

# INFOCUS - OBLIGATION TO INVESTIGATE MINIMUM INVESTIGATIVE STANDARDS UNDER ARTICLE 2 OF THE ECHR, AND THEIR APPLICABILITY TO POST-CONFLICT SITUATIONS



The Convention for the Protection of Human Rights and Fundamental Freedoms (or European Convention on Human Rights; hereinafter – ECHR, the Convention) is a Treaty aimed at the protection of human rights and political freedoms in Europe. The Convention was adopted in 1950 and entered into force on 3 September 1953. All Member States of the Council of Europe are party to the Convention. ECHR also establishes the European Court of Human Rights (hereinafter – ECtHR, European Court), which receives, considers and delivers judgments over complaints of any person who feels his or her rights have been violated by a State party to the Convention. ECtHR’s judgments finding violations are binding on the States in question, who are then obliged to execute them.



Article 2 of the Convention protect the most important right – right to life, of which no derogation is possible.<sup>[1]</sup> Issues related to the right to life also arise from inter-state complaints, but the most of available case-law is stemming from the application and interpretation of the ECHR by the European Court.

While applying and deciding upon the relevant parts of the Convention, the ECtHR developed significant body of jurisprudence, which interpreted many provisions of the Convention, thus at times presenting new concepts, which have been then accepted and carried forward by other bodies and institutions. The concept of procedural obligation to investigate under Article 2 of the ECHR is one of those concepts.

This concept had largely emerged from the situations of obvious loss of life in life-threatening situations, where the investigative material presented to the reviewing experts at the European Commission and then ECtHR was so poor, that there were simply not sufficient grounds to assess whether the death was in violation of the obligation to protect life. This concept became a very effective tool to ensure that the authorities would not be able to avoid responsibility under Article 2

through intentional or negligent conduct of poor investigation.[2]  
Subsequently, Article 2 provisions were also extended to cover cases of disappearances in life-threatening situations.[3]

In simple terms, this concept means that the State authorities are not only obliged to ensure that the right to life of no one under their jurisdiction is violated, neither by anyone acting on behalf of a State, or in their private capacity (which is the substantive obligation - under Article 2 para 1), but they also must conduct sufficient investigation into any suspicious death. In the first case of its kind, *McCann and Others*, the ECtHR said: "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 everyone within their jurisdiction the rights and freedoms defined in Convention', required 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]

#### Criteria of Effective Investigation

To be considered an effective investigation, an investigation should fulfil several basic requirements, formulated in the ECtHR's case-law:[5]

- it should be thorough; it should be expedient;
- it should be sufficiently independent and impartial; the materials and conclusions of the investigation should be sufficiently accessible for the relatives of the victims, to the extent it does not seriously undermine its efficiency;
- the investigation must also be capable of leading to a determination of whether the death was caused unlawfully and if so, to the identification and punishment of those responsible.[6]

Detailing more the criteria of independence, and particularly in relation to the alleged killings by "state agents", the ECtHR states that for an investigation to be effective, it may generally be regarded as necessary for the persons responsible for carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.[7] The fact that the investigation is to be performed "by an appropriate and impartial body" is also emphasised in the case-law of the United Nations Human Rights Council (UN HRC), especially in cases of disappearances.[8]

At the same time being realistic and acknowledging that in practice not every investigation should necessarily be successful nor come to a conclusion which coincides with the claimant's account of events, the ECtHR stresses that this procedural obligation "is not an obligation of results but of means." Therefore, the investigation will satisfy the requirement of "thorough investigation" if:

- the authorities take whatever reasonable steps they can 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 the clinical findings, including the cause of death;
- make a serious attempt to find out what happened and do not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions;[\[9\]](#)
- the investigation was capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and, possibly, the punishment of those responsible;[\[10\]](#)
- the investigation's conclusion are based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of enquiry undermines to a decisive extent the investigation's ability to establish the circumstances of the case and the identity of those responsible.[\[11\]](#)

The European Court

strongly states that any deficiency in the investigation which undermines its ability to establish the cause of death or the identity of the persons responsible will risk falling foul of these standards.[\[12\]](#)

Nevertheless, the same authority likewise clearly states that the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. Each of the cases must be assessed on the basis of all relevant facts and with regard to the practical realities of the investigative work.[\[13\]](#)

Concluding this, we can say that, following the logic and jurisprudence of the ECtHR if the above listed minimum standards are fulfilled (with a few exceptions),[\[14\]](#) the investigation will most probably be considered effective,[\[15\]](#) even if those responsible for the illegal loss of life were never held responsible through criminal proceedings.[\[16\]](#)

## Applicability of Investigative Standards to Criminal Investigations in Post-Conflict Situations

The aim of this paper is not to reopen the ongoing discussion regarding the priority or complementary application of international human rights law or international humanitarian law on the territory of an armed conflict, and which norms establish obligation to investigate crimes committed there.<sup>[17]</sup>

The focus is on the applicability of the above procedural obligations equally to the investigations conducted in conflict/post-conflict time, and in peacetime conditions. Furthermore, this paper discusses if the standard minimum set (algorithm) of actions shall also be fully completed, and the standards complied with, or whether some requirements may be omitted, or deviated from during “turbulent times”.

