



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

RESEARCH REPORT

Article 2

The nature and the scope of the procedural obligation under Article 2 of the Convention to punish those responsible for breaches of the right to life in cases concerning the use of lethal force by State agents

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The manuscript for this text has been finalised on 5 May 2015.

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STUDY OF THE CEDH CASE-LAW ARTICLE 2

SUMMARY

The present report provides a brief overview of a State's procedural obligations under Article 2 of the Convention with a view to ascertaining the nature and the scope of the duty to punish those found to be responsible for breaches of the right to life in cases concerning the use of lethal force by State agents.

The Convention case-law indicates that the investigation required, in order to discharge the procedural obligations under Article 2 of the Convention, is, in principle, criminal.

The case-law also appears to suggest that States have a duty to prosecute when the outcome of the investigation so warrants this solution. Thus, a decision by a prosecutor not to prosecute does not appear to raise *per se* an issue under the procedural limb of Article 2 provided there are no serious shortcomings in the investigation undermining its effectiveness and calling into question the reliability of the facts on which the authorities relied.

Moreover, if the facts of the case demonstrate that the use of lethal force by a State agent was unlawful, then the Court requires the imposition of a suitable penalty. This includes an assessment of not only the severity of the sentences as initially imposed by the domestic courts but also the manner in which they were subsequently implemented.

What constitutes a suitable penalty would appear to depend on the particular circumstances of each case and, notably, on the reasons given by the domestic courts. In particular, the Court must be satisfied that the domestic courts did not use their power of discretion to lessen the consequences of a serious criminal act rather than to show that such acts must not be tolerated. Thus, for the Court, what appears to be essential is that the result of the criminal proceedings should not create a sense of impunity on the part of the perpetrators.

TABLE OF CONTENTS

INTRODUCTION	5
I. Origins of the procedural obligation under Article 2	5
II. purpose, nature and scope of the procedural obligation under article 2.....	8
III. Standards for an effective investigation.....	12
(1) Independence	12
(2) Adequacy	13
(3) Promptness and reasonable expedition	14
(4) Public scrutiny and the participation of next of kin.....	14
IV. Selected case-law on prosecution and sanction	15
(1) Prosecution.....	15
(2) Sanction	21
CONCLUSION	28
Selected bibliography	30

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

INTRODUCTION

1. This report offers a brief overview of the States' procedural obligations under Article 2 of the Convention with a view to ascertaining the nature and scope of the duty to punish those responsible for breaches of the right to life in cases concerning the use of lethal force by State agents. It is worth emphasising at the outset that the cases cited in this report are representative and not exhaustive.

I. ORIGINS OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2

2. There is no explicit mention in the Convention of a duty to investigate, and no such requirement was mentioned in the *travaux préparatoires* with respect to Article 2 of the Convention. In fact, the emergence of a duty to investigate certain violations of international law, notably human-rights violations, appeared on the international legal scene in the early 1980s¹, particularly with the adoption of the Convention against Torture in 1984 and through the case-law of various international actors such as the Human Rights Committee and the Inter-American Court of Human Rights.²

3. A procedural obligation under Article 2 of the Convention was articulated explicitly for the first time by the Convention organs³ in the landmark case of *McCann and Others v. the United Kingdom*⁴:

“161. ... a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.”

4. The Court found, having assessed the particular facts of that case, that the inquest conducted was sufficient to meet the requirements of the

¹. Roe Ariav, National Investigations of Human Rights between National and International Law, in *GoJIL* 4 (2012)3, p. 856.

². *Ibid.*

³. See the Commission decision dated 4 March 1994, paras. 191-193.

⁴. *McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324.

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

procedural aspect of Article 2. It considered it unnecessary, however, to formulate any standards for what constituted an effective investigation.⁵

5. The Court found a violation of Article 2 under its procedural limb for the first time in the case of *Kaya v. Turkey*⁶, which concerned the killing of the applicant's brother by the security forces in disputed circumstances in south-east Turkey. It held that the case could not be considered a clear-cut one of lawful killing which could be disposed of by means of minimal formalities and that the investigation had been seriously deficient (i.e. forensic examination, autopsy). In this connection, it noted that the investigating authorities had proceeded throughout on the assumption that the deceased was a terrorist who had been killed in an armed clash with security forces. The Court held that neither the prevalence of armed clashes in the region nor the high incidence of fatalities could dispense the authorities of the obligation under Article 2 to ensure that deaths arising out of clashes with security forces were effectively investigated.

6. In that case, the Court defined the scope of the investigative duty under Article 2 as follows:

“The Court observes that the procedural protection of the right to life inherent in Article 2 of the Convention secures the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances.”

7. In its examination under Article 13, the Court went further:

“... In particular, where those relatives have an arguable claim that the victim has been unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure.”⁷

8. In this connection, the Court emphasised that the requirements of Article 13 of the Convention were broader than the procedural obligation under Article 2 to conduct an effective investigation⁸.

9. However, in *Oğur v. Turkey* [GC]⁹, where the applicant's son – a night-watchman working at a site belonging to a mining company – was killed by

⁵ Kara E. Irwin, Prospects for Justice: The Procedural Aspect of the Right to Life under the European Convention on Human Rights and Its Applications to Investigations of Northern Ireland's Bloody Sunday, in *Fordham International Law Journal*, Volume 22, Issue 4, 1998, p. 1846.

⁶ *Kaya v. Turkey*, no. 22729/93, 19 February 1998.

⁷ § 107.

⁸ *Ibid.*

⁹ *Oğur v. Turkey* [GC], no. 21594/93, ECHR 1999-III.

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

security forces carrying out an operation against an illegal armed organisation, the Court held that the investigative duty under Article 2 of the Convention should be... “capable of leading to the identification and punishment of those responsible” (see, among other authorities, *Yaşa*, cited above, § 98, and *Assenov and Others v. Bulgaria*, 28 October 1998, *Reports of Judgments and Decisions 1998-VIII*, § 102).”

10. On the basis of the principles referred to and developed in *Kaya v. Turkey*, cited above, as well as in subsequent cases against Turkey involving suspicious deaths in the south-eastern region¹⁰, in 2001 the Court laid down the blueprint for the duty to investigate in four judgments delivered on the same day (4 May 2001)¹¹ against the United Kingdom concerning killings in Northern Ireland¹². In each case the Court found the respondent State in breach of its procedural obligation under Article 2 of the Convention because the investigation of the use of lethal force had disclosed a number of shortcomings.

11. The standards for the requirement of an effective investigation consolidated in [Hugh Jordan v. the United Kingdom](#)¹³, and referred to in the other three judgments against the United Kingdom, constitute the core principles of the Court’s procedural obligations under Article 2 of the Convention, which have been either refined or clarified in recent cases.

12. In that case the relevant principle, for the purposes of the present research report, reads as follows:

“107. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (e.g. the *Kaya v. Turkey* judgment, cited above, p. 324, § 87) and to the identification and punishment of those responsible (*Öğur v. Turkey*, cited above, § 88). This is not an obligation of result, but of means. [emphasis added] The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see concerning autopsies, e.g. *Salman v. Turkey* cited above, § 106; concerning witnesses e.g. *Tanrikulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV, § 109; concerning forensic evidence e.g. *Gül v. Turkey*, 22676/93, [Section 4], § 89). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.”

