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*Veselin Vuchkov*  
*South-West University 'Neofit Rilski', Blagoevgrad*  
*New Bulgarian University, Sofia*  
*[veselinvuchkov@gmail.com]*

*Yanko Roychev*  
*Bulgarian Academy of Sciences*  
*[yanko.roychev@gmail.com]*

## **The Use of Life-Threatening Force by the Police in the Case Law of the European Court of Human Rights and the Bulgarian Experience**

**Abstract:** *The standards deriving from the Convention for the Protection of Human Rights and Fundamental Freedoms regarding the right to life in the context of the use of life-threatening force by the police are analysed. During the last three decades the European Court of Human Rights has formulated and further developed a significant number of requirements both for the general compliance of Member States' domestic legislation with the Convention, and for the conduct of State authorities in terms of planning and realisation of police operations, and investigating into cases of death caused by the police. The current study examines these requirements in detail, and establishes that, in addition to the ones referring to the legislative framework, there are also such of a forensic, institutional and organizational nature. Particular emphasis is placed on the criteria that the investigation must fulfil in order to be effective. The essence and content of the circumstances provided for in Art. 2, para. 2 of the Convention, under which the use of lethal force is absolutely necessary and, therefore, permissible, are discussed. Relevant aspects of the Bulgarian legislative and institutional experience in the process of achieving compliance with the outlined requirements have been reviewed.*

**Keywords:** *right to life; life-threatening force; absolute necessity; death caused by the police; European Court of Human Rights; Art. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms.*

### **1. Introduction**

The right to life established in Art. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup> (European Con-

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<sup>1</sup> Signed in Rome by the Member States of the Council of Europe on 4.11.1950, in force since 3.09.1953.

vention on Human Rights, ECHR), along with the prohibition of torture under Art. 3 ECHR, enshrine one of the basic values of the democratic societies making up the Council of Europe.<sup>2</sup> Both the development of the necessary legislative basis providing real and effective guarantees of law, and its protection in the practice of the authorities, remain one of the most significant challenges faced by Member States. One of the important prerequisites for the successful implementation of these tasks is the in-depth knowledge of the constantly evolving and improving case law of the European Court of Human Rights (ECtHR, the Court), as well as the experience of foreign countries.

Historically, the right to life has been guaranteed by a number of acts of international law and European Union law, prior to the ECHR and adopted later in time.<sup>3</sup> In comparison with them, however, the rules of Art. 2 ECHR are characterized by several essential features, as they set requirements for the protection of the right to life, which are:

(1) new – they have not been present so far in an act of international law formulated in this way;

(2) specified as much as possible to allow the various legislations of the individual Member States to comply with them;

(3) containing an exhaustive enumeration of the hypotheses under which deprivation of life is permissible.

These features, in combination with the prohibition according to Art. 15 ECHR, for derogation in peacetime of the effect of Art. 2 ECHR, predetermine the exceptional importance of the rules in question in the daily activities of the authorities belonging to the national security system and having the relevant powers to use force. As far as the three groups of circumstances established in Art. 2, para. 2 ECHR most often arise in the course of the activities of the police authorities,<sup>4</sup> the current

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<sup>2</sup> *Andronicou and Constantinou v. Cyprus*, 9.10.1997, § 171; *Makaratzis v. Greece*, 20.12.2004, § 56; *Solomou and Others v. Turkey*, 24.06.2008, § 63; *Giuliani and Gaggio v. Italy*, 24.03.2011, § 174; *Petrosyan v. Azerbaijan*, 4.11.2021, § 46.

<sup>3</sup> For example, Art. 3 of the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10.12.1948; Art. 6 of the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16.12.1966 (ICCPR); Art. 6 of the Charter of Fundamental Rights of The European Union, 26.10.2012 (2012/C 326/02).

<sup>4</sup> It is stated that the circumstances under Art. 2, para. 2, letters 'b' and 'c' of the ECHR are largely confined to a law enforcement context (Schabas, 2015, p. 147).

research focuses precisely on these aspects of the protection of the right to life.

## 2. Requirements for the National Legislation

Due to the fundamental importance of the right to life, the ECtHR in its case law constantly states that the provisions under Art. 2, para. 2 ECHR must be strictly construed. Furthermore, the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.<sup>5</sup> This means that a broad interpretation of Art. 2, para. 2 ECHR is not acceptable, in addition to which in each case it is necessary to establish that any of the circumstances included in the provision has occurred, since, as it has been stated, the enumeration is exhaustive.<sup>6</sup>

The issue of the violation of Art. 2 ECHR may be raised in all cases when State authorities have used lethal force. Lethal force is defined as:

- (1) force which is intended to be lethal and which has that effect;
- (2) force which results in the death of a person and which could reasonably have been foreseen to have that effect; and
- (3) the use of force that results in serious injury to a person, where death could have occurred (Murdoch & Roche, 2013, p. 26).

National legislation should regulate the hypotheses in which the use of force, including life-threatening force, is permissible. Under these rules, two main approaches are possible. The first one is a general enumeration of the circumstances under which it is permissible for police authorities to use force, and listing of the types of physical force and auxiliary means, including firearms. The other approach is to link specific hypotheses to separate powers of the police authorities of such type. A

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<sup>5</sup> *McCann and Others v. The United Kingdom*, 27.09.1995, §§ 146-147; *Tanli v. Turkey*, 10.04.2001, § 139; *Bubbins v. The United Kingdom*, 17.03.2005, § 134; *Imakayeva v. Russia*, 9.11.2006, § 139.