In situations of conflict or generalised violence, the European Court on Human Rights has established the applicability of Article 2 to post-conflict situations, including in countries of the former Yugoslavia.<sup>[18]</sup> The Court has further held that the procedural obligation under Article 2 continues to apply in “difficult security conditions, including in a context of armed conflict.”<sup>[19]</sup>

Similarly, the HRC has held that the right to life, including its procedural guarantees, shall be considered as the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.<sup>[20]</sup>

The Court has acknowledged that “where the death (and disappearances) to be investigated under Article 2 occur in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed.”<sup>[21]</sup>

Nonetheless, the Court has held that “the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.”<sup>[22]</sup>

Furthermore, while acknowledging that that Article 2 must not be interpreted in a way which imposes an impossible or disproportionate burden on the authorities, either in the context of policing activities or that of priorities and resources, the European Court stresses that what amounts to an impossible and/or disproportionate burden must be measured by the “very particular facts

and contexts.”[\[23\]](#)

At the same time, the ECHR holds that even if the investigation could initially have encountered certain objective difficulties due to war and post-war situation, the authorities’ inactivity for long subsequent periods could no longer be justified.[\[24\]](#) Similar requirements are established for the situations related to disappearances, torture and other kinds of inhumane and degrading treatment.[\[25\]](#)

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[\[1\]](#) Article 15-2 of the ECHR.

[\[2\]](#) See, among others: *Tanrikulu v. Turkey* [GC], no. 23763/94, judgment of 8 July 1999, §§ 69, 87, 96, 109-110, UCHR 1999-IV; *Güleç v. Turkey*, 27 July 1998, §§ 81-82, Reports of Judgments and Decisions 1998-IV; *Finucane v. the United Kingdom*, no. 29178/95, § 82-84, ECHR 2003-VIII.

[\[3\]](#) See, among others: *Palić v Bosnia and Herzegovina*, no. 4704/04, 15 February 2011; *Bazorkina v. Russia*, no. 69481/01, 27 July 2006; *Aslakhanova and Others v. Russia*, nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, 18 December 2012.

<sup>[4]</sup> ECtHR, *McCann v. United Kingdom*, no. 18984/91, judgment of 27 September 1995, § 161.

<sup>[5]</sup> See: ECtHR [GC], *Finogenov and Others v. Russia*, nos 18299/03 and 27311/03, § 270–272

<sup>[6]</sup> See: ECtHR [GC], *Varnava and Others v. Turkey*, nos 16064/90 and others, judgment of 18 September 2009, § 191; ECtHR, *Palić v. Bosnia and Herzegovina*, cited in footnote 11 above, at § 63.

<sup>[7]</sup> See: ECtHR, *Hugh Jordan v. the United Kingdom*, judgment of 4 May 2001, § 105; ECtHR [GC], *Giuliani and Gaggio v. Italy*, [GC], no. 23458/02, judgment of 24 May 2011, § 300; ECtHR [GC], *Ramsahai and Others v. the Netherlands*, no. 52391/99, judgment of 15 May 2007, § 325.

<sup>[8]</sup> See: HRC, *Joaquín David Herrera Rubio et al. v. Colombia*, § 10.3, Communication No. 161/1983, U.N. Doc. CCPR/C/OP/2 (1990); HRC, *Basilio Laureano Atachahua v. Peru*, § 8.3, Communication No. 540/1993, U.N. Doc. CCPR/C/56/D/540/1993 (1996).

<sup>[9]</sup> See: ECtHR [GC], *El-Masri v. “the former Yugoslav Republic of Macedonia”*, no. 39630/09, judgment of 13 December 2012, § 183; ECtHR [GC], *Mocanu and Others v. Romania*, nos 10865/09, 45886/07 and 32431/08, judgment of 17 September 2014, § 322).

<sup>[10]</sup> See: ECtHR, *Mahmut Kaya v. Turkey*, no. 22535/93, judgment of 28 March 2000, § 124; see also ECtHR, *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, judgment of 14 March 2002, § 71.

<sup>[11]</sup> ECtHR, *Kolevi v. Bulgaria*, no. 1108/02, judgment of 5 November 2009, § 201.

<sup>[12]</sup> See, among others: *Mikheyev v. Russia*, no. 77617/01, 26 January 2006, §§ 107 et seq.; *Assenov and Others v. Bulgaria*, 28 October 1998, §§ 102 et seq.).

