing the use of lethal force or about the weapons issued to law enforcement agencies. It has not been excessive or disproportionate to what was necessary for the defense of any person from unlawful violence.⁹⁰

⁸⁷ ECtHR *Makaratzis V. Greece*, judgment of 20 December 2004. No. 50385/99. Par. 11.

⁸⁸ ECtHR *Affaire Mocanu and Other V. Romania* 24 May 2006. No. 56489/00.

⁸⁹ ECtHR *Wasilewska and Kalucha V. Poland*, judgment of 23 February 2010. No. 28975/04 and 33406/04. Par. 32.

⁹⁰ ECtHR *Giuliani and Gaggio V. Italy*, judgment of 24 March 2011. No. 23458/02. Par. 8

The Court found no violation of Article 2 of the Convention about the organization and planning of the police operations at the summit: the authorities had a duty to ensure peaceful conduct and the safety of all citizens during lawful demonstrations, but “*they could not guarantee this entirely and had a wide discretion in the choice of the means to be used*”.⁹¹ However, there were differing views regarding the State’s obligations (both substantive and procedural) to protect life, including the use of firearms during police operations, issuing nonlethal weapons, and whether there was a higher level of responsibility where large-scale, high-risk demonstrations are planned. The dissenting opinions of four judges found a lack of organization by the State and a lack of support for the officer who ultimately shot Carlo Giuliani (the victim).⁹²

In another case *Finogenov V. Russia*, 20 December 2011, it was claimed that the use of force by the security forces was disproportionate, and the assistance provided to the survivors inadequate. However, the Court found no violation of Article 2 ECHR because it established that “*there existed a real, serious and immediate risk of mass human losses and that the authorities had every reason to believe that a forced intervention was the “lesser evil” in the circumstances*”⁹³ while the use of gas was not disproportionate measure in these circumstances base on the proportionality principle. The Court did find a violation of Article 2 concerning the inadequate planning and implementation of the rescue operations, as well as the lack of medical assistance to the hostages.⁹⁴ This is an interesting case because the Court decided that the principle of proportionality was applicable and had a very good justification for not condemning the right to life under Article 2.

In the case *Fanziyeva V. Russia*, 28 June 2015, the ECtHR concluded that the State authorities failed to provide the victim with sufficient and reasonable protection from foreseeable danger to her life, as required by Article 2 ECHR, and stressed the authorities’ obligation to protect the health and physical well-being of persons under arrest, in detention or custody. Despite the sufficient evidence to show that the person in detention might attempt to escape by jumping out of the building, there were certain basic precautions that police officers should be expected to take concerning persons held in detention to minimize any potential risk to their right to life. That is a foreseeable danger. Also, the Court criticized that one of the State agents had allowed an arrested person to remain unsupervised.⁹⁵

It was determined that it was necessary to investigate the arbitrary homicides, and the allegations of bad treatment infringed on a person who is in the custody of the security forces.

An important case to highlight is *Shavadze v. Georgia*, judgment of 19 November 2020. In this case, law-enforcement officers, heavily armed and wearing masks, had taken part in the operation to apprehend the victim. The ECtHR established that the criminal investigation into the death of the victim had been ineffective and was in breach of the respondent State’s procedural obligations under Article 2 of the Convention.⁹⁶ This judgment condemning the procedural aspect and the lack of an effective investigation is very common in the jurisprudence of the ECtHR.

This is another category of violation of the right to life by security forces that is relevant to highlight because a higher number of cases were decided in the ECtHR in this issue. Also, the cases inside this category are interesting to determine. The judgments of these cases establish essential fundamentals and significant reasons for the condemnation of the States that are accused.

⁹¹ Ibid. Par. 9.

⁹² Ibid. Par. 9.

⁹³ ECtHR *Finogenov V. Russia*, judgment of 20 December 2011. No. 18299/3 and 27311/03. Par. 7

⁹⁴ Ibid.

⁹⁵ ECtHR *Fanziyeva V. Russia*, judgment of 28 June 2015. No. 41675/08. Par 7.

⁹⁶ ECtHR *Shavadze v. Georgia*, judgment of 19 November of 2020. No. 72080/12.

The effective investigation, as it was explained in the subchapter of the procedural aspect of this work, is of vital importance for these crimes and how the Courts rule about them. There are many requisites about what makes an effective investigation, and the security forces have to fulfil all of this for the Court to establish that it has been impartial and efficient.