<sup>6</sup> In this regard also see Mchedlidze, 2017, p. 14; Jayawickrama, 2017, p. 251. The opinion has been expressed that the possibility that non-enumerated exceptions in Art. 2, para. 2 ECHR exist, cannot be excluded. The grounds for this statement derive from the case of *Khatsiyeva and Others v. Russia*, 17.01.2008, § 139, in which the Court decides that it would leave open the question 'whether a State could be justified under Art. 2, para. 2 of the Convention in using lethal force against civilians for mere failure to comply with official safety instructions in an area of an armed conflict' (Schabas, 2015, pp. 146-147).

combined application of the two approaches is implemented in the Bulgarian legislation. Art. 85, para. 1 of the Ministry of Interior Act<sup>7</sup> (MIA) establishes the cases in which, in the course of performance of their official duties, the police authorities may use physical force and auxiliary means only when this is absolutely necessary, and para. 3 provides for which the auxiliary means are. Art. 87 of the MIA regulates in detail the hypotheses under which the use of firearms is permissible.

According to Art. 86, para. 7 and Art. 87, para. 6 of the MIA, it shall be prohibited to apply life-threatening force and firearms for detention or prevention of escape of any individual perpetrating or having perpetrated a non-violent act, if that individual does not pose a risk for the life and health of others. Thus, the requirement established by the ECtHR is met in the Bulgarian legislation – not to use life-threatening force where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence,<sup>8</sup> even if a failure to use lethal force may result in the loss of an opportunity to arrest the fugitive.<sup>9</sup>

The ECtHR has had an occasion to rule that the existence of ambiguities in the legislation does not necessarily mean that there has been a breach of the requirements of the ECHR. In the case of *Finogenov and Others v. Russia*, the Court decrees that although the corresponding law of the State allows the use of weapons and special-purpose hardware and means against terrorists, without indicating what type of weapons or tools can be used and in what circumstances, this factor alone cannot lead to a finding of a violation of Art. 2 of the Convention. The Court adds that even if necessary regulations did exist, they probably would be of limited use in the situation at hand, which was totally unpredictable, exceptional and required a tailor-made response.<sup>10</sup> Therefore, difference should be drawn between ‘routine police operations’ and situations of large-scale anti-terrorist operations.<sup>11</sup> In the latter case, often in situations of acute

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<sup>7</sup> *State Gazette of the Republic of Bulgaria*, Issue 53, 27.06.2014.

<sup>8</sup> *Nachova and Others v. Bulgaria*, 6.07.2005, §§ 103, 107; *Juozaitienė and Bikulčius v. Lithuania*, 24.04.2008, § 72; *Karandja v. Bulgaria*, 7.10.2010, § 59; *Finogenov and Others v. Russia*, 20.12.2011, § 220; *Arapkhanov v. Russia*, 3.10.2013, § 120; *Putintseva v. Russia*, 10.05.2012, §§ 64-67.

<sup>9</sup> *Vasil Sashov Petrov v. Bulgaria*, 10.06.2010, § 45. See also *Tzekov c. Bulgarie*, 23.02.2006, §§ 54-56.

<sup>10</sup> *Finogenov and Others v. Russia*, §§ 229-230.

<sup>11</sup> On the application of the requirements of ‘absolute necessity’ and proportionality in military operations, see Wallace, 2019, pp. 73-109. For an analysis of the criteria

crisis requiring ‘tailor-made’ responses, the States should be able to rely on solutions that would be appropriate to the circumstances.<sup>12</sup> It is stated in theory that the described opinion of the ECtHR represents an ‘erosion of international human rights standards and a reluctance to apply the strict principles established in *McCann*’ (Blake, 2019).<sup>13</sup>

### 3. The Circumstances under Art. 2, para. 2 ECHR

The text of Art. 2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to ‘use force’ which may result, as an unintended outcome, in the deprivation of life.<sup>14</sup> Each use of force should not exceed the ‘absolutely necessary’ for the obtaining of one or more of the objectives pointed out in letters ‘a’ to ‘c’. This concept indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is ‘necessary in a democratic society’ under para. 2 of Art. 8 to 11 (Art. 8-2, Art. 9-2, Art. 10-2, Art. 11-2) of the Convention. Therefore, the force used must be strictly proportionate to the achievement of the aims set out,<sup>15</sup> which governs not only the actions of the agents of the State who actually administer the force, but also all the planning and control of those actions.<sup>16</sup> The State should provide relevant evidence demonstrating that the use of force was both proportionate and necessary.<sup>17</sup>

The principle of necessity encompasses three integral legal duties: to use non-violent means wherever possible; to use force only for a legitimate law enforcement purpose; and to use only the minimum necessary force that is reasonable in the prevailing circumstances (Casey-Maslen & Connolly, 2017, pp. 82-92). The statement has been expressed that the notion of ‘reasonableness’ in the context in question is unclear, and does

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applied by the ECtHR in cases when lethal force has been used by military, respectively by police officials, see Chevalier-Watts, 2010a.

<sup>12</sup> *Tagayeva and Others v. Russia*, 13.04.2018, § 595.