¹⁰. *Ergi v. Turkey*, 28 July 1998, *Reports of Judgments and Decisions 1998-IV*; *Güleç v. Turkey*, 27 July 1998, *Reports 1998-IV*; *Yaşa v. Turkey*, 2 September 1998, *Reports 1998-VI*; *Oğur v. Turkey* [GC], no. 21594/93, ECHR 1999-III; and *Tanrikulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV.

¹¹. Juliet Chevalier-Watts, *Effective investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?* in *The European Journal of International Law*, Vol. 21, no. 3, 2010, p. 710.

¹². *McKerr v. the United Kingdom*, no. 28883/95, ECHR 2001-III; *Kelly and Others v. the United Kingdom*, no. 30054/96; *Shanaghan v. the United Kingdom*, no. 37715/97; and *Hugh Jordan v. the United Kingdom*, no. 24746/94, ECHR 2001-III (extracts).

¹³. *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 105, ECHR 2001-III (extracts).

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

13. Most recently in *Mustafa Tunç and Fecire Tunç v. Turkey* [GC]¹⁴, the applicants challenged the effectiveness of the investigation into the death of their son, who had been fatally injured by gunfire while doing his compulsory military service. They alleged that the court, in upholding a decision to discontinue the proceedings, had lacked independence. The Court reiterated the general principle:

“In order to be ‘effective’ as this expression is to be understood in the context of Article 2 of the Convention, an investigation must firstly be adequate (see *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 324, ECHR 2007-II). That is, it must be capable of leading to the establishment of the facts and, where appropriate [emphasis added], the identification and punishment of those responsible.

II. PURPOSE, NATURE AND SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2

14. The Court has emphasised that the essential purpose of the investigative duty under Article 2 of the Convention is to secure the effective implementation of domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.¹⁵

15. This link between the State’s procedural obligations and the positive obligations to provide for an effective independent judicial system is not always clear.¹⁶

16. While the duty to investigate was first formulated in the context of killings allegedly perpetrated by or in collusion with State agents, it is now accepted that that obligation arises in a variety of situations where there is reason to believe that an individual has sustained life-threatening injuries, has died or has disappeared in suspicious circumstances, including in the context of medical negligence and accidents, irrespective of whether the alleged perpetrators are private persons or State agents or whether their identity is unknown, or whether the harm was self-inflicted.¹⁷

¹⁴. *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 172, 14 April 2015.

¹⁵. *Hugh Jordan v. the United Kingdom*, § 105; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 163, ECHR 2011.

¹⁶. Adam Straw, Article 2: The Right to Life, in *Human Rights Practice R:22: August 2011*, p. 2.025.

¹⁷. See, for example, *Menson v. the United Kingdom* (dec.), no. 47916/99, ECHR 2003-V; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 74, ECHR 2002-II; *Abdullah Yilmaz v. Turkey*, no. 21899/02, § 58, 17 June 2008; *Šilih v. Slovenia* [GC], § 153; *Öneryıldız v. Turkey* [GC], no. 48939/99, § 94, ECHR 2004-XII; *Rajkowska*

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

17. The Court has found that, in the context of killings perpetrated by State agents or where *intentional* killing is suspected, irrespective of the status of the perpetrator, the nature of the investigation that is required by the Court in its assessment of the State's compliance with its procedural obligations under Article 2 is, in principle, criminal.¹⁸ The Court has explained that this is because often, in practice, the true circumstances of the death in such cases are largely confined to the knowledge of State officials or authorities. The bringing of appropriate domestic proceedings such as a criminal prosecution, disciplinary proceedings and proceedings for the exercise of remedies available to victims and their families will therefore be conditional on an adequate official investigation, which must be independent and impartial.¹⁹

18. If the infringement of the right to life or to physical integrity was not caused *intentionally*, the Court has considered that the positive obligation to set up an “*effective judicial system*” does not necessarily require criminal proceedings to be brought in every case and may be satisfied if civil, administrative or even disciplinary remedies were available to the victims.²⁰

19. Therefore, in cases involving the lethal use of force by State agents, in the absence of a criminal investigation, neither civil nor disciplinary remedies can, by themselves, satisfy the requirements of the procedural obligations under Article 2 of the Convention.

20. For example, in [Kelly and Others v. the United Kingdom](#)²¹, the Court found civil proceedings to be irrelevant for the assessment of the State's procedural obligations:

“Civil proceedings would provide a judicial fact finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of damages. It is however a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of any alleged perpetrator. As such, it cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention.”

v. *Poland* (dec.), no. 37393/02, 27 November 2007 and *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 130, ECHR 2013.

¹⁸. *Al-Skeini and Others v. the United Kingdom* [GC], § 165 and *Anna Todorova v. Bulgaria*, no. 23302/03, § 74, 24 May 2011.

¹⁹. *Makaratzis v. Greece* [GC], no. 50385/99, § 73, ECHR 2004-XI. See also *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, §§ 120-121, 24 February 2005.

²⁰. *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII; *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII; and, for exceptions, *Öneryıldız v. Turkey*, [GC], and *Kalender v. Turkey*, no. 4314/02, 15 December 2009.

²¹. *Kelly and Others v. the United Kingdom*, no. 30054/96, 4 May 2001. See also *Al-Skeini and Others v. the United Kingdom* [GC], § 165.

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

21. The Court came to a similar conclusion as regards disciplinary proceedings. In the case of *McBride v. the United Kingdom* (dec.)²², where the applicant complained that soldiers found guilty of murder had been readmitted to the army, the Court explained that it had taken into account the role of disciplinary proceedings in assessing whether the legal system provided adequate protection for the right to respect for life in cases where it had been argued that criminal-law sanctions were not available or applied. However, it reiterated that in the normal course of events a criminal prosecution was generally the most effective way of fulfilling the requirements of Article 2.

22. In some cases, however, the imposition or non-imposition of disciplinary measures, while not decisive, is an additional factor taken into account in the Court's reasoning as regards its assessment of the effectiveness of an investigation under Article 2²³.

23. In *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], cited above, the Court neatly summed up this principle in the following manner:

“The form of investigation required by this obligation varies according to the nature of the infringement of life: although a criminal investigation is generally necessary where death is caused intentionally, civil or even disciplinary proceedings may satisfy this requirement where death occurs as a result of negligence.”

24. As mentioned above, when the intentional taking of life has been alleged, the mere fact that the authorities were informed that a death had taken place gives rise *ipso facto* to an obligation under Article 2 to carry out an effective official investigation²⁴. In certain circumstances such as medical negligence, on the other hand, where the death was caused unintentionally, the procedural obligation is applicable. This obligation may come into play following the institution of proceedings by the deceased's relatives.²⁵

25. Likewise, the nature and degree of the scrutiny which will satisfy the “*effective investigation*” test depends on the particular circumstances of the case, as some cases are undisputed and require minimum formality, whereas in others the facts might be unclear or the situation suspicious.²⁶

²². *McBride v. the United Kingdom* (dec.), no. 1396/06, 9 May 2006.

²³. See, for example, *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 310, ECHR 2011 (extracts); *Yeter v. Turkey*, no. 33750/03, § 70, 13 January 2009 and *Leparskienė v. Lithuania*, no. 4860/02, § 53, 7 July 2009.

²⁴. The standard quotation is as follows: “*whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (...)*”

²⁵. *Šilih v. Slovenia* [GC], § 156, and the cases referred to therein.

