Police Violence and How to Fight It, in Particular When Racially Motivated: The Example of the European Court of Human Rights

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I. INTRODUCTION

Police violence is a widespread, global issue. It concerns the United States as much as it does Europe and other parts of the world. According to an Amnesty International report published in 2015, hundreds of men and women are killed by police each year across the United States.1 Even though some cases—like the fatal shooting of Michael Brown in Ferguson, Missouri—receive national attention, there are countless more across the country involving Hispanic and Indigenous individuals that do not.2 This Article explores the impact of this issue in Europe and how racially motivated violence has been treated by the European Court of Human Rights (ECtHR).

The ECtHR was established in reaction to the atrocities committed in World War II.3 The ECtHR decides cases on the basis of the European Convention on Human Rights (ECHR), adopted on November 4, 1950, and entered into force on September 3, 1953.4 In the years since its inception, the ECtHR has established itself as a key player in the protection of human rights in Europe. It is sometimes referred to as the “Conscious of Europe,”5 an institution established by States which are, as the Preamble of the ECHR expresses, “like-minded and have a common heritage of political traditions, ideals, freedom and the rule of

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1. See AMNESTY INT’L, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES 1 (2015), https://www.amnestyusa.org/wp-content/uploads/2015/06/aiusa_deadlyforcreportjune2015-1.pdf [https://perma.cc/6FREE-UWDC] (noting number of deaths from police officers). Because the United States does not track how many lives are lost to police violence, an exact figure cannot be determined. See id. However, estimates range from 400 to over 1,000. See id. at 4.

2. See id. at 1.


law. 6 Forty-seven Member States of the Council of Europe, the mother organization of the ECtHR, are currently under its jurisdiction.7

The jurisdiction of the ECtHR is broad and encompasses all the allegations of violations of human rights enshrined in the ECHR and having caused by one or several of the forty-seven Member States. The binding nature of the ECHR is recalled in Article 1, according to which the States Parties “shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” One of the cornerstones of the ECHR system is the right to individual application within the meaning of Article 34.8 This direct access to an independent judicial body, which is qualified to examine allegations of human rights abuses, is unique in the world and is open to 800 million people.9 Before a case can be examined on the merits, it has to be declared “admissible,”10 that is, comply with a series of formal criteria, such as the prior exhaustion of local (national) remedies.11

This Article examines police violence, one of the fields where the ECtHR’s case law is voluminous, imposing significant limits on the freedom of parties to the ECHR. Part I covers the “substantial” duties imposed by the ECHR, namely the guarantees against arbitrary and disproportionate use of force, mainly deriving from the right to life.12 Various issues will be covered, such as the required standard of domestic law, the regulatory frameworks and training of police officers, the planning and control of the use of lethal force, and the permitted exceptions to the right to life.13 Another significant guarantee in this field is the prohibition of torture, and inhumane and degrading treatment.14

Part II deals with the “procedural” limb of Articles 2 and 3, such as the duty of the State authorities to investigate the cause of death or ill-treatment allegedly inflicted by police officers.15 Part III considers the guarantees against violence

8. See ECHR, supra note 6, art. 34 (laying out individual application process). “Court may receive any application from any person, non-governmental organ[ization] or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties.” Id.
9. On the other hand, the direct accessibility of the ECtHR also has its drawbacks. On June 30, 2019, 56,800 cases were pending before the ECtHR. Roughly 70% of the cases concern five Member States, namely Italy, Romania, Russia, Turkey and Ukraine. See EUR. COURT OF HUMAN RIGHTS, STATISTICS 1/1-30/6/2019 1, https://www.echr.coe.int/Documents/Stats_month_2019_ENG.pdf [https://perma.cc/EVW5-9RJP] (noting heavy caseload of ECtHR). The numbers indicated by a mail of the registry of the EctHR upon request of the author.
10. See ECHR, supra note 6, art. 35, § 1 (discussing admissibility requirements).
11. See id.
12. See infra Part II (discussing duties of parties to ECHR imposed by Article 2).
13. See infra Sections II.A.2, 3 (expanding issues posed by ECHR).
14. See infra Section II.B (discussing Article 3).
15. See infra Part II (highlighting anti-discrimination considerations within Article 14).
on racial grounds in light of Article 14, which prohibits discrimination.\textsuperscript{16} It is well known that many incidents of police brutality are racially motivated. While African American men are disproportionately impacted by police violence in the United States, the Roma minority is the population that suffers discrimination and violence within the Member States of Central Europe.\textsuperscript{17} This Article will focus on this marginalized population and its treatment by police.