<sup>13</sup> See also Item 11, letters ‘a’ and ‘b’ of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Basic Principles), adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7, 1990.

<sup>14</sup> For more details see Crawshaw, 1991, pp. 300-302.

<sup>15</sup> *McCann and Others v. The United Kingdom*, § 149; *İlhan v. Turkey*, 27.06.2000, § 74; *Demiray v. Turkey*, 21.11.2000, § 41; *Timus and Tarus v. The Republic of Moldova*, 15.10.2013, § 46; *Tagayeva and Others v. Russia*, § 601.

<sup>16</sup> *Ribcheva and Others v. Bulgaria*, 30.03.2021, § 162.

<sup>17</sup> *Douet c. France*, 3.10.2013, § 30.

not provide police authorities with sufficient knowledge of when it is appropriate to use a certain level of force. Police officers should be trained in the doctrine of minimum force for coercion by replacing the word 'reasonable' with words such as 'minimal', 'absolutely necessary', and 'proportionate' in statutory provisions for police coercion (Buttle, 2010, p. 35).

As the text of Art. 2 itself indicates, the use of lethal force by police officers may be justified in certain circumstances. Nonetheless, Art. 2 does not grant a *carte blanche*. Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that, as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force.<sup>18</sup> In all cases, in addition to the hypothetical permissibility of the use of life-threatening force, the police authorities must also establish the need for this. This includes the assessment that the exercise of these powers is the only way to achieve the legally defined objectives, and this is not possible through the application of other measures, including through the use of lower-intensity force, such as electroshock weapons instead of firearms.<sup>19</sup> NATO defines the notion of 'non-lethal weapons' as 'weapons which are explicitly designed and developed to incapacitate or repel personnel, with a low probability of fatality or permanent injury, or to disable equipment, with minimal undesired damage or impact on the environment'.<sup>20</sup> Non-lethal weapons may prove beneficial in at least five types of situations: riot or crowd control; close proximity encounters; to halt fleeing suspects; in hostage situations; and for barricade situations (Peak, 1990, p. 20).

It can be concluded on the basis of the case law of the Court that, in order for the use of life-threatening force to be permissible, the mere occurrence of circumstances in which it is potentially necessary should not be the result of previous conduct by State authorities. The State must take all measures to prevent the occurrence of such situations.<sup>21</sup>

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<sup>18</sup> *Wasilewska and Kalucka v. Poland*, 23.02.2010, § 45; *Kukhalashvili and Others v. Georgia*, 2.04.2020, § 144.

<sup>19</sup> On this matter see Rogers, 2003; Smith, 2009.

<sup>20</sup> North Atlantic Treaty Organisation, *Non-Lethal Weapons Effectiveness Assessment Development and Verification Study. Final Report of Task Group SAS-060* (North Atlantic Treaty Organisation, 2009, 1).

<sup>21</sup> On this matter see *Şimşek and Others v. Turkey*, 26.07.2005, §§ 111-113, and *Güleç v. Turkey*, 27.07.1998, § 71.

In the context of the actions of the police authorities the consideration of the ECtHR is of great significance according to which the use of force by agents of the State in pursuit of one of the aims delineated in Art. 2, para. 2 ECHR may be justified under this provision, where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.<sup>22</sup> This question is particularly acute in England in connection with Operation Kratos aimed at countering suicide terrorism.<sup>23</sup>

Of particular importance in view of the focus of the current analysis is the summary of the above-mentioned statements, which the ECtHR has performed in the case of *Ribcheva and Others v. Bulgaria*. In this judgment, the Court considers the issue of the possible opposition between the obligations of the State to protect life under Art. 2, para. 1 ECHR, and the standard related to Art. 2, para. 2 ECHR not to use force ‘more than absolutely necessary’. In those cases, the reasonableness standard cannot be as limited as in absolute necessity, and the adherence to it cannot be evaluated on the basis of the principles related to the cases of deprivation of life. The scope and content of positive obligations must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities in the assessment of the choices which they face in terms of the priorities and resources, and the unpredictability of human conduct.<sup>24</sup> These two duties may clash, since the use of more lethal weapons will normally ensure better protection of the lives of any officers involved in a law enforcement operation, and at the same time increase the risk to the lives of the targets of that operation.<sup>25</sup> This

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<sup>22</sup> For a hypothesis in which the deprivation of life is aimed at preventing the detonation of an explosive device, see *McCann and Others v. The United Kingdom*, § 200; for the prevention of the use of firearms – *Andronicou and Constantinou v. Cyprus*, §§ 192-193; for protection against an attack with various objects against the *carabinieri*, carried out by many persons – *Giuliani and Gaggio v. Italy*, §§ 178, 183-196; for protection against persons who have fired a shot(s) with a firearm against the police authorities – *Perk et autres c. Turquie*, 28.03.2006, §§ 63-68.

<sup>23</sup> See Squires & Kennison, 2010, pp. 31-52 and *Armani Da Silva v. The United Kingdom*, 30.03.2016.

<sup>24</sup> *Osman v. The United Kingdom*, 28.10.1998, § 116; *Öneryildiz v. Turkey*, 30.11.2004, § 107; *Ataman c. Turquie*, 27.04.2006, § 55; *Pankov v. Bulgaria*, 7.10.2010, § 61; *Ribcheva and Others v. Bulgaria*, § 164.