²⁶. Karen Reid, *Practitioner's Guide to the European Convention on Human Rights*, Fourth Edition, Sweet and Maxwell, 2012, p. 755, see also *Velikova v. Bulgaria*, (no. 41488/98, ECHR 2000-VI) and the cases cited therein in paragraph 80 where it reads: “*The Court*

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

26. For example, the Court has stressed that, in cases where there is an allegation of racially-motivated violence, it is particularly important that the investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.²⁷

27. The need to reopen an investigation would be a further example in those cases where the investigation or death took place a long time ago and where new developments have given rise to a fresh obligation to investigate – for example, newly discovered evidence casting doubt on the results of an earlier investigation or trial, or information that purportedly casts new light on the circumstances of a death. The Court has considered that the scope of the new investigation may be restricted to verifying the reliability of the new evidence and the authorities can legitimately take into account the prospects of launching a new prosecution at such a late stage.²⁸

28. The Court has emphasised that there is no right to obtain a prosecution or conviction, or indeed a particular sentence, and the fact that an investigation ends without concrete results, or with only limited results, is not indicative of any investigative failings as such, since the obligation is one of “*means*” and not of result.²⁹

29. Moreover, in principle, the Court does not require that there should be a judicial review of a prosecutor's decision not to prosecute³⁰. In *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], cited above, the Court reiterated, *inter alia*:

“... the Court is conscious of the existence of a range of procedural systems which may, in spite of their variety, be compatible with the Convention, which does not impose any particular model (see, *mutatis mutandis*, *Kolevi*, cited above, § 208). Where there has been no unlawfulness or flagrant shortcoming which could lead the Court to find that the investigation was flawed, the Court would exceed the limits of

further considers that the nature and degree of scrutiny which satisfies the minimum threshold of the investigation's effectiveness depends on the circumstances of the particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work. It is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria.”

²⁷. *Menson v. the United Kingdom* (dec.) and *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII in the context of Article 14 in conjunction with Article 2.

²⁸. See *Brecknell v. the United Kingdom*, no. 32457/04, §§ 79-81, 27 November 2007, where, years after the original investigation ended, a witness came forward making plausible allegations about security force collusion in a sectarian killing. See also *Gasyak and Others v. Turkey*, no. 27872/03, 13 October 2009.

²⁹. *Brecknell v. the United Kingdom*, § 66; and *Giuliani and Gaggio v. Italy* [GC], § 306.

³⁰. *Gurtekin and others and two other applications against Cyprus*, (dec.), § 29.

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

its jurisdiction were it to interpret Article 2 as imposing a requirement on the authorities to put in place a judicial remedy.”³¹

30. However, if such a judicial-review procedure does exist, the Court appears to examine whether the review in question met certain requirements under the procedural limb of Article 2.³²

31. Likewise, the Court has held that the requirements of Article 2 under its procedural limb go beyond the stage of the official investigation and that, therefore, if the investigation has led to the institution of proceedings in the national courts, then the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives in accordance with the law.³³

32. Finally, the Court has underlined that it is not for it to specify in any detail which procedures the authorities should adopt in providing for proper examination in particular circumstances or that there should be one unified procedure providing for all requirements.³⁴

III. STANDARDS FOR AN EFFECTIVE INVESTIGATION

33. Certain particular features are required for an investigation to comply with the procedural obligation under Article 2 of the Convention, whatever form the investigation takes.³⁵

34. In *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], cited above, the Court clarified that the elements listed below were interrelated and that each of them, taken separately, did not amount to an end in itself³⁶. For the Court:

“They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed. It is in relation to this purpose of an effective investigation that any issues, including that of independence, must be assessed.”³⁷

(1) Independence

35. As regards an investigation into a death – notably one for which State agents or authorities are allegedly responsible – the Court has held that it may generally be regarded as necessary for the persons responsible for

³¹. § 232.

³². *Ramsahai and Others v. the Netherlands* [GC], §§ 351-355.

³³. *Öneryıldız v. Turkey* [GC], § 95.

³⁴. See, for example, *Hugh Jordan v. the United Kingdom*, § 143. See also *Kolevi v. Bulgaria*, no. 1108/02, 5 November 2009.

³⁵. Adam Straw, *Article 2: The Right to Life*, Op. cit., p. 2.026.

³⁶. § 225.

³⁷. *Ibid.*

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

and carrying out the investigation to be independent from those implicated in the events. It has emphasised that this means not only a lack of hierarchical or institutional connection but also a practical independence.³⁸ The Court's examination in this respect calls for a concrete, rather than an abstract, examination of the independence of the investigation in its entirety³⁹.

(2) Adequacy

36. The Court has required that the investigation in question must be effective. In this connection, it has explained that in order to be "effective" within the context of Article 2 of the Convention, an investigation into a death that engages the responsibility of a Contracting Party under that Article must be adequate.⁴⁰

37. In cases concerning the use of lethal force by State agents, the Court has interpreted this requirement to mean that the investigation must be capable of determining whether the force used in such cases was or was not justified in the circumstances and, where appropriate, of leading to the identification and punishment of those responsible.⁴¹ In particular, the investigation must be broad enough to permit the investigating authorities to take into account not only the actions of the State agents who directly used lethal force, but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 to protect life.⁴²

38. However, as the Court has stressed on many occasions, this is not an obligation of result, but of means. The Court assesses, in this context, essentially whether, in the particular circumstances of the case, the authorities have taken the reasonable steps available to them, such as the securing of evidence concerning the incident, including, *inter alia*, eye-

³⁸. *Hugh Jordan v. the United Kingdom*, § 105; *Giuliani and Gaggio v. Italy* [GC], § 300; and *Ramsahai and Others v. the Netherlands* [GC], § 325; *Mastromatteo v. Italy* [GC], § 91, *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, § 320, ECHR 2014 (extracts).

³⁹. *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], § 222. See, for example, the case of *Jaloud v. the Netherlands* [GC], (no. 47708/08, ECHR 2014) where, in the particular context of military operations conducted abroad, the Court considered that the mere fact that the investigators and the investigated were sharing living quarters was not in itself an issue as regards independence of an investigation (para 189).

⁴⁰. *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], *Ramsahai and Others v. the Netherlands* [GC], § 324.

⁴¹. See *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], § 172; see also *Giuliani and Gaggio v. Italy* [GC], § 301 where the word "appropriate" is placed in front of the punishment only or *Mocanu and Others v. Romania* [GC], § 321 where the word "appropriate" is not used.

⁴². *Al-Skeini and Others v. the United Kingdom* [GC], § 163.

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

witness testimony, forensic evidence and where appropriate, an autopsy that provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.⁴³

39. The Court has stressed that the investigation must be thorough, which means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation.⁴⁴ Moreover, the investigation's conclusions must be based on a thorough, objective and impartial analysis of all relevant elements and must apply a standard comparable to the "*no more than absolutely necessary*" standard required by Article 2 § 2 of the Convention.⁴⁵

40. For the Court, any deficiency in the investigation which undermines its ability to establish the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness.⁴⁶

(3) Promptness and reasonable expedition

41. The Court has found that a requirement of promptness and reasonable expedition is implicit in the context of an effective investigation.⁴⁷

42. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, the Court considers that a prompt response by the authorities in investigating suspicious death may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion or tolerance of unlawful acts.⁴⁸

(4) Public scrutiny and the participation of next of kin

43. Likewise, the Court has held that there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. It does not, however, go so far as to require all proceedings following an inquiry into a violent death to be public. The Court has considered that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects on private individuals or other investigations. Therefore, this cannot be regarded as an automatic requirement under Article 2 of the

^{43.} *Nachova and Others v. Bulgaria* [GC], § 113.; *Salman v. Turkey*, [GC], no. 21986/93, § 105, ECHR 2000-VII; *Al-Skeini and Others v. the United Kingdom* [GC], § 166.