The investigation has to allow for a sufficient level of public scrutiny, which will vary due to the matters, but in every case, it has to be accessible to the relatives of the victim. Besides, the investigation must be done with reasonable promptness and speed. The prompt response of the authorities is essential to maintain the trust of the citizens in the validity of the Rule of Law and to avoid any appearance of the complicity or tolerance of the illicit acts.⁹⁷

The role of the police in combating impunity is pivotal because the coercive powers available to the police to enforce the law render officers prone to violate human rights and as their duty is to investigate crime, either by their authority or at the direction of a prosecutor or magistrate, serves to protect human rights. Fundamentally, impunity is a law enforcement problem, and the police are vulnerable to allegations that they have negatively violated human rights or failed to protect human rights. According to the author, under these circumstances, the police investigation of forces inevitably leaves the police open to the accusation that a culture of impunity protects officers from the rule of law.⁹⁸ It can happen that the police officers established that they did not commit a crime because they were doing their work.

Protection of human rights presumes the existence of a regulatory framework, including legislation, regulations and institutional capacity, which puts into practical effect the principles established in the jurisprudence of the international courts.⁹⁹ A raft of international instruments, monitoring bodies¹⁰⁰ and state-funded and voluntary agencies¹⁰¹ have issued guidance on how standards should be complied with. Cross-cutting developments in law and policy of this type have contributed to a burgeoning international discourse on impunity for human rights abuse, a discourse that prioritizes the importance of investigation and criminal prosecution as a means of bringing offenders to justice¹⁰² and points to the central part played by police officers as ‘human rights protectors.

The ECtHR started to punish the lack of an effective investigation and the procedural aspect of the right to life in almost all judgments of this type in the last years of the 20th century.

This can be seen in two judgments in the way in which compliance with the procedural obligation to investigate under Article 2 was associated with standards of effectiveness, independence, adequacy thoroughness, public scrutiny and participation of the complainant in

⁹⁷ Kelly and others c. Reino Unido, 4-5-2001, par. 94-98; Imakayeva, op. cit., par. 146-148; and in Khadzhiyev..., op. cit., par. 100.

⁹⁸ ECtHR Shavadze v. Georgia, judgment of 19 November of 2020. No. 72080/12. P. 85.

⁹⁹ SMITH, GRAHAM. “Chapter 6: Effective Investigation of Alleged Police Human Rights Abuse: Combating Impunity.” In: *The Police and International Human Rights*. Springer. Alleweldt, Ralf; Fickensher, Guido. DSF: German foundation for peace and research. Switzerland, (ed). p.p. 85. 2018.

¹⁰⁰ For example, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), www.cpt.coe.int; Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/Brief.aspx>.

¹⁰¹ For example, the Organization for Security and Cooperation in Europe (OSCE), www.osce.org, and Amnesty International, www.amnesty.org, respectively.

¹⁰² For example, Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (UN Doc. E/CN.4/2005/102/Add.1): <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900>; Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers’ Deputies: <https://wcd.coe.int/ViewDoc>.

proceedings. The Court clarified that the obligation to investigate was also applied to allegations against non-state perpetrators and was not dependent on the complaint being made by a member of the public mere knowledge on the part of the authorities was sufficient to trigger the duty.¹⁰³¹⁰⁴

Smith states that the ECtHR has established in the judgment *Tunç V. Turkey*, Judgment of 2015 that there was no lack of independence in the investigation and for that, there was no violation of the right to life and Article 2. Meanwhile, in the case of *Ramsahai*, the Grand Chamber used the language of standards in establishing independence as a requisite of effectiveness. Smith says that *Tunç's V. Turkey* judgment represents a retreat from a requirement that applied for close to eight years. The Court used to state that an investigation into an alleged violation of Article 2 must be carried out by investigators that are institutionally and hierarchically separate from potential violators, and similarly, independent management and direction arrangements must be in place.¹⁰⁵

¹⁰⁶ There is an exception in the case of *Tunç V. Turkey* about the evolution of the work of the ECtHR, which has been ruling about the necessity of the independent investigation of Article 2 about the violation of the right to life by security forces. This evolution of judgments remained since the end of the decade of the nineties and the beginning of the 2000s.