<sup>25</sup> *Ribcheva and Others v. Bulgaria*, § 173.

problem also arises within the framework of the use of a particular means.<sup>26</sup>

Not every claimed risk to life can entail for the authorities a requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk,<sup>27</sup> provided that a certain level of control over the situation was maintained by the authorities.<sup>28</sup> In such cases the Court would require a respondent State to have taken measures which are 'feasible' in the concrete circumstances.<sup>29</sup>

When the question arises about the opposition of the obligation of the State under Art. 2, para. 1 ECHR, and the obligation under Art. 2, para. 2 ECHR regarding the protection of the rights of the people targeted by the operation, its resolution is always subject to specific assessment. There can be no universal answer as to under what circumstances the police officials should prefer to better protect their own life or that of a third party, and to endanger to a greater extent the life of the individual whose conduct is causing the danger. Whatever efforts could be made to improve the legislative regulations and to perfect the training of officials, comprehensive and fully objective criteria to be followed strictly could not be formulated. It should also be taken into account that, as applies to any citizen, law enforcement authorities can act in the premise of criminal law institutes such as the ones of inevitable defence and extreme necessity. As stated in theory, police officers are not required to use or to consider alternatives that increase danger to themselves or to others, nor are they required to methodically walk through a series of lesser-force options that delay stopping an imminent threat, or are impractical given the circumstances. Nevertheless, many officers often decide to use a less lethal method, provided it is appropriate or sufficient, and sometimes to their own detriment or demise, perhaps in part due to their concerns over

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<sup>26</sup> See Waddington, 1988, p. 81, as cited in: Squires & Kennison, 2010, p. 14.

<sup>27</sup> *Keenan v. The United Kingdom*, 3.04.2001, § 90; *Nicolae Virgiliu Tănase v. Romania*, 25.06.2019, § 136.

<sup>28</sup> *Kukhalashvili and Others v. Georgia*, § 146.

<sup>29</sup> *Finogenov and Others v. Russia*, § 209.



post-incident scrutiny by the public, media, or their own agencies (Shane & Swenson, 2018, pp. 6-7).

The following main guidelines can be identified, including on the basis of the ECtHR case law discussed above:

(1) The danger to the life of the police officer or of the third party must be comparable to the danger to the life of the person in respect of whom life-threatening force would be used, otherwise there would be no ‘absolute necessity’;

(2) The means and measures applied by the police officers must be proportionate to those against which they defend themselves, without a requirement for the former and the latter to be similar, or even to be of the same kind or effect. Above all, their potential to lead to serious injury and death should be taken into account,<sup>30</sup> but specific assessment is needed in all cases. This aspect of the issue is particularly common with the use of means other than firearms, such as electroshock weapons or poisonous gas,<sup>31</sup>

(3) The assessment should be particularly careful in cases where the use of force would also endanger the lives of third parties, for example, if the person’s behaviour demonstrates that they will use a firearm or an explosive against many people – the question arises whether the use of firearms against that person creates danger of lower intensity, or for a smaller number of people;

(4) It is not necessary for a firm conviction to be present that danger to the life of the police officer or the third party exists, but there must be sufficient data which, being objectively evaluated, should lead to a conclusion for the existence of such a threat;

(5) The decisions of the police officers are subject to immediate change due to a reassessment of the situation in the light of the sudden occurrence of new circumstances, especially in relation to the actions of the person who created the danger. Generally, this change is aimed at increasing the intensity of the measures taken until the situation is resolved,<sup>32</sup>

(6) Omissions and flaws in the organization of the police operation may lead to an acquittal of the police officer in a possible criminal case,

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<sup>30</sup> See *Giuliani and Gaggio v. Italy*, §§ 183-196, in which firearms were used after the *carabinieri* were surrounded by numerous people and attacked with a wooden beam, stones, fire extinguishers, etc.

<sup>31</sup> See, for example, *Finogenov and Others v. Russia*.

<sup>32</sup> See Lawson Jr., 2019, p. 180.

for instance, due to the execution of an official order or due to actions performed in the conditions of inevitable defence, but cannot exclude the responsibility of the State for the loss of life when this could have been avoided.

In order for the use of life-threatening force to be permissible, the circumstances under Art. 2, para. 2 ECHR must not only have occurred but also must have been present at the time of the application of the force.<sup>33</sup> In certain cases the Court assumes that the circumstances were not sufficient to justify the use of potentially lethal force due to the lack of an immediate danger.<sup>34</sup>

#### 4. Obligations of the State

The statement has been expressed that the protection of the right to life under Art. 2 ECHR comprises three main requirements:

- (1) a prohibition on unlawful killing by State agents;
- (2) a duty to investigate suspicious deaths; and
- (3) a positive obligation, in certain circumstances, to take steps to prevent an avoidable<sup>35</sup> loss of life (Ovey & Robin, 2006, p. 143, cited by Murdoch & Roche, 2013, p. 25).

In the context of this research, another criterion can be proposed, which, without eliminating as a feature the nature and content of individual obligations, including in view of their division into positive and negative,<sup>36</sup> takes into account the specifics of the concrete measures for their implementation in terms of the timeline of their occurrence and the differences in the circumstances under which these measures are applied. This makes it possible to set out more clearly the limits of responsibility of separate State bodies, which is important since they are subject to different requirements. In view of this, the obligations can be divided into three groups:

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<sup>33</sup> For that reason, in addition to the principles of necessity and proportionality, some authors include the principle of imminence. See Miller, 2016, pp. 111, 114.