II. GUARANTEES AGAINST ARBITRARY OR DISPROPORTIONATE USE OF FORCE

A. Right to Life: Article 2 of the ECHR

1. General Considerations

The first right that is relevant in the context of police violence is the right to life, the most basic human right of all.\textsuperscript{18} Article 2 of the ECHR states:

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
   (a) in defence of any person from unlawful violence;
   (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   (c) in action lawfully taken for the purpose of quelling a riot or insurrection.\textsuperscript{19}

Its fundamental nature is recognized by the fact that Article 2 is one of the few ECHR guarantees that cannot generally be derogated from in time of war or other public emergencies in accordance with Article 15.\textsuperscript{20} Together with the prohibition of torture and inhuman and degrading treatment within the meaning of Article 3, the right to life “enshrines one of the basic values of the democratic societies making up the Council of Europe.”\textsuperscript{21} As a result, the circumstances in

\textsuperscript{16} See infra Part III (detailing Article 14’s guarantees against racially motivated violence).


\textsuperscript{19} ECHR, supra note 6, art. 2.

\textsuperscript{20} See id. art. 15, § 2. Derogations may only be made from Article 2 “in respect of deaths resulting from lawful acts of war.” Id.

which the deprivation of life may be justified under Article 2, for instance in self-
defense, must be “strictly construed.” Article 2 is applicable to both intentional
and unintentional killings. It is also noteworthy to observe that Article 2 may
come into play even when a person whose right to life was allegedly breached
did not die, if the behavior of the State agents put the applicant’s life at serious
risk.

The first sentence of Article 2, section 1 indicates that “everyone’s right to
life shall be protected by law.” In *L.C.B. v. United Kingdom*, the ECtHR held
that this establishes a positive obligation for States Parties to take “appropriate
steps to safeguard the lives of those within their jurisdiction.” From this derives
a “primary duty on the State to secure the right to life by putting in place an
appropriate legal and administrative framework to deter the commission of of-
fences against their person, backed up by law enforcement machinery for the
prevention, suppression and punishment of breaches of such provisions.” The
“legal and administrative framework” mentioned above requires the adoption of
laws prohibiting the taking of life, and calls for the regulation of the conduct of
the police and other State agents or private individuals, as well as of activities
or situations that might involve a risk to life.

2. Standard of Domestic Law, Regulatory Frameworks, and Training

Article 2 imposes certain minimal standards of domestic law and regulatory
frameworks on state parties. Police and other security forces and operations must
be authorized under national law and sufficiently regulated, providing the ade-
quate and effective safeguards. In *Nachova v. Bulgaria*, which will be dis-
cussed further below, the authorities decided not to bring charges against a mil-
tary officer who had shot dead two fleeing soldiers, reasoning that the use of
force regulations had been complied with. The ECtHR held that the legal frame-
work was fundamentally deficient, failing to provide the right to life protection

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23. See *HARRIS ET AL.*, supra note 18, at 203.
25. See *HARRIS ET AL.*, supra note 18, at 203 (asserting right to life protected by law).
27. See id. ¶ 36; see also *Kılıç v. Turkey*, 2000-III Eur. Ct. H.R. 75, ¶ 62 (reaffirming ECtHR’s obligation to safeguard lives within jurisdiction).
29. *HARRIS ET AL.*, supra note 18, at 204.
“by law,” because it was lawful to shoot any fugitive who did not surrender immediately in response to an oral warning and a warning shot in the air, despite not giving consideration to the fact that the two men committed non-violent offenses and did not pose a threat to the arresting officers.33

In Makaratzis v. Greece, the framework in place was considered “slender,” consisting of a general prohibition without any detailed provisions regulating the use of weapons or guidelines for the planning and control of police operations.34 The lack of proper structure, channels of communication, and guidelines prompted in that case for a largely uncontrolled car chase, where officers fired volleys of shots with pistols and machine guns. The failure to put in place an adequate legislative and administrative framework with safeguards to avoid risk to life breached the standard required by Article 2.35

In another case, the lack of clear rules regarding the use of weapons by the police and insufficient training led to a violation of Article 2, section 2 of the ECHR. An officer disobeyed his superior when he approached a violent and armed suspect, placing himself at risk, and then drew his weapon, which then misfired, with fatal consequences, in a struggle with the suspect.36

State agents must be adequately trained to react with the degree of caution to be expected of law enforcement officers in a democratic society.37 Overreaction was, amongst other things, a factor in finding a violation in McCann v. the United Kingdom,38 where the suspects were shot repeatedly at close range.39 In the case of Simsek v. Turkey,40 the ECtHR observed the lack of centralized command and adequate training of the officers involved.41 In this case, officers fired on a crowd killing fifteen to seventeen people and injuring 276 others without first having recourse to less life-threatening methods.42 The ECtHR came to a similar conclusion in the case of Öktem v. Turkey,43 where it criticized the training and response of officers faced with an alleged violent mob situation, who, instead of