It is important to emphasize the theme of impunity. The early ECHR case law on effective investigation coincided with an emerging international discourse on impunity. In 1991, UN Special Rapporteur Louis Joinet was tasked with studying the impunity of perpetrators of human rights violations by the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights (UNCHR). Reporting in 1997,¹⁰⁷ Joinet observed that the need to combat impunity was recognized by the international community at the culmination of a series of stages of civil society opposition to human rights abuse.

With impunity, knowing becomes confused, submerged, hidden, and uncertain. Attacks against life remain unexplained forever. This creates fear, anxiety, and guilt, which elicit abnormal responses and behavior.¹⁰⁸

The principles relating to the right to justice place the onus on the state to punish perpetrators of human rights abuses and crimes against humanity, including provision for the involvement of victims in proceedings.¹⁰⁹ The right to reparation, as well as requiring states providing individual victims with access to remedies, including restitution, compensation and rehabilitation, also requires state recognition of the collective harm that impunity causes to their communities. There

¹⁰³ ECtHR. *Ergi v Turkey* (Application no. 23818/94), Judgment 28 July 1998. The obligation to investigate allegations against non-state actors was applied to Article 3 in *Assenov v Bulgaria* (Application no. 24760/94), Judgment 28 October 1998

¹⁰⁴ SMITH, GRAHAM. "Chapter 6: Effective Investigation of Alleged Police Human Rights Abuse: Combating Impunity." In: *The Police and International Human Rights*. Springer. Alleweldt, Ralf; Fickensher, Guido. DSF: German foundation for peace and research. Switzerland, (ed). p.p. 86. 2018.

¹⁰⁵ ECtHR. *Tunç v. Turkey*, (Application no. 53802/11). Judgment 13 June 2017.

¹⁰⁶ ECtHR. *Ramsahai and Other V. Netherlands*. (Application no. 52391/99), Judgment 10 November 2005.

¹⁰⁷ Final Report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Question of the impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 1 (2 October 1997). <http://www.derechos.org/nizkor/impu/joinet2.html>

¹⁰⁸ ROJAS BAEZ. p.p. 85. 1996

¹⁰⁹ Buttressed by the Rome Statute of the International Criminal Court, and access to justice in the event of failure by a state to meet international humanitarian law duties.

is some overlapping between the collective reparation and the need to protect against impunity reoccurring, and principles relating to the right to reparation.¹¹⁰

According to the ECtHR annual reports, there was a rise in judgments establishing the lack of effective investigation violations of articles 2 and 3 from 2003 to 2009. From 2009 to 2010, there was a small decrease. Then there was an increase getting to a higher peak in 2011. Subsequently, there was a big decrease from 2012 to 2014, and which continued until 2015.¹¹¹

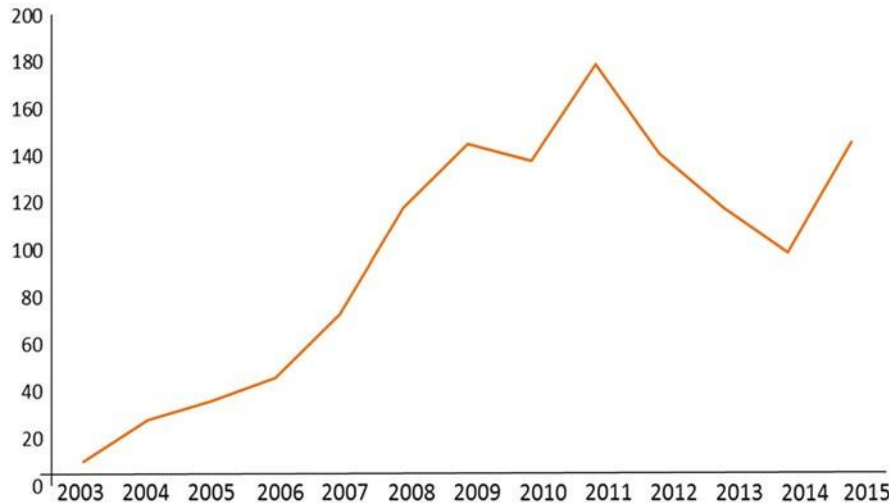


Fig. 1 ECHR Articles 2 and 3 lack of effective investigation violations: 2003–2015. Source: ECtHR annual reports