<sup>[13]</sup> See ECtHR, *Velcea and Mazăre v. Romania*, no. 64301/01, judgment of 1 December 2009, § 105.

<sup>[14]</sup> See par example: ECtHR, *Perevedentsevy v. Russia*, no. 39583, judgement of 24/04/2014; see for detailed analysis of the judgement: Antonov A., Grigorjev V. Decision of the European Court of Human Rights in the case *Perevedentsevy v. Russia*: new trends in old position (in Russian) // *Questions of Jurisprudence* (ISSN: 2073-5022), № 6(28), 2014, P. 219-242.

<sup>[15]</sup> See, e.g.: ECtHR, Grand Chamber (GC), *Varnava and Others v. Turkey*, nos 16064/90 and others, judgment of 18 September 2009, § 191; ECtHR, *Palić v. Bosnia and Herzegovina*, cited in footnote 11 above, at § 63.

<sup>[16]</sup> See, e.g.: ECtHR, *Palić v. Bosnia and Herzegovina*, cited in footnote 11 above, at § 65; ECtHR [GC], *Giuliani and Gaggio v. Italy*, no 23458/02, judgment of 24 March 2011, § 301, 326.

<sup>[17]</sup> See.: Dugard J. Bridging the gap between human rights and humanitarian law: The punishment of offenders // *International Review of the Red Cross*, 30-09-1998, № 324 [electronic source] – <https://www.icrc.org/eng/resources/documents/article/other/57jpg6.htm> (accessed on 20.05.2018); Русинова В.Н. Преследование нарушений международного гуманитарного права на основании принципа универсальности // *Международное публичное и частное право*, Москва, 2005, № 66 С. 21-26.

<sup>[18]</sup> See, among other examples: ECtHR, *Palić v. Bosnia and Herzegovina*, cited in footnote 11 above, and ECtHR, *Jularić v. Croatia*, no. 20106/06, judgment of 20 January 2011.

<sup>[19]</sup> See, e.g.: ECtHR [GC], *Al-Skeini and Others v. the United Kingdom*, judgment of 7 July 2011, no. 55721/07, § 164; ECtHR, *Güleç v. Turkey*, judgment of 27 July 1998, § 81, Reports 1998-IV; ECtHR, *Ergi v. Turkey*, judgment of 28 July 1998, § 79 and 82, Reports 1998-IV; ECtHR, *Ahmet Özkan and Others v. Turkey*, cited above, § 85–90, 309–320 and 326–330; *Isayeva v. Russia*, cited above, § 180 and 210; ECtHR, *Kanlibaş v. Turkey*, no. 32444/96, judgment of 8 December 2005, § 39–51.

[20] See.: HRC, General Comment No. 6, 30 April 1982, § 1; HRC, Abubakar Amirov and Aïzan Amirova v. Russian Federation, communication no. 1447/2006, views of 22 April 2009, § 11.2, CCPR/C/95/D/1447/2006

[21] See, e.g.: ECtHR [GC], Al-Skeini and Others v. the United Kingdom, cited above, § 164; ECtHR, Bazorkina v. Russia, no. 69481/01, judgment of 27 July 2006, § 121.

[22] See, e.g.: ECtHR, Kaya v. Turkey, judgment of 19 February 1998, § 105, Reports of Judgments and Decisions 1998-I, at § 86-92; ECtHR, Ergi v. Turkey, no. 23818/94, judgment of 28 July 1998, Reports 1998-IV; cited above, at §§ 82-85; ECtHR [GC], Tanrikulu v. Turkey, no. 23763/94, judgment of 8 July 1999, § 101-110, ECHR 1999-IV; ECtHR, Khashiyev and Akayeva v. Russia, nos 57942/00 and 57945/00, judgment of 24 February 2005, § 156-166; ECtHR, Isayeva v. Russia, cited above, § 215-224; ECtHR, Musayev and Others v. Russia, nos 57941/00 and others, judgment of 26 July 2007, § 158-165; and many others.

[23] See ECtHR, Palić v. Bosnia and Herzegovina, cited in footnote 11 above, at § 70; Brecknell v. The United Kingdom, no. 32457/04, judgment of 27 November 2007, § 62).

[24] See e.g.: ECtHR, Jelić v. Croatia, no. 57856/11, judgment of 12 June 2014, § 92; ECtHR, Association "21 December 1989" and Others v. Romania, nos. 33810/07 and 18817/08, judgment of 24 May 2011, § 100.

[25] See e.g.: Keller H., Chernishova O. Disappearance Cases before the European Court of Human Rights and the UN Human Rights Committee: Convergences and Divergences; Human Rights Law Journal 32 (2012), P. 237.