34. See Makaratzis, 2004-XI Eur. Ct. H.R. ¶ 62. “On the face of it, the above—somewhat slender—legal framework would not appear sufficient to provide the level of protection ‘by law’ of the right to life that is required in present-day democratic societies in Europe.” See id.
35. See id. ¶ 71; see also KAREN REID, A PRACTITIONER’S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1074 (5th ed. 2015).
36. See Celniku v. Greece, App. No. 21449/04, HUDOC ¶ 57 (July 5, 2007), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%222001-81431%22]} [https://perma.cc/UEE2-VTJ4] (noting lack of clear rules). Despite his superior’s orders, the officer approached a violent and armed suspect, placing himself at risk. See id. ¶ 45. The officer then drew his weapon, which misfired, leading to the suspect’s death. See id.
37. See Reid, supra note 35, at 1073.
39. See id. ¶ 212 (detailing shooting facts).
41. See id. ¶ 109-10 (observing lack of training and command).
42. Id. ¶ 25.
43. See App. No. 9207/03, HUDOC (Nov. 4, 2008), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%222001-89247%22]} [https://perma.cc/NTC7-SWPG].
waiting for support, launched an ill-considered attempt to arrest suspects alleging, in vague terms, that they had to open fire to save their lives.\textsuperscript{44}

3. \textit{Planning and Control of the Use of Lethal Force}

Article 2 prohibits the deprivation of life unless justified by any of the exceptions permitted by its text.\textsuperscript{45} A state may be liable under this provision not only for the conduct of its agents who actually kill a person, but also for those who are responsible for an operation that may threaten life if it was not planned or managed by the authorities “so as to minimize, to the greatest extent possible, recourse to lethal force.”\textsuperscript{46} For an extreme example, in \textit{Finogenov v. Russia},\textsuperscript{47} the Russian authorities faced a situation in which over 900 hostages, whose lives were at real and immediate risk, were being held by Chechen terrorists in a theatre in Moscow.\textsuperscript{48} After a number of hostages were killed by the terrorists, a special unit stormed the building and, using gas, incapacitated or killed all of the hostage takers.\textsuperscript{49} This rescue operation, however, also resulted in the death of 120 hostages.\textsuperscript{50} The court concluded, on the one hand, that the storming of the building was justified:

\begin{quote}
In sum, the situation appeared very alarming. Heavily armed separatists dedicated to their cause had taken hostages and put forward unrealistic demands. The first days of negotiations did not bring any visible success; in addition, the humanitarian situation (the hostages’ physical and psychological condition) had been worsening and made the hostages even more vulnerable. The ECtHR concludes that there existed a real, serious and immediate risk of mass human losses and that the authorities had every reason to believe that a forced intervention was the “lesser evil” in the circumstances. Therefore, the authorities’ decision to end the negotiations and storm the building did not in the circumstances run counter to Article 2 of the Convention.\textsuperscript{51}
\end{quote}

\textsuperscript{44}See id. ¶¶ 50-51, 53 (noting lack of appropriate training); see also Reid, supra note 35, at 1072.

\textsuperscript{45}See ECHR, supra note 6, Art. 2, § 2 (describing exceptions to deprivation of life).


\textsuperscript{48}See id. ¶ 8 (outlining facts of hostage situation); see also Tagayeva v. Russia, App. No. 26562/07, Eur. Ct. H.R. ¶ 21, 100 (2017) (explaining events of Beslan terrorist attack). In this case—which also involved counter-terrorism measures—an attack on a school in Beslan, North Ossetia resulted in the deaths of about 330 civilians, over 180 of which were children, after they were held hostage for several days. See id. The Court here considered whether the lack of planning and control of the operation was a violation of Article 2 of the ECHR as well. See id. ¶¶ 562-74.


\textsuperscript{50}See id. ¶ 48 (documenting number of civilian deaths). Six people died in the hospital, while the other 114 were already dead on arrival. See id.

\textsuperscript{51}Id. ¶ 226 (explaining Court’s reasoning).
Following this reasoning, the ECtHR held that the use of gas was not disproportionate.\textsuperscript{52} It held that in such exceptional circumstances “where the authorities have to act under tremendous time pressure and where the control of the situation was minimal,” a certain margin of appreciation has to be granted to the authorities.\textsuperscript{53} On the other hand, the ECtHR held that the rescue operation had not been adequately planned or implemented, with no centralized coordination and inadequate arrangements for medical assistance.\textsuperscript{54}

In \textit{McCann}, Special Air Service soldiers shot and killed three IRA terrorists, based on the belief that the suspects were about to detonate a bomb in the center of Gibraltar.\textsuperscript{55} In fact, there was no bomb in Gibraltar, nor were the terrorists carrying any arms or any object connected with any possible detonation of a bomb.\textsuperscript{56} By a ten to nine vote, the ECtHR found an Article 2 violation because it was not “persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defense of persons from unlawful violence within the meaning of Article 2 para. 2(a) . . . of the Convention.”\textsuperscript{57} The court considered that the operation could have been planned and controlled to achieve the ultimate objective without the need to kill the suspects.\textsuperscript{58}