Since the *Ramsahai V. Netherlands* judgment of 15 May 2007, there has been limited progress by the Council of Europe member states towards compliance with the effective investigation requirements. Some factors are the lack of will on the part of politicians who may have called on the services of the police in the past, anticipate having to do so in the future, or do not wish to antagonize powerful police chiefs or representative bodies. Also, underdeveloped civil society organizations, including insufficiently independent media and non-governmental organization, are not taken seriously by the government. Furthermore, limited resources for institutional and capacity-building programs are required to improve the regulation of law enforcement, and, for example, establish new bodies, improve communication between law enforcement departments and protect against collusion.¹¹²

Whether a state or non-state actor evades accountability for the wrongs they have committed, impunity de facto essentially relates to problems associated with ensuring that public officials responsible for the criminal process, and disciplinary proceedings in cases where the evidence points to individual or institutional failures that do not meet the criminal threshold, lawfully perform their duties.¹¹³

I believe that the importance for the ECtHR of an effective investigation has been well established in the procedural aspect of the violation of the right to life. Also, the procedural aspects

¹¹⁰ Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (UN Doc. E/CN.4/2005/102/Add.1).

¹¹¹ ECtHR Annual Reports. 2015.

¹¹² SMITH, GRAHAM. “Chapter 6: Effective Investigation of Alleged Police Human Rights Abuse: Combating Impunity.” In: *The Police and International Human Rights*. Springer. Alleweldt, Ralf; Fickensher, Guido. DSF: German foundation for peace and research. Switzerland, (ed). p.p. 98. 2018.

¹¹³ Providing that there is not impunity de jure, in which case remedies for human rights abuse are a matter for the legislature in the first instance; see, for example, *Cestaro v Italy* (Application no. 68841/11), Judgment of 7 April 2015.

include impartial and independent investigation, and these can be causes for condemning the state. This section analyses a few cases where the state was condemned for not guaranteeing an effective investigation and violating the procedural aspect of the right to life.

Moreover, the fight against impunity is very important because if it is not established the perpetrators may stay free of punishment. For this, the relevance of an effective and impartial investigation in each State into the work of the security forces in their actions concerning human rights strengthens. Figuring out impunity is difficult because each state may have their own rules about pardon or amnesty to certain criminals, like it happened in many countries of Latin America.

VI. Deprivation of Liberty by the Security Forces

According to the practice of the ECtHR, Article 5 has the main aim to prevent arbitrariness. The main criterion for the Court is whether the deprivation of liberty has followed objective criteria. Provided that some fundamental rules are observed (respect for human dignity, proportionality, legal provision), the main objective is detecting and excluding arbitrariness.¹¹⁴ This article is about the Right to Liberty and Security.¹¹⁵

Being arrested is quite a serious experience for the person experiencing the arrest. He or she goes from being free to losing his or her freedom, one of the highest goods in our liberal democracies. The arrestee loses contact with and the hypothetical support of friends, relatives or acquaintances and is confined to a restricted space where he/she is told what to do by somebody else without external eyes to witness it. Furthermore, he/she may experience some sort of violence (use of force) during the arrest and might be suffering a certain degree of psychological consequences afterwards.¹¹⁶

The jurisprudence of the ECtHR about the deprivation of the liberty of a person has followed this norm in their judgments. It is important to highlight that the deprivation of the liberty of a person is a violation of the ECHR and of a vital human right. Furthermore, the liberty, security and life of the person are human rights that are interlinked and if the right to life is violated, the two

¹¹⁴ SMITH, GRAHAM. “Chapter 6: Effective Investigation of Alleged Police Human Rights Abuse: Combating Impunity.” In: *The Police and International Human Rights*. Springer. Alledweldt, Ralf; Fickensher, Guido. DSF: German foundation for peace and research. Switzerland, (ed). p.p. 86. 2018..

¹¹⁵ COUNCIL OF EUROPE AND EUROPEAN TRIBUNAL OF HUMAN RIGHTS. “European Convention for the Protection of Human Rights and Fundamental Freedoms”. Strasbourg, France. Signed on November 4, 1950, in Rome, Italy. Entry into force on September 3, 1953. Article 5: 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 noncompliance 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 unauthorized 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.”

¹¹⁶ GUILLÉN LASIERRA, FRANCESC. “Chapter 7: The Deprivation of Liberty by the Police. International Parameters and the Jurisprudence of the European Court of Human Rights.” In: *The Police and International Human Rights*. Springer. Alledweldt, Ralf; Fickensher, Guido. (ed). DSF: German foundation for peace and research. Switzerland. p.p. 104. 2018

other rights are infringed too. For that, it is relevant to understand that the liberty of the person is a human right that cannot be violated without having consequences. It is different when the security forces have a warrant to arrest a person, but it is important not to forget that although a person is deprived of his or her liberty lawfully, this cannot mean ill, cruel or degrading treatment, torture or punishment of this arrested individual.

