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Author: Kempees, P.M.

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2 Problems of substantive Convention law in relation to ‘hard power’

2.1 Introduction

As mentioned, the most obvious defence available to a respondent is to persuade the Court that there is no substantive violation of the Convention at all. Let us therefore first examine the types of cases that experience shows are most liable to give rise to a finding of violation in our particular field of interest.

In times of normality, it is the police who exercise the State’s monopoly on the use of force, not the military. On the whole, the Commission and the Court have developed the applicable jurisprudential standards on the basis of unspectacular cases: the kind of issues that can and will arise even in a society at peace – the arrest, questioning and detention of criminal suspects; the fairness and length of judicial proceedings; the enforcement of domestic decisions and judgments; conditions of detention in police stations and prisons; and so on.

Since the latter decades of the twentieth century, applications complaining about Government measures to combat terrorism and even armed insurgency have increased in absolute numbers (though not necessarily as a proportion of the Court’s case-load). Previously, cases of this nature arose almost invariably from the actions of the United Kingdom, first in Cyprus (a British colony at the time) and later in Northern Ireland; but the United Kingdom has been joined by Turkey, which seeks to assert its sovereignty in the south-eastern parts of its territory, and Russia, whose central Government as we have seen is opposed by separatist forces in parts of the Northern Caucasus under its sovereignty.

More recently applications have reached Strasbourg arising from the exercise of ‘hard power’ in situations that cannot be seen in terms of terrorism or insurgency, to which the expression ‘international armed conflict’ is more appropriate. Events of such a nature have taken place in Iraq and Syria, in the former Yugoslavia, in Moldova, in the Caucasus, and on the island of Cyprus after it achieved statehood.

The challenge was, and is, to apply the substantive standards developed over the years to the use of ‘hard power’ in a way that neither diminishes the protection of the rights of the individual nor prevents Contracting States from acting effectively.

The case-law that has developed is extensive and detailed. Since the main focus of this work is elsewhere, we will confine ourselves to a selection of the most important cases that have arisen under substantive Convention law, concentrating on their relevance to the legal questions here in issue. We will revisit many of them later on.

2.2 Article 2, right to life

The use of lethal force by Government operatives, be they military or police, is covered by Article 2 of the Convention.⁵³

2.2.1 Substantive obligations

2.2.1.1 Active deprivation of life

It can happen that forces on the ground are faced with a situation in which they see no alternative to the use of force. The European Convention on Human Rights does not prevent the use of force in all circumstances: it makes express provision for the use of lethal force where such is absolutely necessary for law enforcement purposes.⁵⁴ On the whole the Court will try to avoid second-guessing the actions of the law enforcer on the spot as long as there is a proper regulatory framework in place, the planning and control of the operation are designed to avoid the use of lethal force, the actual decision to use force is reasonable and the force used is not disproportionate. This is apparent from *McCann and Others*, the case of the shooting dead in Gibraltar of Provisional IRA (Irish Republican Army – ‘IRA’) operatives by the British Special Air Service (SAS),⁵⁵ and confirmed by the multitude of judgments and decisions in which the Court has had to consider the use of lethal force by police. The Court is prepared to make allowances for mistakes made in good faith.⁵⁶ It is comparatively rare for the Court to find a violation on account of the actual use of force in a genuine violent confrontation unless there is evidence of bad faith or of serious deficiencies in planning and control.⁵⁷

The test, as required by the words ‘absolutely necessary’, is one of strict proportionality to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2.⁵⁸ It is therefore required that there be an appropriate legal and administrative framework defining the limited circumstances in which law enforcement officials may use force and firearms, in the light of the relevant international standards. In line

53 The second sentence of Article 2 § 1, which permits the execution of the death penalty, is now a dead letter (see Protocols 6 and 13 and 4.7.5 below).

54 Article 2 § 2 of the Convention.

55 *McCann and Others v. the United Kingdom* [GC], no. 18984/91, §§ 192-193, Series A no. 324.

56 See, for example, *McCann and Others*, § 200; *Bubbins v. the United Kingdom*, no. 50196/99, § 139, ECHR 2005-II; and *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, §§ 178-179, ECHR 2011.

57 See, for example, *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 288, ECHR 2007-II; *Mulder-van Schalkwijk v. the Netherlands* (dec.), no. 26814/09, §§ 107-114, 7 June 2011; and *Finogenov and Others v. Russia*, nos. 18299/03 27311/03, §§ 226 and 235. For examples of violation, see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, §§ 99-109, ECHR 2005-VII, and *Tagayeva and Others v. Russia*, nos. 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11 and 37096/11, §§ 540-611, 13 April 2017. See generally Clare Ovey, ‘Application of the ECHR during International Armed Conflicts’, in *The UK and European Human Rights: A Strained Relationship?* (Katja S Ziegler, Elizabeth Wicks and Loveday Hodson, eds.), Hart Publishing, 2015, pp. 225-245 at pp. 233-237.