^{44.} *Mocanu and Others v. Romania* [GC], § 325.

^{45.} *Nachova and Others v. Bulgaria* [GC], § 113.

^{46.} *Ibid.*

^{47.} *Giuliani and Gaggio v. Italy* [GC], § 305; *Mocanu and Others v. Romania* [GC], § 323.

^{48.} *Al-Skeini and Others v. the United Kingdom* [GC], § 166.

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

Convention.⁴⁹ In this connection, the Court emphasised that the degree of public scrutiny required may well vary from case to case. In particular, where grave and important issues were involved, a particularly intense public scrutiny of the investigation was required⁵⁰.

44. In all cases, however, the Court has required that the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests⁵¹. This, however, is not to be interpreted as requiring the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation.⁵² Likewise, the Court has found that lack of public scrutiny of police investigations may be compensated by providing the requisite access to the public or the victim's relatives at other stages of the procedure.⁵³

IV. SELECTED CASE-LAW ON PROSECUTION AND SANCTION

(1) Prosecution

45. There are several international Conventions which clearly provide for a duty to prosecute the crimes that are defined therein, such as the Geneva Conventions of 1949, the Genocide Convention and the Convention against Torture⁵⁴. No such absolute duty can be derived from Article 2 of the Convention, either from the text of the Convention or from the case-law of the Convention organs.

46. In *Brecknell v. the United Kingdom*⁵⁵, the Court examined the extent of the procedural obligation where facts/allegations of collusion came to light many years after the events and the original investigation (allegations were made in 1999 by a police officer, Mr Weir, as to RUC involvement in the death of the applicant's husband in 1975). The Court held:

⁴⁹. *Ramsahai and Others v. the Netherlands* [GC], § 353; *Giuliani and Gaggio v. Italy* [GC], § 304.

⁵⁰. *Al Nashiri v. Poland*, no. 28761/11, § 497, 24 July 2014.

⁵¹. See, for example, *Mocanu and Others v. Romania* [GC], §§ 324 and 349-351; *Abdurashidova v. Russia*, no. 32968/05, § 86, 8 April 2010; *Oğur v. Turkey* [GC], § 92 and also *Putintseva v. Russia*, no. 33498/04, § 56, 10 May 2012.

⁵². *Giuliani and Gaggio v. Italy* [GC], § 304; *Ramsahai and Others v. the Netherlands* [GC], § 348.

⁵³. *Hugh Jordan v. the United Kingdom*, § 121; and *Giuliani and Gaggio v. Italy* [GC], § 304.

⁵⁴. Michael Scharf, The letter of the Law : the scope of the international legal obligation to prosecute human rights crimes, in *Law and Contemporary Problems*, Vol. 59: No.4, 1996, p. 42.

⁵⁵. *Brecknell v. the United Kingdom*, no. 32457/04, 27 November 2007

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

“... There is no absolute right however to obtain a prosecution or conviction and the fact that an investigation ends without concrete, or with only limited results is not indicative of any failings as such. The obligation is of means only.”⁵⁶

47. When examining the adequacy of the revived investigation, in the particular circumstances of that case, the Court noted:

“80. Insofar as the applicant claims that a further prosecution could be brought against McClure and Shields, the Court recalls that the earlier prosecution was dropped and that attempts to challenge the lawfulness of this step failed, *inter alia*, due to the delay by the applicant in raising the matter and the potential unfairness to the two involved individuals who had not been parties to the case. It would note that these two individuals were relatively minor participants in events and considers that the authorities could reasonably take the view that attempting to revive the previous charges, or upgrade them to aiding and abetting, would at this stage be either doomed to failure or be unduly oppressive and thus not assist materially in bringing to account those principally responsible for the death of the applicant’s husband.

81. Nor is it apparent that any prosecution against any other person would have any prospect of success given Weir’s refusal to make a statement or to give evidence himself. In the circumstances, the Court cannot impugn the authorities for any culpable disregard, discernable bad faith or lack of will (*mutatis mutandis*, *Szula v. the United Kingdom*, cited above).”

48. Ultimately, the Court found a procedural violation of Article 2 in that case because it considered that the investigative response to Weir’s allegations had lacked the requisite independence at its early stages.

49. The limit of the duty to prosecute under Article 2 of the Convention was explored by the Court in a recent inadmissibility decision⁵⁷, in which it held, in particular:

“27. The applicants’ principal complaint appears to be that the investigations have ended without any prosecutions. The Court can understand that it must be frustrating for the applicants that potential suspects have been named and, in two instances, located and questioned but that no further steps apparently were going to be taken. However, Article 2 cannot be interpreted so as to impose a requirement on the authorities to launch a prosecution irrespective of the evidence which is available. [emphasis added] A prosecution, particularly on such a serious charge as involvement in mass unlawful killings, should never be embarked upon lightly as the impact on a defendant who comes under the weight of the criminal justice system is considerable, being held up to public obloquy, with all the attendant repercussions on reputation, private, family and professional life. Given the presumption of innocence enshrined in Article 6 § 2 of the Convention, it can never be assumed that a particular person is so

⁵⁶. § 394; *Petrović v. Serbia*, no. 40485/08, § 75, 15 July 2014; *Harrison and Others v. the United Kingdom*, (dec.), no. 44301/13, §49, 25 March 2014. Note, however, that in some cases, such as for example, *Nježić and Štimac v. Croatia*, no. 29823/13, § 63, 9 April 2015, the word “absolute” does not figure in the above sentence.

⁵⁷. *Gurtekin and others and two other applications against Cyprus*, nos. 60441/13, 68206/13 and 68667/13, 11 March 2014; see also *Emin (Mustafa) and Others v. Cyprus* (dec.), no. 13207/12, 16 December 2014.

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

tainted with suspicion that the standard of evidence to be applied is an irrelevance. [emphasis added] Rumour and gossip are a dangerous basis on which to base any steps that can potentially devastate a person's life.

28. Insofar as the applicants argued that, at the very least, the decision that the evidence was insufficient to justify a prosecution should have been submitted for decision by a court, the Court does not consider that the procedural obligation in Article 2 necessarily requires that there should be judicial review of investigative decisions as such. Where such review of investigative decisions exists, they are doubtless a re-assuring safeguard of accountability and transparency. However, it is not for the Court to micro-manage the functioning of, and procedures applied in, criminal investigative and justice systems in Contracting States which may well vary in their approach and policies. No one model can be imposed [emphasis added] (see, *mutatis mutandis*, *McKerr v. the United Kingdom*, no.28883/95, § 143, ECHR 2001-III).”

50. This may be because, as the Court has stressed on many occasions:

“... criminal law liability is distinct from international law responsibility under the Convention. The Court's competence is confined to the latter. Responsibility under the Convention is based on its own provisions which are to be interpreted and applied on the basis of the objectives of the Convention and in the light of the relevant principles of international law. The responsibility of a State under the Convention, arising for the acts of its organs, agents and servants, is not to be confused with the domestic legal issues of individual criminal responsibility under examination in the national criminal courts. The Court is not concerned with reaching any findings as to guilt or innocence in that sense⁵⁸.”