A lack of planning and control was also detected by the court in the case of \textit{Güleç v. Turkey}.\textsuperscript{59} In that case, the applicant's son and another person were killed after forces fired into a crowd of disorderly demonstrators, gathered to protest the destruction of a village.\textsuperscript{60} The ECtHR observed that despite the region’s disorder and state of emergency, the police were ill-equipped to handle the expected disorder.\textsuperscript{61} Unconvinced that armed terrorists had been among the crowd, the

\textsuperscript{52} See id. ¶ 236 (upholding use of gas).
\textsuperscript{53} Finogenov v. Russia, 2011-VI Eur. Ct. H.R. 365 ¶¶ 211-13 (describing when ECtHR may depart from rigorous standard).
\textsuperscript{54} See id. ¶ 247 (criticizing planning of medical assistance and evacuation). The ECtHR summarized: “[I]n the circumstances the rescue operation of 26 October 2002 was not sufficiently prepared, in particular because of the inadequate information exchange between various services, the belated start of the evacuation, limited on-the-field coordination of various services, lack of appropriate medical treatment and equipment on the spot, and inadequate logistics. The Court concludes that the State breached its positive obligations under Article 2 of the Convention.” Id. ¶ 266.
\textsuperscript{56} See id. ¶ 186 (describing confusion over bomb).
\textsuperscript{57} See id. ¶ 213.
\textsuperscript{58} See id. ¶ 212.
\textsuperscript{60} See HARRIS ET AL., supra note 18, at 223.
\textsuperscript{61} See Güleç, 1998-IV Eur. Ct. H.R. ¶ 71. The police were only equipped with machine guns. See id. They were not equipped with truncheons, riot shields, water cannons, tear gas, or rubber bullets. See id.
court considered the level of force applied was not “absolutely necessary.” The court concluded that, contrary to the government’s submissions, the demonstrators were unarmed and the security forces had fired not above their heads, but at the ground in front of them, with an obvious risk of ricocheting bullets. Following the *McCann* reasoning, the ECtHR held that despite the state of emergency and expected disorder, the operation was not planned to minimize the risk of life—the security forces resorted to using live bullets because they were not provided with less powerful weapons.

In *Simsek*, the ECtHR found a violation of Article 2, section 2 due to the failure of police to seek “less life-threatening methods” to suppress a riot. In addition, the court strongly criticized the lack of centralized command as well as the lack of adequate training of the officers involved.

In light of the mentioned case law, it can certainly be asserted that a distinction can be drawn between cases in which the armed forces had to react spontaneously to a fast-developing situation—for example *Finogenov*—and those where an operation had been, or could have been, preplanned; namely *McCann*, Güleç, and Şimşek. In the latter cases, it is justified that the court applies a justifiably more rigorous test to examine whether the planning of the operation had due regard to reducing the risk to life to the minimum.

4. **Permitted Exceptions to the Right to Life**

Three of the exceptions listed in Article 2, section 2 of the ECHR are relevant in the context of police violence. The taking of life by the State can be justified when it results from use of force that is no more than “absolutely necessary” for one or more of the following authorized purposes: in self-defense or the defense of another, to effect a lawful arrest or prevent an escape from lawful detention, and to quell a riot or insurrection.

The burden of proof lies with the government to show that the force used meets the requirement of absolutely necessity. Force is “absolutely necessary”
if it is “strictly proportionate” to the achievement of a permitted purpose. In this respect, Article 2, section 2 imposes a more rigorous test of necessity than paragraph 2 of Articles 8-11 of the ECHR, guaranteeing the right to respect for private and family life, the freedom of thought, conscience and religion, the freedom of expression, and the freedom of assembly and association, where the requirement is simply one of proportionality. Contrary to those guarantees, and apart from very exceptional circumstances, like those in Finogenov, states are generally allowed no “margin of appreciation” under Article 2, section 2. What the ECtHR means with “absolutely necessary” and “strictly proportionate” will be further discussed in the following subsections.

a. Self-defense or Defense of Another

Article 2, section 2(a) allows the use of force by state agents in self-defense or the defense of another. It does not, however, permit it for the defense of property. In McCann, the three suspects were shot dead in circumstances where the ECtHR held less violent alternatives existed. Looking at the soldiers’ actions, however, the court found unanimously that based on the information given to them, the officers were under an “honest belief” that it was necessary to shoot them in order to prevent the detonation of a bomb. Such an honest belief can be justified even if it turned out to be mistaken. To hold otherwise would put an unrealistic burden on law enforcement officers.