58 See *McCann and Others*, § 149; more recently and among many other examples, *Giuliani and Gaggio v. Italy* (GC), no. 23458/02, § 176, ECHR 2011.

with the principle of strict proportionality, the national legal framework must make recourse to firearms dependent on a careful assessment of the situation. Furthermore, the national law regulating policing operations must secure a system of adequate and effective safeguards against arbitrariness and abuse of force and even against avoidable accident. The Court sees these requirements as part and parcel of the 'primary duty on the State to secure the right to life'.⁵⁹

2.2.1.2 Positive obligations

The Court has interpreted the first sentence of Article 2 § 1, which states simply that '[e]veryone's right to life shall be protected by law', to require the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. The State's obligation in this respect involves 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 may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.⁶⁰ It cannot however be required that the State provide absolute safety: inevitably, there are operational choices to be made in terms of priorities and resources, and there is a trade-off in terms of due process and other guarantees which legitimately place restraints on the scope of police action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention. An applicant complaining of a lack of adequate protection must satisfy the Court that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. This is a stricter test than one of 'gross negligence or wilful disregard' of the right to life.⁶¹

It has been rightly pointed out that while this positive obligation imposes a duty on the State to protect the public against possible terrorist acts, States are not allowed to combat international terrorism at all costs. They must not resort to methods which undermine the very values they seek to protect.⁶²

2.2.2 Procedural obligations

It does not end there. The obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 of the Convention to

⁵⁹ *Giuliani and Gaggio*, § 209.

⁶⁰ *Osman v. the United Kingdom* (GC), no. 23452/94, §§ 115-16, *Reports* 1998-VIII.

⁶¹ *Osman*, §§ 115-116.

⁶² *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008, concurring opinion of Judge Myjer, joined by Judge Zagrebelski.

‘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.⁶³ The State must therefore ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished.⁶⁴ Moreover, where there has been a use of force by State agents, the investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances. An effective enquiry is one that is:⁶⁵

- adequate: that is, it must be capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible. This means decent police work: all reasonable efforts must be made to collect the evidence needed, and the evidence must be properly assessed. In particular, the investigation’s conclusions must be based on thorough, objective and impartial analysis of all relevant elements;
- independent: that is, from anyone implicated or likely to be implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence;
- accessible: that is, to the victim’s family and to public scrutiny. This does not mean that the victim’s family and the public should have access to the investigation file whenever they like, but it does mean that there should be a procedure for them to be properly informed and for their interests to be properly protected.

What is at stake here is nothing less than public confidence in the State’s monopoly on the use of force.⁶⁶

It should be added that the circumstances of the case may dictate an investigation into possible nefarious motives that may have led to the use of unnecessary or excessive force, racist sentiment for example.⁶⁷

63 *McCann and Others*, § 161.

64 *Armani da Silva v. the United Kingdom* (GC), no. 5878/08, § 230, ECHR 2016.

65 Useful summaries are given in *Mustafa Tunç and Fecire Tunç v. Turkey*, no. 24014/05, §§ 171-182, 25 June 2013, and *Armani da Silva v. the United Kingdom* (GC), no. 5878/08, §§ 231-239, ECHR 2016. See generally D.J. Harris, M. O’Boyle, E.P. Bates and C.M. Buckley, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights*, 3rd edition Oxford University Press 2014, pp. 214-218; Clare Ovey, “Application of the ECHR during International Armed Conflicts”, in *The UK and European Human Rights: A Strained Relationship?* (Katja S Ziegler, Elizabeth Wicks and Loveday Hodson, eds.), Hart Publishing, 2015, pp. 225-245 at pp. 237-239; and Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, C., *Jacobs, White, and Ovey, The European Convention on Human Rights*, 7th edition Oxford University Press 2017, pp. 168-177.

66 *Ramsahai and Others*, § 325; *Armani da Silva*, § 232.

67 *Nachova*, § 164. For a critical appraisal of the Court’s case-law on the distribution of the burden of proof in this case and similar ones see Jasmina Mačkić, “Het onzichtbare bewijzen: Over de mogelijkheden om de bewijslast te verschuiven van klager naar de verwerende staat in zaken

One writer, Olga Chernishova, reminds us that the procedural requirement of Article 2 should be placed against the background not merely of repression and prevention, but also against that of the right of surviving kin to know the truth about what happened to their loved ones.⁶⁸

It is worth mentioning here that the Government of the United Kingdom has created an organisation, Iraq Historic Allegations Team (IHAT), to review allegations of abuse of Iraqi civilians by UK armed forces personnel in Iraq during the period of 2003 to July 2009. The alleged offences range from 'murder to low-level violence' from the start of the military campaign in Iraq, in March 2003, through the major combat operations of April 2003 and the following years spent maintaining security as part of the Multi-National Force and mentoring and training Iraqi security forces. The Ministry of Defence funded the IHAT, 'consistent with its obligations to ensure that allegations were investigated in compliance with the European Convention of Human Rights'. Of the approximately 3,400 complaints received, some 1,400 have been or are being investigated.⁶⁹

If an application is presented in Strasbourg, the Court usually avoids second-guessing the domestic investigating authorities. That said, experience shows that this is where in practice violations of Article 2 have proved to be the most likely.

Thus, in *al-Skeini and Others v. the United Kingdom*, the military police investigators reported to the commanding officer of the suspects instead of directly to the prosecutors. The criminal investigation was therefore not independent.⁷⁰ The case concerned a number of fatal shootings by British servicemen in Iraq.