<sup>34</sup> See *Wasilewska and Kalucka v. Poland*, §§ 52-53; *Juozaitienė and Bikulčius v. Lithuania*, §§ 78-80; *Kitanovski v. The Former Yugoslav Republic of Macedonia*, 22.01.2015, § 71.

<sup>35</sup> See *Osman v. The United Kingdom*, §§ 115-116; *Mahmut Kaya v. Turkey*, 28.03.2000, §§ 85-101; *Mastromatteo v. Italy*, 24.10.2002, §§ 69-79; *Paul and Audrey Edwards v. The United Kingdom*, 14.03.2002, § 55.

<sup>36</sup> For more details see Xenos, 2011, pp. 76-107; Schabas, 2015, pp. 126-139; Gerards, 2019, pp. 108-135.

(1) Preliminary and preventive obligations. This group includes ensuring of compliance between the legal framework and the requirements of the Convention;<sup>37</sup> implementation of preventive measures to protect human life when such are necessary; ensuring adequate training of the bodies in charge of the protection of rights enshrined in the ECHR, and the careful selection of officials carrying weapons; the establishment and constant updating of rules of conduct, respectively rules of engagement applicable for these bodies, in particular as regards the use of force; providing sufficient human and material resources for the effective exercise of these powers. The fulfilment of these obligations is related to the general guidelines of the State policy in the respective areas. It is strategic in nature and involves the use of significant expert and administrative capacity. Therefore, upon finding out that the State has violated its commitments under Art. 2 ECHR due to non-fulfilment of obligations of this nature, the conclusion of the Court in a significant share of the cases would be in favour of the applicant.<sup>38</sup>

(2) Immediate obligations. This group includes the obligations of State authorities in terms of planning, controlling and conducting a concrete police operation, including the provision of appropriate resources for that purpose. Unlike the previous group, the context of these obligations concerns decisions and actions that are taken and carried out, as a rule, in short terms and in particularly stressful situations, including ones involving danger to the health and lives of police officers and third parties. Due to this, when examining the conduct of the officers concerned, it is necessary to identify and take into account all the accompanying circumstances and to bring them under completely different criteria.<sup>39</sup>

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<sup>37</sup> This obligation and its implementation are characterized by less pronounced dynamics in comparison with the other ones, but it would not be reasonable to consider that it is subject to a kind of one-time implementation, consisting of the development of regulatory acts fully compliant with ECHR standards, and, therefore, excluding the need for improvement. The practice of the ECtHR is constantly evolving under the influence of a wide variety of factors, and this creates new obligations for Member States with regard to specific aspects of the protection of the rights and freedoms guaranteed by the Convention.

<sup>38</sup> The ECtHR finds inconsistencies between domestic legislation and the ECHR, for example, in the cases of *Makaratzis v. Greece*, §§ 62, 70; *Nachova and Others v. Bulgaria*, §§ 99-100, 104; *Karandja v. Bulgaria*, §§ 56-59; *Ativan v. Turkey*, 23.09.2014, §§ 34-38.

<sup>39</sup> See, for example, Decision of the European Commission of Human Rights in the case of *Stewart v. The United Kingdom* (dec.), 10.07.1984 on inflicting the death of a child by a plastic bullet.

(3) Subsequent obligations. These include, above all, the conducting of an effective investigation.

As an indirect consequence of the actions to fulfil the immediate and subsequent obligations, it may become necessary to take other measures in addition, such as providing medical assistance to the persons concerned,<sup>40</sup> protecting participants in criminal proceedings, guarding the lives of detainees or prisoners, etc.

The fulfilment of the requirement to prohibit the unlawful deprivation of life by State authorities should be guaranteed at a regulatory level. The obligation of the State is not exclusively concerned with intentional killing resulting from the use of force by agents of the State but also extends, in the first sentence of Art. 2, para. 1 ECHR, to imposing a positive obligation on States that the right to life be protected by law.<sup>41</sup> In regard to carrying out a police operation, Art. 2 ECHR addresses the conduct of both the police officers directly using force, and their superiors. The ECtHR declares that the flaws in the organization and conduct of an operation, due to the absence of a clear chain of command, is a factor which by its very nature may increase the risk of some police officers shooting erratically.<sup>42</sup> In determining whether the force used is compatible with Art. 2 ECHR, it may also be relevant whether the law enforcement operation has been planned and controlled so as to minimise to the greatest extent possible recourse to lethal force or incidental derivation of life.<sup>43</sup> These are stringent requirements but given the importance of the right to life and the professionalism which can rightly be expected of security forces operating in democratic European States, they are essential attributes of this positive obligation (Mowbray, 2004, p. 13).

Due to the significance of the protection provided under Art. 2 ECHR, the Court carries out a particularly careful examination of cases of deprivation of life, taking into account not only the conduct of State authorities but also all other circumstances.<sup>44</sup> For instance, in view of the vulnerable situation of detainees and the obligation of the State to provide them with protection, if the person is in good health at the time of detention, and they have injuries when they are released, the State should

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<sup>40</sup> On this obligation see Mowbray, 2004, pp. 22-27.

<sup>41</sup> *Çakici v. Turkey*, 8.07.1999, § 86.

<sup>42</sup> *Makaratzis v. Greece*, § 68.