A standard of honest belief, based on good reasons, also applied in Andronicou Constantinou v. Cyprus. In this case, Cypriot police special forces had to deal with a situation in which a young man was holding his fiancée hostage...
with a gun in their flat. When the police stormed the building to rescue the fiancée, the couple was killed in the course of using lethal force in defense of themselves and the fiancée. The ECtHR concluded that the actual killings were “strictly proportionate” on the facts, considering that the officers “honestly and reasonably believed” that they and the hostage were at risk from the armed hostage-taker and that they were entitled to open fire to eliminate that risk. Another tragic outcome occurred in Bubbins v. United Kingdom, where the officer was faced with a man with a gun, which he could not know was only a replica. The officer in charge was confronted by a man pointing a gun at him who ignored warnings to give himself up and, defying these warnings, conveyed on occasions a clear impression that he would open fire. In addition, even before discharging the fatal shot, the officer shouted a final warning, which went unheeded. The court concluded that the use of lethal force in the circumstances of this case, although highly regrettable, “was not disproportionate and did not exceed what was absolutely necessary to avert what was honestly perceived by [the officer] to be a real and immediate risk to his life and the lives of his colleagues.”

The case of Giuliani v. Italy received particular media attention because of its particular setting. Large anti-globalization demonstrations at the G8 summit in Genoa had provoked violent clashes between demonstrators and law enforcement agencies. A police officer in an isolated Jeep was being attacked, and after issuing a warning, the officer fired shots, ultimately killing a demonstrator. The ECtHR did not find a violation of Article 2, holding that in the “extremely tense situation,” the soldier acted in self-defense, with the honest and reasonable fear for his life and the lives of his colleagues. In another case,
however, the shooting of 50-55 bullets through a door, causing multiple fatal injuries, on an unseen target in a residential block occupied by innocent civilians—including women and children—was considered to be “grossly disproportionate” because the special team officers had no reasonable belief that their lives were at risk.97

Finally, the ECtHR had the opportunity to summarize its previous case law concerning subparagraph (a) of Article 2, section 2 of the ECHR in the recent case of Da Silva v. United Kingdom.98 The applicant was a relative of Mr. Jean Charles de Menezes, who was mistakenly identified as a terrorist suspect and shot dead on July 22, 2005 by two special firearms officers in London.99 The shooting occurred the day after a police manhunt was launched to find those responsible for four unexploded bombs that had been found on three underground trains and a bus in London.100 The authorities feared that another bomb attack was imminent.101 In a March 20, 2016 judgment, the court summarized its earlier case law in the following paragraph:

It can therefore be elicited from the Court’s case-law that in applying the McCann and Others test the principal question to be addressed is whether the person had an honest and genuine belief that the use of force was necessary. In addressing this question, the Court will have to consider whether the belief was subjectively reasonable, having full regard to the circumstances that pertained at the relevant time. If the belief was not subjectively reasonable (that is, it was not based on subjective good reasons), it is likely that the Court would have difficulty accepting that it was honestly and genuinely held.102

In the instant case, the court concluded that all the independent authorities who had considered the actions of the two officers responsible for the shooting had carefully examined the reasonableness of their belief that Mr. de Menezes was a suicide bomber who could detonate a bomb at any second.103 Consequently, it could not be said that the domestic authorities had failed to consider, in a manner compatible with the requirements of Article 2, whether the use of force had been justified in the circumstances.104

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99. See id. ¶ 12 (explaining relation of applicant to deceased)
100. See id. ¶¶ 12-14 (detailing London terrorist attack)
101. See id. ¶¶ 14-17 (providing basis for imminence of another attack).
102. Da Silva, App. No. 5878/08 ¶ 248.
103. See id. ¶ 253 (reciting Court’s conclusion based on reasonableness of officer’s belief).
104. See id.
b. “To Effect a Lawful Arrest or Prevent an Escape from Lawful Detention”

The use of force is justified under Article 2, section 2(b) if it is “absolutely necessary” to effect an arrest or to prevent an escape. Most cases under this provision have concerned the use of firearms, which are particularly life-threatening.105 Where relevant, prior verbal warnings and warning shots are taken into account by the ECtHR when assessing the facts, although it will not by themselves render subsequent shots “absolutely necessary.”106

Similarly, in Nachova v. Bulgaria, the ECtHR found that police had violated Article 2 when they shot and killed two people—who police knew were unarmed, not otherwise dangerous, and had no record of violence—when they, despite police warnings to stop, ran away to avoid being arrested for an unauthorized absence from work.107 The use of lethal force in that circumstance showed grossly excessive force, especially because officers used rifles on their automatic setting, and the fact that other options were available to make the arrest.108

In certain situations, the question arises whether the use of lethal force by law enforcement officials to stop a car of suspects is justified. In such cases, a court will consider whether the facts indicate that the use of firearms was applied by the police as a necessary caution.109 Besides being justified under subparagraph (b), the use of firearms for self-defense may be permissible within the meaning of subparagraph (a) of Article 2, section 2.110 Yet, in both Juozaitiené v. Lithuania111 and Wasilewska v. Poland,112 shooting at an escaping car was nevertheless not justified as self-defense or to effect an arrest. In the former case, the court determined that firing many bullets at a car unjustifiably put the lives of