In *Jaloud v. the Netherlands*, another case arising from a fatal shooting in Iraq (this time involving the Dutch Royal Army), it turned out that there were documents that had gone missing from the investigation file; the Dutch soldier suspected of having fired at least some of the fatal shots had not been kept separate from other witnesses (not that there was any appearance of collusion, but as a safety measure his separation would have been necessary); the autopsy had been carried out by an Iraqi doctor whose qualifications were unknown; the report of the autopsy was very flimsy indeed; and the bullet fragments taken from the body of the deceased had been allowed to

van discriminatoir geweld voor het Europese Hof voor de Rechten van de Mens", *NTM/NJCM-bulletin* jrg. 42 [2017], nr. 4, pp. 477-494.

68 Olga Chernishova, "Right to the truth in the case-law of the European Court of Human Rights", in in *The Right to Life under Article 2 of the European Convention on Human Rights: Twenty Years of Legal Developments since McCann v. the United Kingdom (In honour of Michael O'Boyle)*, pp. 145-160.

69 <https://www.gov.uk/government/groups/iraq-historic-allegations-team-ihat> (accessed 4 September 2018). See also the paper "De Britse reactie op claims van mensenrechtenschendingen door Britse militairen gedurende de militaire aanwezigheid in Irak: een analyse van het Iraq Historic Allegations Team" ('The British reaction to claims of human rights violations by British military personnel during the military presence in Iraq: an analysis of the Iraq Historic Allegations Team'), published by the Dutch Ministry of Defence, http://puc.overheid.nl/doc/PUC_88361_11 (accessed on 4 September 2018).

70 *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 172-174, ECHR 2011.

disappear.⁷¹ On the subject of the autopsy, the Court suggested that if the Dutch armed forces had not the facilities in Iraq then perhaps it ought to have been carried out by another of the Coalition powers.

It has been suggested that the standards resulting from *Jaloud* would not impose too onerous a burden on a peacekeeping force.⁷² However, a minority of the Grand Chamber thought the majority judgment too harsh on the merits, especially in relation to the autopsy.⁷³

An example worth mentioning of compliance with investigative obligations under Article 2 is the case of *Mustafić-Mujić and Others*. The case concerned attempts by surviving kin of some of the victims of the Srebrenica massacre to have the leadership of the Dutch peacekeeping force prosecuted as alleged accomplices of the Bosnian Serb perpetrators. The Dutch court refused to order any prosecution, finding the facts to be such that convictions were highly unlikely to result.

In dismissing the applicants' complaints against this refusal, the Court found that it was 'not possible for the Court to find that the investigations [had been] ineffective or inadequate'. The information available included a report on the Srebrenica massacre by the Secretary General of the United Nations; several judgments of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (International Criminal Tribunal for the former Yugoslavia, "ICTY") convicting Bosnian Serb accused; a report of debriefing of all returning Dutch military personnel who had lived through the events; a parliamentary enquiry; an extensive and detailed report by an independent domestic body, the NIOD Institute for War, Holocaust and Genocide Studies, running to thousands of pages; and evidence produced by the applicants themselves in parallel civil proceedings.⁷⁴ This decision illustrates that an investigation satisfying the procedural requirements of Article 2 does not have to be carried out under the sole responsibility of the authorities of the Convention Party concerned: it is acceptable to rely on information obtained by a competent international body. Nor does it have to be specifically criminal in nature, as long as it is independent and thorough and yields the necessary facts.

The mass murder at Srebrenica has aroused horror in many parts of the world, not least in the Netherlands owing precisely to the presence of Dutch peacekeeping troops. The existence of extensive and well-researched domestic material is therefore not surprising.

71 *Jaloud v. the Netherlands* (GC), no. 47708/08, §§ 203, 208, 211, 213-15 and 219, ECHR 2014.

72 Jane M. Rooney, "Extraterritorial derogation from the European Convention on Human Rights in the United Kingdom", E.H.R.L.R. 2016, 6, pp. 656-663, at pp. 657-58 and *passim*.

73 *Jaloud*, joint concurring opinion of Judges Casadevall, Berro-Lefèvre, Šikuta, Hirvelä, López Guerra, Sajó and Silvis.

74 *Mustafić-Mujić and Others v. the Netherlands* (dec.), no. 49037/15, §§ 103-06, 30 August 2016.