There is no definition of deprivation of liberty in the text of the European Convention. The Court has not given any clear definition in its findings either, although it has defined the factors that can help to determine whether a deprivation of liberty has taken place. First of all, not any restriction of freedom is considered like that. Hence, it is crucial that the restriction of liberty has particular characteristics to be considered as a detention. Some special circumstances should be present to qualify a situation as a deprivation of liberty in terms of Article 5 of the Convention.¹¹⁷

The Court states that, although the duration of the measure is a factor to be considered, the fact that control is imposed for a significant period of time is not in itself sufficient to justify a deprivation of liberty, as was clear from the cases on night curfews.¹¹⁸

The police should not resort to detention as a first remedy for a particular situation. The European Code of Police Ethics (ECPE) establishes that “Deprivation of liberty of persons shall be as limited as possible” (Article 54).¹¹⁹ It confirms the principle established by the Court in the sense that detention should be necessary. Necessity should be understood in the sense that there is no other way to achieve the same goal with a different and less restrictive measure.¹²⁰ Consequently, it is required not only that the detention be lawful within the country where it takes place but that it should also be necessary under the circumstances of the case.¹²¹

Furthermore, the ECHR establishes a closed list of legitimate grounds for detention. The list is exhaustive. Police interventions should only be carried out within the framework of a procedure prescribed by law. The grounds are:

1. To bring a convicted felon into jail, to secure the fulfillment of an order from a court of the law.
2. To bring somebody before a judge or a court who presumably has committed a crime or to prevent somebody from committing any offense.
3. To bring a minor before the competent authority for educational reasons.
4. Prevention of spreading infectious diseases, protect and control people with mental problems, drugs, addiction, alcoholism or vagrants.
5. To prevent an illegal entry of the country or to enforce an expulsion of somebody who stays illegally or has an order of extradition or deportation.¹²²

¹¹⁷ Ibid. p.p. 105

¹¹⁸ Vid. Raimondo V. Italy, (1994), and Trijonis v. Lithuania, (2005) (quoted in Austin and Others V. U.K, 2011, § 41).

¹¹⁹ COUNCIL OF EUROPE AND EUROPEAN TRIBUNAL OF HUMAN RIGHTS. “*European Convention for the Protection of Human Rights and Fundamental Freedoms*”. Strasburg, France. Signed on November 4, 1950, in Rome, Italy. Entry into force on September 3, 1953. Article 54.

¹²⁰ Witold Litwa v. Poland, (2000, § 72–80)

¹²¹ Hilda Hafsteinsdottir v. Island, (2004, § 51).

¹²² GUILLÉN LASIERRA, FRANCESC. “Chapter 7: The Deprivation of Liberty by the Police. International Parameters and the Jurisprudence of the European Court of Human Rights.” In: *The Police and International Human Rights*. Springer. Alleweldt, Ralf; Fickensher, Guido. (ed). DSF: German foundation for peace and research. Switzerland. p.p. 112. 2018

It is important to highlight that a person that is a criminal and deprived of his or her liberty, also has human rights must treat with humanity. Article 10 of the Covenant on Civil and Political Rights 1966 provides that “*all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*”¹²³

Moreover, Article 5 of the ECHR defines the violations of this right and their exceptions. Normally, the violation of the right to life by security forces suppose the deprivation of the liberty without a judicial warrant, mostly in enforced disappearances or police brutality, but it can happen that this right is not violated and the right to life is infringed. This frequently occur with executions by security forces in the middle of an operative or protest or even in the street when the person who is killed is suspected of a crime.

VII. Positive Obligations of the State

It was established that the State has positive and negative obligations regarding the right to life. It is necessary to determine the positive obligations of the state in relation to the right to life and security forces. This obligation is relevant in relation to the right to life, as the government must do everything that is in its power to avoid the loss of lives. Furthermore, the State must take all the necessary measures at a national, provincial or municipal level that avoid the deprivation of life.

Dimitris Xenos states that the main focus is put on the professional duty of the police, which in human rights law involves the positive obligations of the state to actively protect and guarantee human rights. The positive obligations are not about abuses of police powers but the emergence of the police as a service provider and its officers as professionals, bound by a duty of care that characterizes their work which is to enforce the law and tackle crime.¹²⁴ The positive obligation is to guarantee and protect the right to life and the negative is to avoid and punish killing arbitrarily a citizen.