105. See Harris et al., supra note 18, at 231.
106. See, e.g., Öğür v. Turkey, 1999-III Eur. Ct. H.R. 519, ¶¶ 82-84 (discussing use of verbal warnings and warning shots when evaluating necessity of lethal force); see also Kakoulli v. Turkey, App. No. 38595/97, HUDOC ¶¶ 119-21 (Nov. 22, 2005), https://hudoc.echr.coe.int/eng#%22fulltext%22:%22%2338595/97%22,%22documentcollectionid%22:%22%22GRANDCHAMBER%22,%22CHAMBER%22,%22itemid%22:%22%22001-71208%22%22) [https://perma.cc/FPC9-NE8A] (finding force not proportionate or absolutely necessary after reaction to warning shots).
109. See Harris et al., supra note 18, at 232 (describing possible permissibility of firearm use for self-defense).
111. App. Nos. 70659/01 & 74371/01, HUDOC (Apr. 24, 2008), https://hudoc.echr.coe.int/eng#%22fulltext%22:%22%2270659/01%22,%22documentcollectionid%22:%22%22GRANDCHAMBER%22,%22CHAMBER%22,%22itemid%22:%22%22001-86024%22%22) [https://perma.cc/KVS4-36JB].
112. App. Nos. 28975/04 & 33406/04, HUDOC (Feb. 23, 2010), https://hudoc.echr.coe.int/eng#%22fulltext%22:%22%2228975/04%22,%22documentcollectionid%22:%22%22GRANDCHAMBER%22,%22CHAMBER%22,%22itemid%22:%22%22001-97410%22%22) [https://perma.cc/SWY7-YXWG].
the occupants at risk and could only be acceptable to counter a clear and imminent danger. The court found a violation of Article 2 because there was no convincing argument that the car, however recklessly it was being driven, was putting the officers’ or anyone else’s lives at risk. In the latter case, the ECtHR seems to have accepted that the police officers were justified in using their weapons when the car full of suspects drove at them, but it found the manner in which they did so was not strictly proportionate, in particular because most of the bullets were fired once the car had passed and the officers were no longer in danger. Further, even though the officers claimed to have been shooting at the tires, the bullets hit the body of the car and the occupants instead.

The court has also considered situations where persons to be arrested died as a result of special arrest techniques. In the earliest of those cases, Douglas-Williams v. United Kingdom, the applicant’s brother died after arrest from positional asphyxia caused by the method of restraint used, but the court held that the use of force had not been excessive to restrain a man armed with a knife. Moreover, the evidence did not reveal that the police could have foreseen his sudden collapse or that they had failed to respond adequately to his condition. The court applied a similar reasoning in Scavuzzo-Hager v. Switzerland, where a drug addict in a precarious state of health died after being forcibly arrested. According to the ECtHR, there was no liability where the police officers had no reason to suspect any risk from conventional arrest techniques. In a later case, Saoud v. France, given the subsequent volume of material attesting to the lethal danger of positional asphyxia deriving from the immobilization technique of pinning a person’s chest down on the floor for a prolonged period, the court held there was a violation of Article 2 where a suspect died after being immobilized for thirty-five minutes, despite the fact that he was secured by his wrists and

113. See id. ¶ 80 (comparing level of threat to action taken). The ECtHR summarized: [T]he risk to the lives of the car passengers, considered in the light of the absence of an immediate danger posed by the driver and the ensuing lack of urgency in stopping the car, points to a measure of impulsiveness in the way in which the police officers handled the situation. The Court considers that their actions, in particular the erratic shooting at the car escaping from the scene of the incident at an increasing speed whilst swerving, indicated a lack of caution in the use of firearms, contrary to what should be expected from law-enforcement professionals. Id. ¶ 82.
115. See id. (suggesting location of bullets indicates officers not aiming at tires).
116. See id. ¶ 13 (describing how decedent died while in custody).
117. See id. ¶ 5 (detailing Coroner’s testimony about circumstances of death).
118. See id. ¶ 14-17 (describing facts of case).
120. See id. ¶¶ 14-17 (describing facts of case).
121. See id. ¶ 61.
122. App. No. 9375/02, HUDOC (Oct. 9, 2007), https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-82583%22] [https://perma.cc/GK78-2ZXD].
ankles and was injured.\textsuperscript{123} Finally, in a recent case against France, \textit{Boukrourou v. France},\textsuperscript{124} the ECtHR considered that the police officers had certainly been aware that M.B. was receiving psychiatric treatment, but they did not know he was suffering also from a heart disease when they punched him twice in the solar plexus, corresponding allegedly to a technique taught to police officers with the aim of creating a diversion and facilitating handcuffing.\textsuperscript{125} Therefore, the court held that even if there was some causal link between the force used by the police officers and M.B.’s death, that consequence could not be foreseen under the circumstances of the present case.\textsuperscript{126} As a result, there was no violation of Article 2.\textsuperscript{127} The court, however, found a violation of Article 3, which will be discussed below.\textsuperscript{128}

c. “To Quell a Riot or Insurrection”