2.3 Article 3, prohibition of torture

2.3.1 Substantive obligations

2.3.1.1 'Inhuman or degrading treatment' and 'torture'

Article 3 of the Convention, which in the present redaction of the Convention bears the title 'prohibition of torture', in actual fact is wider in scope than that: it forbids torture or inhuman or degrading treatment or punishment. The Court's classical formulation, frequently repeated, is that any recourse to physical force which has not been made strictly necessary by the victim's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.⁷⁵

The fact that the victim is in possession of information that he or she refuses to disclose does not constitute 'conduct' justifying the use or threat of force. In *Gäfgen v. Germany* the Court reinforced the absolute nature of Article 3 to the point of finding that it prevented the use of torture even when human life was at stake.⁷⁶ The case was one in which police subjected a suspected kidnapper to treatment contrary to that provision in the sincere but mistaken belief that his victim, a young child, was still alive and forcing him to divulge the child's whereabouts might save the child's life. On occasion the Court has held that the use of a confession or a witness statement extracted under torture to ground a criminal conviction constitutes a violation of Article 6 of the Convention.⁷⁷

The protection of Article 3 is equally absolute in expulsion cases. In *Chahal* the Court, invited by the Government of the United Kingdom to permit the handover of a suspected terrorist to India, held, although well aware of 'the immense difficulties faced by States in modern times in protecting their communities from terrorist violence', that the activities of the individual in question, 'however undesirable or dangerous', could 'not be a material consideration'.⁷⁸

Physical violence does not exhaust the applicability of Article 3. Even in the absence of actual bodily injury or intense physical or mental suffering, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as de-

75 See, among many other authorities, *Ribitsch v. Austria*, no. 18896/91, § 38, Series A no. 336; *Selmouni v. France* (GC), no. 25803/94, § 99, ECHR 1999-V; *El-Masri v. "the Former Yugoslav Republic of Macedonia"* (GC), no. 39630/09, § 207, ECHR 2012; and *Bouyid v. Belgium* (GC), no. 23380/09, § 88, ECHR 2015.

76 *Gäfgen v. Germany* (GC), no. 22978/05, § 107, ECHR 2010.

77 *Harutyunyan v. Armenia*, no. 36549/03, § 65, ECHR 2007-III; *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 267, ECHR 2012.

78 *Chahal v. the United Kingdom* (GC), no. 22414/93, § 80, Reports 1996-V. For a detailed statement of the Court's approach to cases of this type, see *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, §§ 183-89, ECHR 2012 (extracts).

grading and also fall within the prohibition set forth in Article 3. It may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others.⁷⁹

In the context of this study, issues under Article 3 are most likely to arise in relation to the interrogation of captives, terrorist suspects or prisoners of war for example. Interrogation techniques found to have violated that provision have included the ‘five techniques’ used by the United Kingdom authorities in Northern Ireland in the 1970s, during a particularly troubled period: these were the use of stress positions, sensory deprivation, white noise, deprivation of sleep and deprivation of food and drink,⁸⁰ which were designed to keep the victim in a prolonged state of state of anguish and stress by means other than bodily assault.⁸¹

The distinction between actual torture and ‘mere’ inhuman or degrading treatment is stated by the Court as follows:

In order to determine whether any particular form of ill-treatment should be classified as torture, the Court must have regard to the distinction drawn in Article 3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of “torture” to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see [*Aksoy v. Turkey*, no. 21987/93, § 62, Reports 1996-VI]). In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (Article 1 of the United Nations Convention) (see *İlhan v. Turkey* [GC], no. 22277/93, § 85, ECHR 2000-VII; and [*El-Masri v. the Former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 197, ECHR 2012]).⁸²

Acts found by the Court to have amounted to actual torture have included, among others, ‘Palestinian hanging’, the victim being stripped naked, with his arms tied together behind his back, and suspended by his arms;⁸³ rape;⁸⁴ severe beating and

79 *Bouyid*, § 87.

80 *Ireland v. the United Kingdom*, judgment of 18 January 1971, §§ 96 and 167, Series A no. 25. Judgment of 20 March 2018, revision request dismissed; referral request dismissed on 10 September 2018.

81 *El-Masri*, § 202.

82 *Al Nashiri v. Poland*, no. 28761/11, § 56, 24 July 2014; *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, § 500, 24 July 2014.

83 *Aksoy v. Turkey*, no. 21987/93, § 64, Reports 1996-VI.

84 *Aydın v. Turkey*, no. 23178/94, § 86, Reports 1997-VI.

sodomy with an object;⁸⁵ and the use of 'enhanced interrogation techniques' by the American CIA including the now-infamous waterboarding.⁸⁶

2.3.1.2 Positive obligations

As in the case of Article 2, States are required to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence.⁸⁷ The mere fact that a victim (or potential victim) withdraws a criminal complaint against the perpetrator does not relieve public authority of its duties to act effectively and prevent recurrence.⁸⁸

2.3.2 Procedural obligations

As in the case of Article 2, where an individual raises an arguable claim that he or she has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1, requires by implication that there should be an effective official investigation. The principles are, to all intents and purposes, the same as those governing the procedural aspect of Article 2 and need not be repeated.⁸⁹

2.4 Article 5, right to liberty and security

2.4.1 Substantive obligations

2.4.1.1 Deprivation of liberty

Short of the use of force, it may be necessary to arrest and detain people. Arrest and detention are covered by Article 5 of the Convention, which guarantees the right to liberty and security of person. The first paragraph of the Article provides that no one may be deprived of their liberty save in accordance with a procedure prescribed by law, and on the grounds specified. It was for a long time held that the enumeration of permitted grounds of detention – which covers all conceivable cases in which detention may be used for purposes of law enforcement – was exhaustive;⁹⁰ however, since *Hassan v. the United Kingdom*, it would appear that an exception now exists for

85 *El-Masri*, §§ 205 and 211.