<sup>43</sup> *McCann and Others v. The United Kingdom*, § 194; *Ergi v. Turkey*, 28.07.1998, §§ 79-81, 86; *Huohvanainen v. Finland*, 13.03.2007, § 94.

<sup>44</sup> *Luluyev and Others v. Russia*, 9.11.2006, § 77.

provide a plausible explanation on how these have been inflicted.<sup>45</sup> In the absence of such an explanation, the Court may draw conclusions unfavourable to the State.<sup>46</sup> In addition to the cases of deprivation of life, Art. 2 ECHR is also applied when a serious risk to life has occurred.<sup>47</sup>

The requirement for Member States to set high professional standards within their law enforcement systems and ensure that the persons serving in these systems meet the requisite criteria, can be viewed as a guarantee in this regard. In particular, when equipping police forces with firearms, not only must the necessary technical training be given but the selection of agents allowed to carry such firearms must also be subject to particular scrutiny.<sup>48</sup>

In its case law, the ECtHR places strong emphasis on the obligation of the State to conduct an investigation in the event of an alleged violation of Art. 2 ECHR. The obligation for investigation under Art. 2 ECHR is supported by the most coherent body of the Court's case law, in comparison, for example, with the obligation under Art. 3 ECHR, which has been more problematic (Mowbray, 2002, p. 448). The former is an implicit consequence of the requirement to protect human life at a legislative level<sup>49</sup> and has been articulated explicitly for the first time in the case of *McCann and Others v. The United Kingdom*.<sup>50</sup> This is the first case in which the Court has found a violation of Art. 2 ECHR. The judgment is adopted by ten votes to nine, which is indicative of the controversial nature of the issues (Dembour, 2006, p. 57).

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<sup>45</sup> *Salman v. Turkey*, 27.06.2000, § 99.

<sup>46</sup> *Bouyid v. Belgium*, 28.09.2015, § 83. For more details see *Guide on Article 2 of the European Convention on Human Rights. Right to Life. Last update: 31.08.2022*. European Court of Human Rights, 2022, [https://www.echr.coe.int/Documents/Guide\\_Art\\_2\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf), 28. Accessed 10.02.2023. Rules on the use of force against detainees are also provided for in Items 15-17 of the Basic Principles.

<sup>47</sup> *Krivova v. Ukraine*, 9.11.2010, § 45.

<sup>48</sup> *Gorovenky and Bugara v. Ukraine*, 12.01.2012, § 38; *Sašo Gorgiev v. The Former Yugoslav Republic of Macedonia*, 19.04.2012, § 51. The ECtHR considers the need to set similar requirements for soldiers – see *mutatis mutandis McCann and Others v. The United Kingdom*, § 212; *Abdullah Yilmaz c. Turquie*, 17.06.2008, §§ 56-57. The issue is discussed in detail in Items 18-21 of the Basic Principles.

<sup>49</sup> *Çakici v. Turkey*, § 86; *Mulini v. Bulgaria*, 20.10.2015, § 41.

<sup>50</sup> *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*. Council of Europe/European Court of Human Rights 2015, 5.

As stated in theory, the development of the procedural aspect of Art. 2 ECHR itself stands testimony to the difficulties of holding State actors accountable domestically (Bell & Keenan, 2005, p. 72).

The essential purpose of the investigation is to secure the effective implementation of the national legislation safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.<sup>51</sup>

The investigation must be effective. In order to be within the scope of this criterion, it must meet the following minimum requirements:

(1) The officials responsible for the investigation and those conducting it must be independent of the persons allegedly involved in the act in question. This means not only a lack of hierarchical or institutional connection but also a practical independence.<sup>52</sup>

(2) In the course of the investigation, it must be possible:

– to establish the facts determining whether the use of force has been justified in the concrete case;

– to identify and, if appropriate, to punish those responsible.<sup>53</sup>

The ECtHR states that in order to be ‘effective’ as this expression is to be understood in the context of Art. 2 ECHR, an investigation into a death that engages the responsibility of a Contracting Party under that Article must firstly be adequate. That is, it must be capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but one of means. Any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of this standard.<sup>54</sup>

(3) The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy providing a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.<sup>55</sup>

(4) The investigation is subject to the requirement of promptness and reasonable expedition. A prompt response by the authorities in inves-

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<sup>51</sup> *Nachova and Others v. Bulgaria*, § 110; *Leonidis v. Greece*, 8.01.2009, § 67.

<sup>52</sup> *Paul and Audrey Edwards v. The United Kingdom*, § 70; *Mastromatteo v. Italy*, § 91.

<sup>53</sup> *Armani Da Silva v. The United Kingdom*, § 233; *Jeronovičs v. Latvia*, 5.07.2016, § 103.

<sup>54</sup> *Ramsahai and Others v. The Netherlands*, 15.05.2007, § 324; *Mocanu and Others v. Romania*, 17.09.2014, § 322.

<sup>55</sup> *Mížigárová v. Slovakia*, 14.12.2010, § 93. See also *Velikova v. Bulgaria*, 18.05.2000, §§ 78-84; *Mihaylova and Malinova v. Bulgaria*, 24.02.2015, § 62.

tigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.<sup>56</sup> The speed of the investigation is of great significance for revealing the objective truth and hence – for the accomplishment of the tasks of criminal repression, including the protection of the rights of the accused and the victims.