Whereas there is no ECHR definition of what are “riots” or “insurrections,”\textsuperscript{129} the “strict proportionality” interpretation of the “absolutely necessary” requirement used in \textit{McCann} is also instrumental in ensuring caution on the part of law enforcement officers when facing large crowds at public meetings and demonstrations that might get out of control.\textsuperscript{130} In the above mentioned case of \textit{Güleç}, where the applicant’s son and another person had been killed by a bullet fired by gendarmes during a demonstration that had turned unruly, the court considered this limb of Article 2 for the first time.\textsuperscript{131} While it accepted that the use of force might be justified under Article 2, section 2(c) of the ECHR, it did not find that the state agents used proportionate force.\textsuperscript{132} The requirement of “absolutely necessary” was further infringed in two cases, decided by the ECtHR on the same day, resulting from the deaths of Greek Cypriots who had encroached upon the United Nations buffer zone in Cyprus for purposes of demonstrating against the Turkish occupation of Northern Turkey and was met with counter-demonstration

\begin{enumerate}
\item[123.] See \textit{id.} \S 98-104. Interestingly, the ECtHR approached this case due to an obligation to protect the suspect’s life, particularly because of the fact that he was under arrest and under the control of the authorities. See \textit{id.}
\item[124.] App. No. 30059/15, HUDOC (Nov. 16, 2017), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2230059/15%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-178921%22]} [https://perma.cc/MAL9-DV6K].
\item[125.] See \textit{id.} \S\S 61, 85 (noting technique used inappropriate under circumstances).
\item[126.] See \textit{id.} \S 62.
\item[127.] See \textit{id.} \S 62.
\item[128.] See \textit{infra} Section II.B (describing cases lacking proportional response)
\item[129.] See \textit{Reid, supra} note 35, at 1072.
\item[130.] See \textit{Harris et al., supra} note 18, at 232; \textit{Reid, supra} note 35, at 1072.
\item[131.] See \textit{Reid, supra} note 35, at 1072 (explaining Court’s application of Article 2).
\end{enumerate}
by Turkish Cypriots. In *Isaak v. Turkey*, a group of people, including Turkish soldiers, beat and killed a demonstrator in the buffer zone. Also, in *Solomou v. Turkey*, a demonstrator who crossed over the Turkish cease fire line from the buffer zone was shot and killed by Turkish soldiers while climbing a flagpole that displayed the Turkish flag. The court held that these killings, resulting from action taken against two unarmed demonstrators, could not be justified as being “absolutely necessary” to quell a riot within the meaning of Article 2. The court summarized its findings in the case of *Solomou* in the following terms:

> [T]he decisive factor in the Court’s view is that it was not contested that one demonstrator only—Mr. Solomou—had crossed the ceasefire line and had been unarmed. The first shots were directed at him and not at the other demonstrators. Under these circumstances, they could hardly be described as measures aimed at calming the violent behavior of the other demonstrators, who were still in the UN buffer zone. In this context, the Court reiterates that the use of force should be “absolutely necessary” for pursuing one or more of the aims laid down in paragraph 2 of Article 2 and that a potential illegal or violent action from a group of persons cannot, as such, justify the immediate shooting and killing of one or more other individuals who are not themselves posing a threat.

The right to life within the meaning of Article 2 constitutes a strong guarantee against police violence. It is, however, not the only guarantee that is applicable to police violence. Another important limitation to the behavior of state authorities and their agents in the use of force is found in Article 3, which prohibits ill-treatment.

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133. See HARRIS ET AL., supra note 18, at 232 (detailing violent demonstration).
135. See id. ¶ 15. The ECtHR describes that “Anastasios Isaak was thrown to the ground after having being chased. During a period of approximately five minutes he was kicked and beaten continuously on every part of his body and his head with metal and wooden batons.” See id.
136. App. No. 36832/97, HUDOC (June 24, 2009), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2236832/97%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%222001-87144%22]} [https://perma.cc/6FCQ-Z9R6].
137. See id. ¶¶ 10-12 (summarizing facts of case); see also HARRIS ET AL., supra note 18, at 232-33 (demonstrating example where infringement of “absolutely necessary” requirement occurred).
138. See *Isaak*, App. No. 44587/98, Eur. Ct. H.R. ¶ 120. The Court also held that Anastasios was killed by, and/or with the tacit agreement of, agents of the respondent state. See id.
B. Inhuman and Degrading Treatment: Article 3 of the ECHR

If a victim of police violence does not die as a result of police ill-treatment, Article 3, which prohibits torture and “inhuman or degrading treatment or punishment,” may come into play.140 Unlike Article 2, Article 3 contains no exceptions, and there cannot be any derogation from this Article in the event of a public emergency, as declared in Article 15.141 The ECtHR has made clear that Article 3 of the ECHR is one of the most fundamental values of all democratic societies within the Council of Europe and requires a heightened standard of vigilance.142 Whereas Article 3 applies irrespective of the victim’s conduct,143 ill-treatment must attain a minimum level of severity if it is to fall within the scope of this guarantee.144 Determining the minimum level of severity of ill-treatment depends on the circumstances of each case, and a court will look at many factors, including the duration of the treatment, its physical or mental effects, and the sex, age, or state of mind of the victim.145

Article 3 prohibits different categories of treatments, such as torture, inhuman and degrading treatment, or punishment. In *Ireland v. United Kingdom*,146 the ECtHR identified that torture involves suffering of a particular intensity and cruelty, attaching a “special stigma to deliberate inhuman treatment causing very serious and cruel suffering.”147 In the field of police violence, particularly during arrests, torture might normally fall within the definition of inhuman treatment. At the very least, torture covers treatment that deliberately causes severe mental and physical suffering.148 Article 3 does not prohibit the use of force in certain well-defined circumstances.