86 *Al Nashiri v. Poland*, §§ 401 and 516; *Husayn (Abu Zubaydah) v. Poland*, §§ 416 and 511. On the CIA rendition programme as a violation of the *ius cogens* prohibition of torture, see generally Vincent Charles Keating, "The anti-torture norm and cooperation in the CIA black site programme", *The International Journal of Human Rights*, 2016, Vol. 20, No. 7, 935–955.

87 *Opuz v. Turkey*, no. 33401/02, § 159, ECHR 2009.

88 *Opuz*, § 168.

89 See, among other authorities, *Mocanu and Others v. Romania* (GC), nos. 10865/09, 45886/07 and 32431/08, §§ 314–325 and 2.2.1.2 above.

90 Among many other authorities, *Del Río Prada v. Spain* (GC), no. 42750/09, § 123, ECHR 2013.

the detention of prisoners of war, in accordance with the Third Geneva Convention, and the detention of persons whose internment is necessary for imperative reasons of security, in accordance with the Fourth Geneva Convention, in the event of an international armed conflict.⁹¹ We will consider this particular judgment in greater depth below, as part of our discussion of the interrelation of the Convention and international humanitarian law.⁹²

The Court has developed a vast body of case-law under this Article, some of which is directly relevant to our subject.

For anyone arrested and detained, there should normally be access to family or some other support network. There should be supervision by a judge or a similarly qualified functionary who has the power to order release. *Habeas corpus* is basic to every civilised detention system, but supervision by a judge also helps to prevent, for example, torture. So does access to a doctor or a lawyer. Both were found lacking in *Aksoy v. Turkey*, the first case in fact in which the Court found that there had been torture as distinct from ‘ordinary’ inhuman or degrading treatment.⁹³

The Court’s judgment in *Ibrahim and Others v. the United Kingdom*, although it concerned a case decided under Article 6 not Article 5, strongly suggests that holding a detainee incommunicado – denying them contact with their support network and even legal advice – may be justified only in exceptional circumstances amounting to ‘compelling reasons’ and for the briefest of periods, and must be based on an individual assessment of the particular circumstances of the case. The existence of ‘an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case’ could amount to ‘compelling reasons’.⁹⁴

The dangers of incommunicado detention are well illustrated by the *El-Masri* case, which we will examine in greater depth later. The applicant in that case was taken prisoner in the territory of the Former Yugoslav Republic of Macedonia and held in unacknowledged detention in a hotel room for three weeks of brutal questioning. He was then handed over to American CIA agents who whisked him off to Afghanistan for four more months of unsavoury treatment. Had not the country’s Minister of the Interior of the day, who was later to become its Prime Minister, had the courage to break his silence, the Court would have had to rely entirely on the applicant’s own statement backed up only by circumstantial evidence.⁹⁵

91 *Hassan v. the United Kingdom* (GC), no. 29750/09, ECHR 2014; see also *Merabishvili v. Georgia* (GC), no. 72508/13, § 298, ECHR 2017 (extracts). The statement that the list of exceptions set out in Article 5 § 1 is an exhaustive one reappears, however, in *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 123, 20 March 2018, and *Şahin Alpaly v. Turkey*, no. 16538/17, § 102, 20 March 2018.

92 See 3.4.2 below.

93 *Aksoy*, §§ 64 and 83–84.

94 *Ibrahim and Others v. the United Kingdom* (GC), nos. 50541/08, 50571/08, 50573/08 and 40351/09, §§ 258–259, ECHR 2016.

95 *El-Masri*, §§ 161–164. See also Helen Duffy and Stephen A. Kostas, “‘Extraordinary Rendition’: A Challenge for the Rule of Law”, in *Counter-Terrorism: International Law and Practice* (Ana María de Frías, Katja L.H. Samuel, Nigel D. White, eds.), Oxford University Press 2011 p. 539 at pp. pp. p48–556 and pp. 564–566.

Worse still, of course, is when people are arrested and then disappear without trace. *Kurt v. Turkey*⁹⁶ and *Bazorkina v. Russia*⁹⁷ are both cases in which the applicant was the mother of a young man last seen surrounded by soldiers.

In *Al-Jedda* the applicant was kept in internment by British forces in Iraq for three years. The United Kingdom Government tried to argue that they were duty bound under United Nations Security Council Resolution 1546 to exercise their power of detention where this was necessary for imperative reasons of security. The Court restated its own case-law according to which Article 5 of the Convention does not authorise preventive detention without charge (in fact, this is a rule stated by the Court in the very first case decided by it, back in 1961: *Lawless v. Ireland*).⁹⁸ It then took a close look at the Charter of the United Nations and Resolution 1546. According to the first Article of the Charter, the United Nations existed to maintain peace and security, but also to 'achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms'. That being so, the Court found a presumption that the Security Council Resolution had to be interpreted so as to avoid conflict with obligations under human rights law. Since there was nothing in Resolution 1546 to suggest that the Security Council intended the United Kingdom to violate the European Convention on Human Rights or any other human rights document, it followed that there was no justification for failing to comply with Article 5.⁹⁹

In *Hassan v. the United Kingdom* the Court was prepared to follow the argument of the respondent Party that in situations of international armed conflict the guarantees of Article 5 should be read in the light of the Third and Fourth Geneva Conventions. This takes us outside the safe enclosure of Convention law and into a minefield that we will enter warily.¹⁰⁰

2.4.1.2 Positive obligations

In *Storck v. Germany*, the Court held that Article 5 § 1, first sentence, of the Convention must be construed as laying down a positive obligation on the State to protect the liberty of its citizens. The case concerned the detention of a person in a private psychiatric clinic without a judicial decision and without her consent.¹⁰¹ It goes without saying that this obligation applies all the more when the threat emanates from terrorists or other criminals.