51. In the particular circumstances of war crimes, where an applicant complained that the investigation into her husband's death had been inadequate because none of the direct perpetrators, whom witnesses had identified by name, had been indicted, even though the senior official responsible had been convicted, the Court held in *Jelić v. Croatia*⁵⁹:

“88. However, apart from the responsibility of the superior officers, in the case at issue there is a deficiency which undermines the effectiveness of the investigation and which could not be remedied by convicting only those in command. In the context of war crimes the superior (command) responsibility is to be distinguished from the responsibility of their subordinates. The punishment of superiors for the failure to take necessary and reasonable measures to prevent or punish war crimes committed by their subordinates cannot exonerate the latter from their own criminal responsibility (...).

⁵⁸. *Tanlı v. Turkey*, no. 26129/95, ECHR 2001-III (extracts). In that case the Court found a violation of Article 2 under its procedural limb due to defective forensic investigation into the death of the applicant's relative who died in police custody. It noted, in particular, that in the light of the defective forensic investigation, it was not surprising that the court proceedings resulted in the acquittal for lack of evidence of the three police officers who had been interrogating the applicant's relative before he died (§ 153).

⁵⁹. *Jelić v. Croatia*, no. 57856/11, 12 June 2014.

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

89. During the investigation three witnesses stated that A.H. had personally shot and killed Vaso Jelić. While a ballistic report was carried out in that connection (see paragraph 29 above), that could not excuse the State authorities from taking further relevant steps to verify statements given by three witnesses. In the situation where the names of potential perpetrators have been revealed to the authorities by witnesses whose reliability has not been called into question and where some of them were direct eyewitnesses, it should be expected of the prosecuting authorities that they take appropriate steps in order to bring those responsible to justice. It does not appear however that such steps were taken.

90. In this connection the Court notes that among the main purposes of imposing criminal sanctions are retribution as a form of justice for victims and general deterrence aimed at prevention of new violations and upholding the rule of law. However, neither of these aims can be obtained without alleged perpetrators being brought to justice. Failure by the authorities to pursue the prosecution of the most probable direct perpetrators undermines the effectiveness of the criminal-law mechanism aimed at prevention, suppression and punishment of unlawful killings.[emphasis added] Compliance with the State's procedural obligations under Article 2 requires the domestic legal system to demonstrate its capacity and willingness to enforce criminal law against those who have unlawfully taken the life of another (see *Nachova and Others*, cited above, § 160; and *Ghimp and Others v. the Republic of Moldova*, no.32520/ 09, § 43, 30 October 2012)."

52. The case of *Stjepanović v. Bosnia and Herzegovina* (dec.)⁶⁰, also concerned alleged war crimes and, notably, the disappearance of the applicant's son after he had been taken into custody. The Court held as follows:

"26. Furthermore, although it is true that those directly responsible for the disappearance and death of the applicants' son have not been brought to justice yet, Article 2 cannot be interpreted so as to impose a requirement on the authorities to launch a prosecution irrespective of the evidence available. A prosecution, particularly on such a serious charge as involvement in war crimes, should never be embarked upon lightly as the impact on a defendant who comes under the weight of the criminal justice system is considerable, being held up to public obloquy, with all the attendant repercussions on reputation, private, family and professional life. Given the presumption of innocence enshrined in Article 6 § 2 of the Convention, it can never be assumed that a particular person is so tainted with suspicion that the standard of evidence to be applied is an irrelevance. Rumour and gossip are a dangerous basis on which to base any steps that can potentially devastate a person's life (see Palić, cited above, § 65, where the Court held that the investigation was effective, despite the fact that there had not been any convictions; and seven other inadmissibility decisions). Indeed, as the Court has held on many occasions the procedural obligation under Article 2 is not an obligation of result, but of means⁶¹."

53. The Court has also considered that Article 2 of the Convention is engaged when a decision of non-prosecution is given because of the application of statutory limitations. For example, in *Mocanu and Others*

⁶⁰. *Stjepanović v. Bosnia and Herzegovina* (dec.), no. 13207/12, 16 December 2014.

⁶¹. See also *Nježić and Štimac v. Croatia*, § 69.

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

v. Romania [GC]⁶², the applicants complained of lack of investigation into the death of the first applicant's husband and the injury sustained by the second applicant during the June 1990 demonstrations against the Romanian regime. The Court observed that the investigation into the violence inflicted on the second applicant had been terminated by a decision of 17 June 2009 not to bring a prosecution, upheld by the judgment of 9 March 2011, namely, ten years after he had lodged a complaint. It considered that the procedural obligations arising under Articles 2 and 3 of the Convention could hardly be considered to have been met where an investigation had been terminated through the statutory limitation of criminal liability resulting from the authorities' inactivity.

54. In the landmark case of *Nachova and Others v. Bulgaria* [GC]⁶³ the investigation into the killing of two young Roma by the military police ended after unsuccessful appeals against the military prosecutor's decision to close the investigation, that prosecutor considering that the military police who had shot them had acted in accordance with the regulations in force. The Court, in its assessment of the effectiveness of the investigation, noted:

“... the investigation into the deaths of Mr Angelov and Mr Petkov assessed the lawfulness of the officers' conduct in the light of the relevant regulations. The fact that the investigation validated the use of force in the circumstances only serves to confirm the fundamentally defective nature of those regulations and their disregard of the right to life. By basing themselves on the strict letter of the regulations, the investigating authorities did not examine relevant matters such as the fact that the victims were known to be unarmed and represented no danger to anyone, still less whether it was appropriate to dispatch a team of heavily armed officers in pursuit of two men whose only offence was to be absent without leave. In short, there was no strict scrutiny of all the material circumstances (see paragraphs 50-54 above).”

55. In that case, the Grand Chamber further found a number of other deficiencies in the investigation, some of which, in the Court's view, raised serious doubts as to the objectivity and impartiality of the investigators and prosecutors involved.

56. The unique case of *Kolevi v. Bulgaria*⁶⁴ concerned the institutional and procedural guarantees of the independence and effectiveness of an investigation, where the Chief Public Prosecutor might have been a suspect in the murder of a high-ranking prosecutor. The Court accepted as plausible the following assertion made by the applicants:

“... given the centralised structure of the Bulgarian prosecution system, based on subordination, its exclusive power to bring charges and the procedural and

⁶². *Mocanu and Others v. Romania*, nos. 10865/09, 45886/07 and 32431/08, ECHR 2014 (extracts); see also *Alikaj and Others v. Italy*, no. 47357/08, 29 March 2011.

⁶³. *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII. See also *Karandja v. Bulgaria*, no. 69180/01, § 65, 7 October 2010.

⁶⁴. *Kolevi v. Bulgaria*, no. 1108/02, 5 November 2009.

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

institutional rules allowing full control by the Chief Public Prosecutor over every investigation in the country, in the circumstances prevailing when Mr F. was the Chief Public Prosecutor it was practically impossible to conduct an independent investigation into circumstances implicating him, even after the constitutional amendment allowing in theory the bringing of charges against him.”

57. The Court thus found that the investigation into Mr Kolev’s death had not been independent, objective or effective, and that it had breached the procedural limb of Article 2.

58. In principle, it is difficult to identify as a separate group those cases where a prosecutor decided not to prosecute a State agent allegedly responsible for the death of a relative and where the Court found a procedural breach of Article 2. This is because in most of those cases the procedural breach was due to a number of deficiencies, in the investigation⁶⁵ and/or in the law,⁶⁶ which the Court considered serious enough to undermine the effectiveness of the investigation.