Xenos highlights the principle of effectiveness which was introduced a long time ago by the ECtHR and the Court has consistently employed to represent the wider scope of constitutional review at the European level. The principle of effectiveness looks at individual and specific failures of police responses and also capable of re-determining and developing further the duties and standards of police work.¹²⁵

More often and, traditionally, the responsibility of the police has been examined and reviewed by the organs of international law, including the EU, in relation to abuses of police powers.¹²⁶

Due to the intersection of the system of ECHR with other regional human rights systems and that of the UN, there is a considerable degree of harmonization of the review principles and standards at both national and European/international levels.¹²⁷

The state’s positive obligations arise in the context of crime since tackling crime is a common form of protection against human rights violations. Since the early years of the emergence of positive obligations in the constitutional review of the ECtHR, victims of crime have asserted protection of their human rights from the state.

¹²³ GENERAL ASSEMBLY UNITED NATIONS. Resolution 2200A (XXI). International Covenant on Civil and Political Rights. 16 December 1966. Article 10.

¹²⁴ XENOS, DIMITRIS. “Chapter 10:” The Protection Against Crime as a Human Right: Positive Obligations of the Police”. In: *The Police and International Human Rights*. Springer. Alleweldt, Ralf; Fickensher, Guido. (ed) DSF: German foundation for peace and research. Switzerland. p.p. 183. 2018.

¹²⁵ Ibid. p.p. 185

¹²⁶ Murdoch (2001); Buckley (2001), p.p. 35–65; Reidy et al. (1997), p.p. 161–173.

¹²⁷ ECtHR M. and Others v Italy and Bulgaria App No. 40020/03 (31 July 2012), par. 147.

The ECtHR has clarified the starting point of its constitutional review, by constantly reiterating that the state's positive obligation involves a primary duty 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.¹²⁸

Where a conflict of rights exists, the police duty of protection against crime requires a balance between the competing human rights involved. In general, and without considering the specific facts involved, guidance can be taken by identifying the most pressing issue involved.¹²⁹ The author here talks about the “*supreme value in the hierarchy of human rights*”. This is important because, in many of the cases studied in this research, the police and other security forces are in a situation where they must decide if they violate a human right to save another like the right to life. Several times violating the right to life by security forces is not necessary because it is possible to apprehend the person who commits the crime without taking the life of this or these persons.

It is necessary to understand that the police must make the decision of what they do in the situation that they are facing under a lot of pressure. It can be an intentional act of aggression, an error in the proportionality of the force they are facing, or a mistake of the security forces on the site.

The focus on constitutional review and the ECtHR is justified by the fact that the European Court has contributed substantially to the determination of police duties and their development, and through its case law it has managed to harmonize relevant standards across the European continent. Its principles and standards can also be discerned in the international human rights law systems.¹³⁰

In the European Convention of Human Rights of 1950 and in their additional Protocols, many of the rights and freedoms are defined in terms such that implies fundamentally as obligations of respect or abstention, also called negatives, for the States. This occur particularly in Article 2 (according to which the death cannot be inflicted intentionally), Article 3 (prohibition of torture) and Article 4 (prohibition of the slavery and forced work).¹³¹

It is a doctrine of the old tribunal that luckily has persisted in the new, which means that in the assumptions in which is apply make that human rights prevail over the sovereign of the states.¹³² In the above mentioned case *McCann and Others V. United Kingdom, judgment of 27 September of 1995*, the condemnation of the defendant state was based fundamentally in the violation of the positive obligation of the State.¹³³

The utility of the doctrine of the positive obligations is also in use when the applicant alleges several summaries executions and acts of torture in violation of Articles 2 and 3. Frequently in these cases, the state accused has left of investigating and sanctioning the facts.¹³⁴

¹²⁸ ECtHR. *Osman v the United Kingdom* App No. 23452/94 (ECHR, 28 October 1998), par. 115; ECtHR *Kontrova v Slovakia* App no 7510/04 (31 May 2007), par. 49

¹²⁹ XENOS, DIMITRIS. “Chapter 10:” *The Protection Against Crime as a Human Right: Positive Obligations of the Police*. In: *The Police and International Human Rights*. Springer. Alleweldt, Ralf; Fickensher, Guido. (ed) DSF: German foundation por peace and research. Switzerland. p.p. 209. 2018.