96 *Kurt v. Turkey*, 25 May 1998, Reports 1998-III.

97 *Bazorkina v. Russia*, no. 69481/01, 27 July 2006.

98 *Lawless v. Ireland* (no. 3), 1 July 1961, Series A no. 3.

99 *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, §§ 99-110, ECHR 2011; see also 8.4.5.2.3 below. See also Clare Ovey, "Application of the ECHR during International Armed Conflicts", in *The UK and European Human Rights: A Strained Relationship?* (Katja S Ziegler, Elizabeth Wicks and Loveday Hodson, eds.), Hart Publishing, 2015, pp. 225-245 at pp. 240-41.

100 See 3.4.2 below.

101 *Storck v. Germany*, no. 61603/00, § 102, ECHR 2005-V.

As we will see, it also applies when the threat emanates from foreign governments and when the victims are foreign nationals, as in the CIA rendition cases.¹⁰²

With the deradicalisation of jihadist fighters returning from the Middle East becoming a concern in some countries,¹⁰³ it is worth drawing attention briefly to the judgment *Riera Blume and Others v. Spain*. The applicants in that case were believed to have been brainwashed by a religious or pseudo-religious sect; at the behest of their families and with the assistance of the police, they had been taken to a hotel where they had been held against their will for ‘deprogramming’. The Court found that the applicants had been detained without any legal basis. Although direct responsibility lay with private actors (the applicants’ families and a private association), Spain had violated Article 5 of the Convention by dint of the active support lent by its authorities.¹⁰⁴

2.4.2 *Procedural obligations*

Article 5 itself lays down procedural obligations. A right ‘to take proceedings by which the lawfulness of [one’s] detention shall be decided speedily by a court and [one’s] release ordered if detention is not lawful’ – often referred to by the mediaeval Latin phrase of English law *habeas corpus* – is to be found in Article 5 § 4.

The fifth paragraph of Article 5 provides that anyone arrested or detained in contravention of the provisions of Article 5 shall have an enforceable right to compensation.

2.5 Protection of home and property

Article 1 of Protocol No. 1 protects property rights. In the situations relevant to our study, complaints about violations of this provision frequently coincide with complaints under Article 8, right to respect for one’s home, because they concern homes and real estate.

The Court has received many applications from Greek Cypriots turned out of their homes in Northern Cyprus.¹⁰⁵ There has also been an interstate case before the Court, in addition to three before the Commission, brought by the Cyprus Government

¹⁰² See 6.3 below.

¹⁰³ The United Kingdom, for example. *The Daily Telegraph*, 1 September 2014, “British jihadists to be forced to attend deradicalisation programmes, says Cameron”, <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11068878/British-jihadists-to-be-forced-to-attend-deradicalisation-programmes-says-Cameron.html> (accessed 26 August 2017)

¹⁰⁴ *Riera Blume and Others v. Spain*, no. 37680/97, §§ 31–35, ECHR 1999-VII.

¹⁰⁵ Among many others, *Loizidou and Xenides-Arestis*, note 5 above.

against Turkey.¹⁰⁶ The Turkish Government has had to pay large amounts in compensation.¹⁰⁷

Other aspects of the Turkish occupation of Northern Cyprus include the isolation of the Karpas peninsula and its inhabitants. This too has resulted in awards totalling a considerable sum of money.¹⁰⁸

The problems encountered by persons wishing to regain possession of homes from which they have been driven by military action are at the core of *Chiragov and Others* and *Sargsyan*. The cases are each other's mirror image: both arise from the conflict between Armenia and Azerbaijan over Nagorno-Karabakh, but Armenia is the respondent in the former and Azerbaijan in the latter. Substantive violations were found of both Article 8 of the Convention and Article 1 of Protocol No. 1.¹⁰⁹ The applicants' claims for restitution and compensation for damage were decided in separate judgments on what the Convention terms 'just satisfaction' (Article 41).¹¹⁰

Beyond the immediate scope of direct application of the Convention (and of the jurisdiction of the European Commission and Court of Human Rights) the importance of the rights guaranteed by Articles 8 of the Convention and 1 of Protocol No. 1, as they relate to housing, are well illustrated by the wars that raged in the former component republics of the Socialist Federative Republic of Yugoslavia between early 1992 and the end of 1995. Millions of people were driven from their homes – over 2.2 million persons in Bosnia and Herzegovina alone – by 'ethnic cleansing' or generalised violence. Most fled to areas controlled by their own ethnic group; their homes were quickly taken over by others who had been forced to flee from elsewhere.¹¹¹ After the end of the hostilities, most wished to return to their original homes.¹¹² Many who sought to return to their pre-war properties found them occupied by others who, displaced themselves, had nowhere to return to. Others, wishing to sell their original dwellings to finance a new home in a different location, were unable to because occupancy, and in many cases title, had been transferred to someone else while they were displaced. There followed a flurry of litigation that carried on until well after the

106 *Cyprus v. Turkey* (merits) (GC), no. 25781/94, ECHR 2001-IV.