59. In this connection, it appears that if the Court deems the investigation at issue was effective, it gives the prosecuting authorities a margin of appreciation in determining whether to prosecute.⁶⁷

60. For example, in *Romijn v. the Netherlands* (dec.)⁶⁸ the applicant complained about the decision of the public prosecutor not to bring proceedings against the police officer who had injured her and killed her partner by gunshot during an arrest operation in their home. The Court, considering that the results of the investigation were reliable⁶⁹, held:

“... On the facts of the present case, as set out above, the Court takes the view that the public prosecutor and the Court of Appeal did not act unreasonably in sparing Police Officer 0308 a trial. It would be perverse to construe Article 2 or any other

⁶⁵. See, recent examples, *Kitanovski v. the former Yugoslav Republic of Macedonia*, no. 15191/12, § 90, 22 January 2015; *Petrović v. Serbia*, no. 40485/08, §§ 87-92, 15 July 2014; *Gülbahar Özer and Others v. Turkey*, no. 44125/06, § 73, 2 July 2013; *Mihaylova and Malinova v. Bulgaria*, no. 36613/08, §§ 61-65, 24 February 2015; *Ciorcan and Others v. Romania*, nos. 29414/09 and 44841/09, §§ 123-126, 27 January 2015; *Timus and Tarus v. the Republic of Moldova*, no. 70077/11, § 55, 15 October 2013.

⁶⁶. See, in particular, the recent case of *Cestaro v. Italy*, no. 6884/11, 7 April 2015 (Article 3 – not yet final).

⁶⁷ Adam Straw, *Article 2: The Right to Life*, Op. cit., p.2.014. See, for recent examples, *Giuliani and Gaggio v. Italy* [GC] and *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], *Tonkavi v. Bulgaria* (dec.), no. 21302/13, 30 September 2014; *Giorgi Georgiev v. Bulgaria* (dec.), no. 34137/03, 11 January 2011; *Kamalak v. Turkey*, no.2251/11, 8 October 2013.

⁶⁸ *Romijn v. the Netherlands* (dec.), no. 62006/00, 3 March 2005.

⁶⁹ “In the circumstances of the present case, whatever misgivings may remain in the applicant’s mind as regards the debriefing which was apparently held immediately after the incident and the five days which were allowed to pass before the arresting team members were questioned, the Court is not disposed in the present case to find that the authorities’ establishment of the facts fell short of the standards required by Article 2 of the Convention.”

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

Article of the Convention as requiring a criminal prosecution even in circumstances where it is apparent that the individual prosecuted is entitled to claim self-defence.”

61. Thus, the Court found the applicant’s complaint, which it examined under Article 2 of the Convention, inadmissible as manifestly ill-founded.

62. Likewise, the Court also declared inadmissible a similar complaint in the case of [Mulder-Van Schalkwijk v. the Netherlands](#)⁷⁰. It considered that the applicant had failed to show any cogent reasons to call into question the Amsterdam Court of Appeal’s finding that, as a matter of domestic law, the police officer who had shot the applicant’s relative would be entitled to claim self-defence if proceedings were brought against him.

(2) Sanction

63. Recent case-law of the Court appears to suggest that an issue may arise under Article 2 of the Convention on account of the sanction applied to the alleged perpetrator.

64. In the landmark case of [Öneryıldız v. Turkey](#) [GC]⁷¹, the Court examined the responsibility of authorities in connection with deaths resulting from an accidental explosion at a rubbish tip close to a shanty town. The Court held that, in the particular context of the case, the judicial system required by Article 2 must:

“94.... make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied where lives are lost as a result of a dangerous activity if and to the extent that this is justified by the findings of the investigation (see, *mutatis mutandis*, *Hugh Jordan v. the United Kingdom*, no. 24746/94, §§ 105-09, 4 May 2001, and *Paul and Audrey Edwards*, cited above, §§ 69-73).”

65. The Court went on to emphasise:

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

66. The Court pointed out, however:

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

⁷⁰. *Mulder-Van Schalkwijk v. the Netherlands*, no. 26814/09, 7 June 2011.

⁷¹. *Öneryıldız v. Turkey* [GC], no. 48939/99, 30 November 2004.

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

in a particular sentence (see, *mutatis mutandis*, *Tanli v. Turkey*, no. 26129/95, § 111, ECHR 2001-III).”

67. While the Court considered that the national courts should not, under any circumstances, be prepared to allow life-threatening offences to go unpunished, it emphasised that its review was limited to examining whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention⁷².

68. Having regard to the facts of the case, the Court considered that there was no need to dwell on the shortcomings in the criminal investigation, since criminal proceedings had nonetheless been instituted before the Istanbul Criminal Court, which, it noted, had had full jurisdiction to examine the facts as it saw fit and, where appropriate, to order further inquiries. Moreover, its judgment had been subject to review by the Court of Cassation.

69. Instead, the Court held:

“... the issue to be assessed is whether the judicial authorities, as the guardians of the laws laid down to protect lives, were determined to sanction those responsible.”⁷³

70. Ultimately, the Court found a procedural violation of Article 2 of the Convention because, *inter alia*, there was no indication that the trial court had had sufficient regard to the extremely serious consequences of the accident: the persons held liable had ultimately been sentenced to derisory fines, which had, moreover, been suspended.

71. The Court adopted similar reasoning in the more recent case of [Okkali v. Turkey](#)⁷⁴, which concerned the ill-treatment of a twelve-year-old child at a police station. The criminal complaint which he had lodged resulted in minimal suspended sentences for the police officers concerned and his action for damages had been declared inadmissible as time-barred. The Court held:

“... rather than determining whether there was a preliminary investigation that fully met all the procedural requirements – which it seems there was – it should consider whether the judicial authorities, the custodians of the laws designed to protect people’s physical and psychological integrity, actually showed determination to punish those responsible.”

72. In finding a breach of Article 3 (substantive) in that case, the Court took into account the fact that the applicant had been denied the additional protection to which he had been entitled as a minor (i.e. he had not been

⁷². *ibid*, § 96.

⁷³. § 115.

⁷⁴. *Okkali v. Turkey*, no. 52067/99, ECHR 2006-XII (extracts).

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

represented by a lawyer, and his parents had not been informed) and that the manner in which the domestic courts had interpreted and applied domestic law resulted in the *de facto* impunity of the police officers responsible.

73. This approach was followed in the case of *Nikolova and Velichkova v. Bulgaria*⁷⁵. The case concerned the death of the applicants' relative following ill-treatment in police custody. The criminal proceedings against the police officers ended when the court convicted them for having caused the death of the applicants' relative as a result of intentional grievous bodily harm and gave them a three-year suspended prison sentence. The court also awarded compensation to be paid by the chief officer, but the enforcement of that award was discontinued as the latter had no assets. Following a tort action brought by the applicants, the court ordered the police department to pay compensation, and the amounts awarded were paid shortly after the end of those proceedings. No disciplinary measures were ever taken against the police officers.

74. The Court found a violation of Article 2 of the Convention on account of the fact that, *inter alia*: the criminal proceedings against the police officers had lasted seven years; they had been given a minimal suspended sentence; and they had never been disciplined for their wrongful acts.

75. In particular, the Court stated:

“... It is true that it is not for the Court to rule on the degree of individual guilt (see *Öneryıldız*, § 116; and *Nachova and Others*, § 147, both cited above), or to determine the appropriate sentence of an offender, those being matters falling within the exclusive jurisdiction of the national criminal courts. However, under Article 19 of the Convention and under the principle that the Convention is intended to guarantee not theoretical or illusory, but practical and effective rights ..., the Court has to ensure that a State's obligation to protect the rights of those under its jurisdiction is adequately discharged. In cases of deaths occurring as a result of the use of excessive force, it must in particular verify whether the State has complied with its duty under Article 2 to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions, and by not allowing life-endangering offences to go unpunished [emphasis added] Moreover, as noted in *Scordino* (no. 1) ..., in determining an applicant's continuing victim status the Court must have regard to the result obtained from using domestic remedies.