(5) The conclusions from the investigation must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry undermines the investigation's ability to establish the circumstances of the case and the person responsible. Such an investigation cannot be seen as effective.<sup>57</sup> The investigation into serious allegations of ill-treatment must be both prompt and thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions.<sup>58</sup> According to Art. 13, para. 1 of the Bulgarian Criminal Procedure Code<sup>59</sup> (CPC), the court, the prosecutor and the investigating bodies shall be obligated to apply all available measures within the limits of their competence in order to secure revealing of the objective truth. Art. 14 CPC requires that the court, the prosecutor and the investigating bodies shall take their decisions by inner conviction, based on objective, thorough and complete inspection of all circumstances of the case, under the guidance of the law.

(6) There must be a sufficient element of public scrutiny of the investigation or its results. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard their legitimate interests,<sup>60</sup> without Art. 2 ECHR imposing on the investigating authorities the obligation to comply with any request for investigative measures that may be made by a relative of the victim during the

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<sup>56</sup> *Hugh Jordan v. The United Kingdom*, 4.05.2001, § 108; *Finucane v. The United Kingdom*, 1.07.2003, § 70; *Bouyid v. Belgium*, § 121; *Olewnik-Cieplińska and Olewnik v. Poland*, 5.09.2019, § 137.

<sup>57</sup> *Kolevi v. Bulgaria*, 5.11.2009, § 201; *Enukidze and Girgvliani v. Georgia*, 26.04.2011, § 266.

<sup>58</sup> *El-Masri v. The Former Yugoslav Republic of Macedonia*, 13.12.2012, § 183.

<sup>59</sup> *State Gazette of the Republic of Bulgaria*, Issue 86, 28.10.2005.

<sup>60</sup> *McKerr v. The United Kingdom*, 4.05.2001, § 148; *Anguelova v. Bulgaria*, 13.06.2002, § 140. For more details see *Guide on Article 2...*, pp. 37-38.

course of the investigation.<sup>61</sup> The Court also considers that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Art. 2 ECHR. In some cases, however, the ECtHR identifies as a shortcoming of the investigation the failure to provide information to the victim's family about the reasons for the decision not to prosecute the alleged perpetrators.<sup>62</sup> The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures.<sup>63</sup> There is no absolute right 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.<sup>64</sup> The obligation of competent investigating authorities to conduct an effective investigation, however, arises regardless of the filing or not of a formal complaint, after they receive information about a committed killing.<sup>65</sup> In the Bulgarian criminal procedure, the victim or their heirs have ample opportunities for active participation in the process of defence of both their moral and material interests related to the implementation of the criminal and civil liability of the perpetrator.<sup>66</sup>

The ECtHR notes that it is not their task to specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents.<sup>67</sup> It should be taken into account that, in all cases, the nature and degree of scrutiny which satisfies the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. It is not possible

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<sup>61</sup> *Velcea et Mazăre c. Roumanie*, 1.12.2009, § 113.

<sup>62</sup> *Hugh Jordan v. The United Kingdom*, § 142; *Shanaghan v. The United Kingdom*, 4.05.2001, § 122; *Kelly and Others v. The United Kingdom*, 4.05.2001, § 136; *McKerr v. The United Kingdom*, §§ 129, 157.

<sup>63</sup> *McKerr v. The United Kingdom*, § 129; *Giuliani and Gaggio v. Italy*, § 304. For more details on the correlation between citizens' rights and the obligations of the State to ensure an effective investigation, see Chevalier-Watts, 2010b.

<sup>64</sup> *Szula v. The United Kingdom* (dec.), 4.01.2007, § 1; *Brecknell v. The United Kingdom*, 27.11.2007, § 66.

<sup>65</sup> *Yaşa v. Turkey*, 2.09.1998, § 100; *Avşar v. Turkey*, 10.07.2001, § 393; *Zakriyeva and Others v. Russia*, 8.01.2009, § 83. See also *Ergi v. Turkey*, § 82.

<sup>66</sup> See Art. 74-79 and Art. 84-88 CPC.

<sup>67</sup> *Hugh Jordan v. The United Kingdom*, § 143; *Shanaghan v. The United Kingdom*, § 123; *Kelly and Others v. The United Kingdom*, § 137; *McKerr v. The United Kingdom*, § 159.



to simplify the criteria or to list them exhaustively.<sup>68</sup> The Court employs the same approach with regard to the cases of identification of new materials that call into question the conclusions of a closed investigation, expressing doubt as to whether it is at all possible to formulate a detailed test that could be successfully applied to the wide range of significantly differing situations which may arise. The Court also points out that the Convention provides for minimum standards and Member States can provide further protection or guarantees, but in cases when the obligation to conduct an investigation into a particular incident is not derived from the Convention, the fact that the State chooses to pursue some form of inquiry does not thereby have the effect of imposing the standards of Art. 2 ECHR on the proceedings.<sup>69</sup>

It can be concluded on the basis of the above discussion that over the previous three decades the ECtHR has developed broad case law on various cases related to Art. 2 ECHR, establishing a number of requirements concerning the investigations into deaths involving State authorities. These standards are concrete to a certain degree, but compliance with them can be achieved through various regulatory approaches, and this issue should be addressed at a national level by Member States, in accordance with domestic legislations and existing legislative traditions. In addition to the criminal procedure requirements, the guidelines of the ECtHR include such of a forensic, institutional and organizational nature, which contributes to the development of comprehensive and effective standards for investigating into alleged violations of fundamental rights protected by the Convention, such as the right to life.