107 For example, *Xenides-Arestis v. Turkey* (just satisfaction), no. 46347/99, §§ 42 and 48 and operative provision no. 1, 7 December 2006 (800,000 euros for pecuniary damage, 50,000 for non-pecuniary damage, plus costs and expenses); *Cyprus v. Turkey* (just satisfaction) (GC), no. 25781/94, §§ 58 and operative provisions nos. 4 and 5, ECHR 2014 (a total of 90 million euros for non-pecuniary damage).

108 *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, § 58 and operative provision no. 5, ECHR 2014 (sixty million euros).

109 *Chiragov and Others v. Armenia* (GC), no. 13216/05, ECHR 2015; *Sargsyan v. Azerbaijan* (GC), no. 40167/06, ECHR 2015.

110 *Chiragov and Others v. Armenia* (just satisfaction) (GC), no. 13216/05, 12 December 2017; *Sargsyan v. Azerbaijan* (just satisfaction) (GC), no. 40167/06, 12 December 2017.

111 Đokić v. Bosnia and Herzegovina, no. 6518/04, § 7, 27 May 2010.

112 Commission for Real Property Claims of Displaced Persons and Refugees and United Nations High Commissioner for Refugees, *Return, Local Integration and Property Rights* (Sarajevo, November 1999), <http://www.unhcr.org/3c3c42794.pdf> (accessed 25 April 2017).

various former Yugoslav republics had been admitted to the Council of Europe and joined the Convention and continues even to the present day.¹¹³

The most thorough attempt to remedy this situation at the domestic level by encapsulating the standards of the Convention in domestic law was made in the armistice agreement that put an end to the war in Bosnia and Herzegovina, the Dayton Peace Agreement (or to give it its official title, the General Framework Agreement for Peace in Bosnia and Herzegovina), which entered into force on 14 December 1995. Annexed to it was an 'Agreement on Refugees and Displaced Persons' (Annex 7), which in the first paragraph of its first Article provided that

All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were; deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries.

The reality was that many were prevented shortly after the end of the war from making use of this right. The Commission for Real Property Claims of Displaced Persons and Refugees set up under Annex 7 could recognise title but not enforce it;¹¹⁴ for that, other bodies had to be created. Most notable among these, for our purposes, were the Constitutional Court of Bosnia and Herzegovina, set up under the new Constitution (Annex 4 to the Dayton Peace Agreement)¹¹⁵ and the Commission on Human Rights, consisting of an Ombudsperson and a Human Rights Chamber, set up under the Agreement on Human Rights, Annex 6.¹¹⁶ We will address the functioning of these externally-imposed quasi-indigenous institutions later.¹¹⁷ The remit of both the Constitutional Court and the Commission on Human Rights included the Convention and its Protocols as their primary source of substantive law,¹¹⁸ which were thus fully applied for over six and a half years before Bosnia and Herzegovina became a party to the Convention on 12 July 2002.

¹¹³ See, for example, *Blečić v. Croatia* (GC), no. 59532/00, ECHR 2006-III; *Brezovec v. Croatia*, no. 13488/07, 29 March 2011; *Mago and Others v. Bosnia and Herzegovina*, nos. 12959/05, 11706/09, 19724/05, 47860/06, 8367/08 and 9872/09, 3 May 2012.

¹¹⁴ Antoine Buyse, *Post-Conflict Housing Restitution: The European human rights perspective, with a case study on Bosnia and Herzegovina* (diss. Leiden 2008), Intersentia, 2008, pp. 275-281; see also *Janković v. Bosnia and Herzegovina* (dec.), no. 5172/03, 16 May 2006.

¹¹⁵ Buyse (2008), pp. 281-284.

¹¹⁶ Buyse (2008), pp. 284-301.

¹¹⁷ See 8.5.5.2 below.

¹¹⁸ Article II (2) of Annex 4; Article I of Annex 6.

The pattern is the same after all wars. When the fighting stops, ordinary people tend to want to resume normal life and leave quarrelling to the politicians. Their order of priorities is well described by Maslow's famous hierarchy of needs: once their immediate physiological needs are met, their next priorities are their homes and their livelihoods.

2.6 Article 13

As we mentioned right at the outset,¹¹⁹ it is in the first place the responsibility of the Contracting States to secure the rights and freedoms defined in the Convention and its Protocols. It is therefore no surprise to find that Article 13 of the Convention provides that '[e]veryone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.