62. It follows that while the Court should grant substantial deference to the national courts in the choice of appropriate sanctions for ill-treatment and homicide by State agents, it must exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed. [emphasis added] Were it to be otherwise, the States' duty to carry out an effective investigation would lose much of its meaning, and the right enshrined by Article 2, despite its fundamental importance, would be ineffective in practice.”

⁷⁵. *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, 20 December 2007.

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

76. Since then, the aforementioned principles established in these cases have been applied in a number of cases under Articles 2 and 3 of the Convention. While most of these cases appeared to concern either ill-treatment or death following ill-treatment by State agents⁷⁶, there have been few which concerned the use of lethal force by State agents.

77. For example, in *Kulah and Koyuncu v. Turkey*⁷⁷, the applicant's son was killed by a police officer during arrest. The Court found a violation of both the substantive and the procedural limbs of Article 2 of the Convention because, despite having concluded that the killing of the applicants' son had been in breach of the domestic legislation because the use of fatal force by the police officer had been unlawful, a prison sentence of only one year and one month had been enforced and then suspended altogether. In particular, the Court held:

“42. In the present case, although the domestic law permitted the trial court to mete out a much higher sentence, the court handed down an extremely lenient sentence for the offence of unlawful killing and then suspended it altogether. By imposing such a disproportionate sentence, the trial court used its power of discretion to lessen the consequences of a serious criminal act rather than to show that such acts could in no way be tolerated (see *Okkali*, cited above, § 75).”

78. The Court considered that the criminal-law system, as applied in that case, had proved to be far from rigorous and had had little dissuasive effect capable of ensuring the effective prevention of unlawful acts.

79. In *Bektaş and Özalp v. Turkey*⁷⁸ the applicants' close relatives were killed by police officers in their houses during a police operation. The Court noted that, although the domestic court had concluded that the killing of the first applicant's husband had been in breach of domestic law because the force used by the police had been excessive, it imposed only a six-month prison sentence on the guilty officers and then suspended the sentences altogether. Using similar reasoning as outlined above, the Court found a violation of Article 2 (substantive).

80. As to the killing of the second applicant's brother, the Court observed that the police officers had been acquitted because the domestic courts considered that the use of force was proportionate. However, the Court, taking into account, *inter alia*, the defective investigation, disagreed with the domestic court's findings and found a violation of Article 2 (substantive).

⁷⁶. See, in particular, *Ali and Ayşe Duran v. Turkey*, no. 42942/02, 8 April 2008 and *Yeter v. Turkey*, no. 33750/03, 13 January 2009.

⁷⁷. *Kulah and Koyuncu v. Turkey*, no. 24827/05, 23 April 2013. See also *Fadime and Turan Karabulut v. Turkey*, no. 23872/04, 27 May 2010, *Kasap and Others v. Turkey*, no. 8656/10, 14 January 2014.

⁷⁸. *Bektaş and Özalp v. Turkey*, no. 10036/03, 20 April 2010.

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

81. In a recent case concerning allegations of torture⁷⁹, the Court summarised the type of cases where it had considered that law-enforcement officials found guilty by the national courts of ill-treatment related offences or unlawful killings had been allowed to go unpunished in Turkey. The first group of cases concerned those where either the criminal proceedings or the execution of the punishment had been suspended following the application of Law no. 4616⁸⁰. The second group consisted of cases where an amendment to the Code of Criminal Procedure had led to the suspension of the pronouncement of a judgment if the prison sentence imposed was less than two years⁸¹. The third group related to criminal proceedings which had become time-barred on account of the expiry of the prescription period.⁸²

82. Unlike in the above-mentioned cases, the Court found no violation in the case of *Leparskienė v. Lithuania*⁸³, where the applicant had essentially complained that the State had failed to punish adequately the police officer who had unlawfully deprived her son of his life. In that case, the Court could find no fault in the manner in which the investigation had been conducted.

83. As to the applicant's complaint regarding punishment, the Court held as follows:

“... Article 2 does not give an applicant the right to have a third party prosecuted or sentenced for a criminal offence or an obligation for the prosecution to result in conviction, or indeed in a particular sentence (see paragraph 50 above). On the other hand, the Court would also state that while it is true that it is not its task to address issues of domestic law concerning individual criminal responsibility, or to deliver guilty or not guilty verdicts, in order to determine whether the respondent Government have fulfilled their international law responsibility under the Convention the Court must have regard to the Lithuanian courts' considerations while convicting the police officer and to the punishment imposed on him as a result. While doing that, the Court should grant substantial deference to the national courts in the choice of appropriate sanctions for the death caused by the State agent. However, it must still exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed”

⁷⁹. *Uğur v. Turkey*, no. 37308/05, §§ 99-101, 13 January 2015.

⁸⁰. See, for example, *Ali and Ayşe Duran v. Turkey*, § 69.

⁸¹. See, for example, *Eski v. Turkey*, no. 8354/04, § 36, 5 June 2012 (Article 3).

⁸². See, for example, *Batu and Others v. Turkey*, nos. 33097/96 and 57834/00, §§ 146-148, ECHR 2004-IV (extracts) (Article 3).

⁸³. *Leparskienė v. Lithuania*, no. 4860/02, 7 July 2009; see also *Dölek v. Turkey*, no. 39541/98, 2 October 2007. On the issue of appropriate sentencing the most recent case appears to be *Mileusnić and Mileusnić-Espenheim v. Croatia*, no. 66953/09, 19 February 2015 where the Court held that the sentences given to the perpetrators responsible for the killing of the applicant's relative (ten and nine years) do not appear to fall short of reinforcing the deterrent effect of the judicial system in place and the significance of the role proper sentencing is required to play in preventing violations of the right to life.

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

84. In this connection, the Court noted:

“... the domestic courts had sufficient regard to the extremely serious consequences of the incident and gave substantial reasoning as to why they had characterised the act committed by the officer as manslaughter as well as specified grounds for imposing the medium term of imprisonment allowed by law and for opting to suspend it (see paragraphs 20 and 23 above). In particular, the criminal proceedings did concern the protection of the right to life, given that the State agent was prosecuted and subsequently convicted not only of abuse of office but also of manslaughter (see, *a contrario*, *Öneriyıldız*, cited above, § 116, ECHR 2004-XII), and sentenced to two years and six months’ imprisonment.”

85. While the Court was disconcerted by the fact that the execution of that sentence had been suspended, it nonetheless attached some weight to the fact that the authorities had dismissed the police officer in question from the police and that he had never been re-employed by the police or any other law-enforcement authority. It found that the punishment imposed by the State had not been disproportionate to the gravity of the act the police officer had committed.