¹³⁰ *Ibid.* p.p. 212

¹³¹ PASTOR RIDRUEJO, JOSÉ ANTONIO.. “*La Reciente Jurisprudencia del Tribunal Europeo de Derechos Humanos: Temas Escogidos*”. p.p. 240-276. p.p. 247. 2007.

¹³² *Ibid.* p.p. 251.

¹³³ ECtHR *McCann V. United Kingdom, judgment 27 September 1995*. No. 18984/91. P. 12

¹³⁴ PASTOR RIDRUEJO, JOSÉ ANTONIO.. “*La Reciente Jurisprudencia del Tribunal Europeo de Derechos Humanos: Temas Escogidos*”. p.p. 240-276. p.p. 252. 2007.

The context of crime has long provided and continues to provide the judicial opportunities for developing not only the duties of the police, but also the entire constitutional review of human rights obligations of the states.¹³⁵

As the police are also subject to negative obligations, they cannot interfere with human rights without proper justification. A preliminary condition for a lawful exercise of police powers regards the prior regulation of the offence in criminal law.¹³⁶

Defining an individual behavior as criminal, which is punishable by criminal law, is an artificial and deliberative process that involves considerations of punishment and retribution, actual protection of individuals when dangerous criminals must be retained in prisons.¹³⁷

As constitutional review operates under the principle of effectiveness, it asks whether training exists and, if yes, whether it is effective in the given context. In that way, the judges can make use of case law standards, various relevant authoritative documents, suggestions, reports and hard and soft law specific duties and standards that enable them to review the effectiveness of the police training programme.¹³⁸

Also, it is important to show how this part highlights the constitutional review that the countries of Europe do about the laws of the ECHR. It is also relevant to state that concerning the right to life the positive and negative obligations of the State are both equally important to avoid violating this right.

Conclusion

This sub-chapter is necessary to understand certain aspects of the ECtHR that later will be applied in the comparison between the standards with the COURT IDH. Also, it is interesting how the substantial aspect is not as developed as the procedural aspect, as this tribunal has historically given more importance to this latter aspect when condemning the violation of the right to life by security forces. Furthermore, the effective investigation is related to the procedural duties and what is established about this is important.

Furthermore, it was necessary to write a subchapter about the enforced disappearances that were condemned in this tribunal because it is a crime against humanity and, of course, the deprivation of the liberty of the person because it is an important subject for this tribunal and all human rights that are established in ECHR in Article 3 (prohibition of torture).

In my opinion this paper is relevant for establishing a base about the literature and jurisprudence of the ECtHR. I examined the enforced disappearances, the police brutality, the substantial and procedural aspect of the right to life and the positive and negative obligations of the member states. It is necessary to emphasize that in many cases the states have not complied with their negative and positive obligations. Furthermore, the procedural aspect has been highlighted in the ECtHR as

¹³⁵ ECtHR *Delfi v Estonia* App no 64569/09 (16 June 2015), par. 4: ‘Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (cited case omitted).

¹³⁶ The first condition for a lawful interference with human rights (esp. in Articles 8–11) requires that the interference must be regulated by law, e.g. Article 8(2), ECHR: ‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law’.

¹³⁷ *Paul and Audrey Edwards v the United Kingdom* App no 46477/99 (ECHR, 14 March 2002); *Maiorano and Others v Italy* App no 28634/06 (ECHR, 15 December 2009); *Choreftakis and Choreftaki v Greece* App no 46846/08 (ECHR, 7 January 2012).

¹³⁸ *McCann and Others v the United Kingdom* App no 18984/91 (ECHR, 27 September 1995).

the necessity of an effective and impartial investigation by the States and is more relevant than the substantial aspect. Another aspect that is important to examine is the articles that protect the right to life in the European Convention on Human Rights. Article 2 of the ECHR establishes some exceptions where violating the right to life is permitted.

I believe that it is important to establish these exceptions in this Convention to understand why in certain cases a person who kills another is justified, like for example, the legitimate defense. Moreover, it is significant to identify the situation of security forces and understand if they commit homicide with justification or if it was an abuse of power of the security forces. It is also important to state the basic concepts of the violation of the right to life by security forces.

Finally, I believe that is relevant to emphasize the crime of enforced disappearances, that is a crime against humanity and the police brutality, because are the crimes that are more frequent in the ECHR.

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