The existence of an actual violation has never been a prerequisite for the applicability of Article 13. It has long been recognised that 'a person cannot establish a "violation" before a national authority unless he is first able to lodge with such an authority a complaint to that effect'; rather, 'Article 13 requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress'.¹²⁰ However, the Court does not interpret Article 13 so as to require a remedy in domestic law in respect of any supposed grievance under the Convention that an individual may have, no matter how unmeritorious his complaint may be: the grievance must be an arguable one in terms of the Convention.¹²¹

In many if not most cases of the actual exercise of 'hard power' it will be difficult for aggrieved individuals to prove their case without the assistance of an official inquiry of some sort. The significance of the procedural requirements of Articles 2 and 3, as outlined above, is therefore wider than merely to satisfy the need for a criminal remedy: it is also to enable use to be made of other remedies, such as a claim for compensation.¹²²

¹¹⁹ See 1.1 above.

¹²⁰ *Klass and Others v. Germany*, no. 5029/71, § 64, Series A no. 28.

¹²¹ *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131.

¹²² *Taş v. Turkey*, no. 24396/94, § 93, 14 November 2000; *Aktaş v. Turkey*, no. 24351/94, §§ 329-333, ECHR 2003-V (extracts).

2.7 The problem of proof

Regardless of the context of the case, it is standing case-law of the Court that parties must substantiate their factual arguments before it by providing the necessary evidence.¹²³

In cases of the types here in issue it will often be difficult for the applicant to prove the facts underlying his complaint. The Court has accordingly developed evidentiary principles in its case-law under Articles 2, 3 and 5 of the Convention to the effect that, as summarised in *El-Masri*:

In cases in which there are conflicting accounts of events, the Court is inevitably confronted when establishing the facts with the same difficulties as those faced by any first-instance court. It reiterates that, in assessing evidence, it has adopted the standard of proof “beyond reasonable doubt”. However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States’ responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties’ submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (...).¹²⁴

That said,

where the events in issue lie within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. The burden of proof in such a case may be regarded as resting on the authori-

¹²³ See, for example, *Lisnyy and Others v. Ukraine and Russia* (dec.), nos. 5355/15, 44913/15 and 50853/15, 5 July 2016.

¹²⁴ *El-Masri*, § 151.

ties to provide a satisfactory and convincing explanation. In the absence of such explanation, the Court can draw inferences which may be unfavourable for the Government.¹²⁵

The *Jaloud* judgment illustrates the difficulties that may be involved in arguing on the facts that there is no substantive violation. We have seen that the failings in the autopsy proceedings were found by a majority of the Grand Chamber to have violated Article 2 under its procedural head. The Dutch Government had in fact submitted that the Dutch Royal Military Constabulary (*Koninklijke Marechaussee*, military police) had been compelled to entrust the body to the care of the Iraqi authorities, and it was they who had prevented any Dutch officials from attending the autopsy; in addition, Iraqi nationals in attendance had threatened to take Dutch personnel hostage, forcing them to leave.¹²⁶

No finding that Royal Military Constabulary personnel were excluded from the autopsy and threatened with capture is to be found in the judgment. Brief statements to this effect appear in the Government's written memorial, unsupported by any official record or other evidence of any description; the applicant's counsel, speaking at the hearing, stated that the applicant and his family had been present but denied that any attempt was made to prevent the autopsy from going ahead.¹²⁷ As so often in judicial practice, the question was who must shoulder the burden of proof:¹²⁸ while one can understand how the majority judgment might appear unreasonable to the serviceman whose duty it is to create a semblance of law and order in a plainly hostile environment,¹²⁹ in fairness to the majority it needs to be pointed out that like every other court of law in the world the Court must apply the law to established fact.¹³⁰

2.8 Conclusion

Even in ordinary times, there is scope aplenty for any person wielding the powers of the State to violate the Convention rights of the individual. Such however is the

¹²⁵ *El-Masri*, § 152; see also Helen Duffy and Stephen A. Kostas, "Extraordinary Rendition: A Challenge for the Rule of Law", in *Counter-Terrorism: International Law and Practice* (Ana María de Frías, Katja L.H. Samuel, Nigel D. White, eds.), Oxford University Press 2011 p. 539 at p. 574.

¹²⁶ Joint concurring opinion of Judges Casadevall, Berro-Lefèvre, Šikuta, Hirvelä, López Guerra, Sajó and Silvis, § 6.

¹²⁷ Government's memorial, §§ 51 and 59; see also the webcast of the hearing, available on the Court's web site.

¹²⁸ Compare, for example, *D.H. and Others v. the Czech Republic* (GC), no. 57325/00, § 179, ECHR 2007-IV.

¹²⁹ See, for example, Françoise J. Hampson, "Article 2 of the Convention and military operations during armed conflict", in *The Right to Life under Article 2 of the European Convention on Human Rights: Twenty Years of Legal Developments since McCann v. the United Kingdom (In honour of Michael O'Boyle)*, p. 191 at p. 207.

¹³⁰ *Jaloud*, § 223.

nature of 'hard power' that its exercise only makes violations more likely. That said, even in situations of armed conflict, the serviceman on the ground remains no less duty bound than his political leaders to be aware of the human rights obligations of his State: any failure to comply with them is likely to engage the responsibility of the State which he serves.

It is possible, albeit within limits, for the State to adapt its liabilities under the Convention to the possibilities which it has to meet them. First, however, we must turn to the interrelation between the Convention and international humanitarian law in general.