86. In *Aydan v. Turkey*⁸⁴, the applicants’ relative was killed by shots fired from a military jeep while he was waiting for a bus close to a demonstration. Criminal proceedings were initiated against a gendarme but the domestic courts decided not to impose a criminal penalty because they established that he had exceeded the limits of self-defence while in an excusable state of emotion, fear or panic. As regards the substantive limb of Article 2, the Court examined whether the use of lethal force had been “*absolutely necessary*” and whether the respondent State had taken the necessary measures to reduce as far as possible the adverse consequences of the use of force, and found that it had not on both accounts. On the latter point, the Court criticised the way in which the Criminal Code had been applied in the instant case. In particular, it considered that the decision of the domestic courts not to impose criminal sanctions on a gendarme who had made unjustified use of his firearm could be interpreted as giving *carte blanche* to the members of the security forces operating in that region. As to the procedural limb of Article 2, the Court found a number of deficiencies, notably a lack of promptness and thoroughness.

87. In the case of *Enukidze and Girgvlani v. Georgia*⁸⁵, where the applicant’s son was abducted, beaten and killed by a group of senior law-enforcement officers, the Court, under the procedural limb of Article 2, addressed not only the severity of the sentences as initially imposed by the domestic courts, but also the manner in which they had subsequently been implemented. In particular, it held:

⁸⁴. *Aydan v. Turkey*, no. 16281/10, 12 March 2013.

⁸⁵. *Enukidze and Girgvlani v. Georgia*, no. 25091/07, 26 April 2011.

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

“273. In any event, it is not so much the initial sentences imposed on the offenders as the subsequent manner of their implementation which is at the core of the problem. The Court is struck by the fact that on 24 November 2008 the President of Georgia found it appropriate to pardon State agents convicted of such a heinous crime by reducing the remainder of their sentences by half. Then, as if that measure of clemency was not generous enough, on 5 September 2009 the prison authority recommended and the relevant domestic court granted the convicts’ release on licence. The Government referred to the necessity of holding offenders accountable before the public at large (see paragraph 229 above). The Court observes in that respect that Georgian society was expected to accept the fact that three years and six months of imprisonment (see paragraphs 61 and 205 above) was sufficient punishment for senior officers of the Ministry of the Interior who had wantonly ill-treated and killed an innocent man.”

88. The Court therefore considered:

“... the sentences as initially imposed upon the convicts by the domestic courts and actually implemented by the relevant domestic authorities did not constitute adequate punishment for the crime committed. That unreasonable leniency deprived the criminal prosecution of the four officers of any remedial effect under Article 2 of the Convention (see *Nikolova and Velichkova*, cited above, §§ 58-64 and 75).”

89. In that case, in finding that there had been a violation of Article 2 of the Convention under its procedural limb, the Court concluded, *inter alia*:

“... when a suspicious death has been inflicted at the hands of a State agent, particularly stringent scrutiny must be applied by the relevant domestic authorities to the ensuing investigation. Otherwise, the State risks instilling a sense of impunity in its agents, by appearing to tolerate their life-threatening acts, which could open the way to more wanton crimes such as that committed in the present case [emphasis added]⁸⁶.”

90. Finally, mention must be made of the latest authority where the issue of amnesty was discussed, namely, *Marguš v. Croatia* [GC]⁸⁷. The Court considered that, by convicting of war crimes a soldier who had previously been granted an amnesty, the Croatian authorities had acted in compliance with the requirements of Articles 2 and 3 of the Convention and that therefore Article 4 of Protocol No. 7 was not applicable. In particular, the Court held:

“126. The Court has already held that, where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible (see *Abdüsamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004; *Okkaly v. Turkey*, no. 52067/99, § 76, 17 October 2006; and *Yeşil and Sevim v. Turkey*, no. 34738/04, § 38, 5 June 2007). It has considered in particular that the national authorities should not give the impression that they are

⁸⁶. § 277.

⁸⁷. *Marguš v. Croatia* [GC], no. 4455/10, ECHR-2014 (extracts).

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

willing to allow such treatment to go unpunished (see *Egmez v. Cyprus*, no. 30873/96, § 71, ECHR 2000-XII, and *Turan Cakir v. Belgium*, no. 44256/06, § 69, 10 March 2009). In its decision in the case of *Ould Dah v. France* (dec.), no. 13113/03, ECHR 2009) the Court held, referring also to the United Nations Human Rights Committee and the ICTY, that an amnesty was generally incompatible with the duty incumbent on States to investigate acts such as torture and that the obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that might be considered contrary to international law.

127. The obligation of States to prosecute acts such as torture and intentional killings is thus well established in the Court's case-law. The Court's case-law affirms that granting amnesty in respect of the killing and ill-treatment of civilians would run contrary to the State's obligations under Articles 2 and 3 of the Convention since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible. Such a result would diminish the purpose of the protection guaranteed by under Articles 2 and 3 of the Convention and render illusory the guarantees in respect of an individual's right to life and the right not to be ill-treated. [emphasis added] The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others*, cited above, § 146)."

CONCLUSION

91. This report attempts to provide a brief overview of a State's procedural obligations under Article 2 of the Convention with a view to ascertaining the nature and scope of the duty to punish those responsible for breaches of the right to life in cases concerning the use of lethal force by State agents.

92. The Court's case-law, as referred to above, indicates that the nature of the investigation required to discharge a State's procedural obligations under Article 2 as regards the use of lethal force by State agents is, in principle, criminal.

93. When assessing the adequacy of a criminal investigation, the Court requires that it be capable of determining whether the force used in such a case was or was not justified in the circumstances and, where appropriate, the identification and punishment of those responsible. This is not an obligation of result, but one of means.

94. In particular, the Court has emphasised that the procedural obligation under Article 2 cannot be interpreted in a manner which would require that third parties be prosecuted and sentenced for a particular criminal offence or that all prosecutions should result in conviction, or in a particular sentence. However, in order to ensure that States have respected their obligations inherent in Article 2, the Court reviews whether and to what extent the domestic courts, in reaching their conclusion, have submitted the case to the careful scrutiny required by Article 2 of the Convention.

ARTICLE 2

THE NATURE AND THE SCOPE OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE CONVENTION TO PUNISH THOSE RESPONSIBLE FOR BREACHES OF THE RIGHT TO LIFE IN CASES CONCERNING THE USE OF LETHAL FORCE BY STATE AGENTS

95. The Court's case-law, as attested by the examples mentioned above, appears to suggest that States have a duty to prosecute when the outcome of the investigation warrants that solution. Thus, a decision by a public prosecutor not to prosecute does not appear to raise *per se* an issue under the procedural limb of Article 2, provided that there were no serious shortcomings in the investigation undermining its effectiveness and calling into question the reliability of the facts on which the authorities relied.

96. The Court's case-law further appears to suggest that, if the facts of a case demonstrate that the killing in question was unlawful, then the Court requires the imposition of a suitable penalty. This includes an assessment of not only the severity of the sentence as initially imposed by the domestic courts, but also the manner in which they were subsequently implemented.

97. What constitutes a suitable penalty would appear to depend on the particular circumstances of each case and, notably, on the reasons given by the domestic courts. In particular, the Court must be satisfied that the domestic courts did not use their power of discretion to lessen the consequences of a serious criminal act, rather than to show that such acts could in no way be tolerated⁸⁸. Thus, what appears to be essential for the Court is that the result of the criminal proceedings should not create a sense of impunity on the part of the perpetrators⁸⁹. This, as the Court has emphasised many times, is essential for maintaining public confidence, ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts⁹⁰.

⁸⁸. See, in particular, *Ali and Ayşe Duran v. Turkey*, §§ 67-68 (death following ill-treatment) and *Külah and Koyuncu v. Turkey*, § 42.

⁸⁹. See, for example, *Nikolova and Velichkova v. Bulgaria*, § 63.

⁹⁰. See, for example, *Kasap and Others v. Turkey*, § 60.

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