### 5. The Bulgarian Experience

In view of the Bulgarian context, the important date 1 July 2012 stands out, when the Bulgarian Ministry of Interior Act<sup>70</sup> regulating the powers of police authorities, was radically amended. This was a consequence of the condition of the post-monitoring dialogue established between the Republic of Bulgaria and the Council of Europe following the country's accession in 1992. In general, on this date the standard of 'absolute necessity' in the use of firearms, physical force and auxiliary

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<sup>68</sup> *Velikova v. Bulgaria*, § 80; *Mustafa Tunç and Fecire Tunç v. Turkey*, 14.04.2015, § 176.

<sup>69</sup> *Brecknell v. The United Kingdom*, § 70.

<sup>70</sup> *State Gazette of the Republic of Bulgaria*, Issue 17, 24.02.2006, repealed by MIA.

means by police authorities was introduced into Bulgarian legislation.<sup>71</sup> The discussed legislative effort was preceded by a detailed analysis of the dozens of cases of the ECtHR with a Bulgarian context, cooperation between the political leaders of the Ministry of Interior, the Prosecutor General's Office and the non-governmental sector, public debates on the occurrence of police violence. The sharing of some aspects of the Bulgarian experience in the current publication may have a beneficial impact on other national legislative systems facing a similar challenge.

In 2010, the cooperation with the bodies of the Council of Europe within the framework of the post-monitoring dialogue with Bulgaria continued. In January 2010, Mr. Serhiy Holovaty, Ukraine Representative in the Parliamentary Assembly of the Council of Europe (PACE), Chairman of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), presented a draft report from his visit to Bulgaria (December 2009), on the basis of which, in April 2010, PACE adopted Resolution 1730 within the framework of the post-monitoring dialogue with Bulgaria. The document indicated Bulgaria's progress in the field of human rights protection. The will of the Bulgarian authorities to strive to fulfil the country's commitments to the Council of Europe was positively assessed. A number of recommendations were formulated, in the implementation of which the Ministry of Interior was actively involved within its competences.

At the end of October 2010, the fifth periodic visit of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) took place. During the visit, the CPT delegation held an introductory meeting with representatives of the Ministry of Interior engaged in matters within the competence of the Committee, went to locations subordinate to the Ministry of Interior accommodating detained persons, and conducted a closing meeting with representatives of the Ministry of Interior. The CPT's preliminary observations presented at the end of the visit, highlighted the progress achieved since the previous one, while some recommendations were also introduced. The Ministry of Interior provided comments on the preliminary observations of the CPT. The final report from the Committee's visit was published in March 2012.

The cooperation with the Council of Europe within the framework of the post-monitoring dialogue with Bulgaria was maintained throughout 2011. The dialogue at the political level with PACE significantly

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<sup>71</sup> See Ilieva, 2011; Girginov, 2012.

intensified (meetings and correspondence between the PACE President and the Deputy Minister of Interior of the Republic of Bulgaria). In December 2011, Mr. Luca Volontè, Italy Representative in PACE, Chairman of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), visited Sofia, and in 2013 a report was presented on Bulgaria's implementation of PACE Resolution 1730.

In 2012, the dialogue at the political level with PACE was further developed. In September 2012, the second visit within ten months by Mr. Luca Volontè took place. Within this visit Mr. Volontè got acquainted with the progress of Bulgaria's implementation of PACE Resolution 1730. The main emphasis of the discussion held with the Deputy Minister of Interior Mr. Veselin Vuchkov was on the legislative amendments to the Ministry of Interior Act, in force since July 2012, which introduced the principle of 'absolute necessity' in the use of firearms, physical force and auxiliary means by the police, as well as the subsequent organizational and training measures in this direction. The relevant information was provided in advance in a letter to the PACE President.

As a result of these legislative measures, and also on the basis of the actual progress achieved in the field of human rights, it was proposed in Strasbourg to end the post-monitoring of Bulgaria. Two more votes were needed in order to close the entire post-monitoring procedure. Eventually, an amendment to the Resolution led to the elimination of some of the topics, including human rights abuses by law enforcement officials. The judiciary, the high-level corruption, the media, and human rights remain subjects to monitoring.

## **6. Conclusion**

In its case law, the ECtHR comprehensively and consistently establishes the requirements that Art. 2 ECHR imposes on Member States. Compliance with the standard of the protection of human life enshrined in the Convention can only be guaranteed through the successful development and interaction of several factors. Domestic legislation should provide for rules eliminating the arbitrary, unnecessary or disproportionate use of life-threatening force, simultaneously allowing police officers to exercise their powers in a manner appropriate for the concrete circumstances, and providing effective protection of their lives and the lives of third parties. The training of police officers must be in line with the high standards for their professional conduct and the effective respect for and protection of human life. It should be a sufficient foundation for the im-

mediate formation of a correct assessment in a concrete situation. This concept applies both to the superior officers who plan and control the operations aimed at neutralizing threats, and to the ones who come into immediate contact with them. Only the gradual but consistent improvement of the legislations and practices of Member States shall form the necessary basis to respond adequately to the growing challenges in respect of the protection of human life.

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