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140. See ECHR, supra note 6, art. 3.
141. See id. arts. 3, 15; *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. (ser. A) at 25, ¶ 163 (1978); see also *Soering v. United Kingdom*, App. No. 14038/88, HUDOC ¶ 88 (July 7, 1989), https://hudoc.echr.coe.int/eng/#/%22fulltext%22[%2214038/88%22],%22documentcollectionid%22[%22GRANDCHAMBER%22],%22HAMB%22,%22itemid%22[%22001-57619%22] [https://perma.cc/BN4R-YT4H]. Although the *Soering* case did not concern ill treatment by police, it is a leading case in the field of Article 3 ECHR because it surrounds the question of whether a person can be extradited to the United States where he would face years of death row and capital punishment. See id.
144. See supra note 143.
147. See id. ¶ 167 (providing prohibited types of treatment).
148. See id. (highlighting categories of inhuman treatment depend on intensity of techniques).
Nevertheless, such force may be used only if indispensable and must not be excessive.149 When a person is confronted by the police or other state officers, recourse to physical force that has not been made strictly necessary by the person’s own conduct diminishes human dignity and is in principle an infringement on the rights set forth in Article 3 of the ECHR.150 The court attaches particular importance to the type of injuries sustained and the circumstances in which force was used,151 and where injuries have been sustained at the hands of the police, the burden lies on the Government to show the necessity of the force used.152

In the event that serious injury is inflicted during an arrest, the government will be required to furnish credible and convincing arguments to justify the degree of force. In Rehbock v. Slovenia,153 the police accounts of how the applicant, unarmed and unresisting, came to suffer a double fracture were inconsistent and vague.154 In another case, the ECtHR found that the fact that the applicants were resisting arrest could only have provided a very incomplete, and therefore

149. See, e.g., Günaydin v. Turkey, App. No. 27526/95, HUDOC ¶¶ 30-32 (Oct. 13, 2005), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2227526/95%22],%22display%22:[%22languageisocode%22:[%22FRE%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%2227526/95%22]],%22documentid%22:[%2227526/95%22]} [https://perma.cc/WS5T-WDKD] (examining whether force proportionate to injuries sustained); Krastanov v. Bulgaria, App. No. 50222/99, HUDOC ¶ 53 (Sept. 30, 2004), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2250222/99%22],%22display%22:[%22languageisocode%22:[%22BUL%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%222227526/95%22]],%22documentid%22:[%2250222/99%22]} [https://perma.cc/WS5T-WDKD] (noting injuries inflicted unintentionally); Altay v. Turkey, App. No. 22279/93, HUDOC ¶ 54 (May 22, 2001), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2222279/93%22],%22display%22:[%22languageisocode%22:[%22TUR%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%2222279/93%22]],%22documentid%22:[%2222279/93%22]} [https://perma.cc/WS5T-WDKD] (emphasizing importance of only using force when strictly necessary).

150. See, e.g., Timtik v. Turkey, App. No. 12503/06, HUDOC ¶ 47 (Nov. 9, 2010), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2212503/06%22],%22display%22:[%22languageisocode%22:[%22TUR%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%2212503/06%22]],%22documentid%22:[%2212503/06%22]} [https://perma.cc/2MAP-EYD2] (noting certain conduct constitutes violation of Article 3); Kop v. Turkey, App. No. 12728/05, HUDOC ¶ 27 (Oct. 20, 2009), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2212728/05%22],%22display%22:[%22languageisocode%22:[%22TUR%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%2222728/05%22]],%22documentid%22:[%2212728/05%22]} [https://perma.cc/4J3Q-MIXQ]; Rachwalski v. Poland, App. No. 47709/99, HUDOC ¶ 59 (July 28, 2009), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2247709/99%22],%22display%22:[%22languageisocode%22:[%22POL%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%2222279/93%22]],%22documentid%22:[%2247709/99%22]} [https://perma.cc/WS5T-WDKD] (emphasizing importance of only using force when strictly necessary).

151. See, e.g., Najafi v. Azerbaijan, App. No. 2594/07, HUDOC ¶ 38 (Oct. 10, 2012), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%222594/07%22],%22display%22:[%22languageisocode%22:[%22AZE%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%222594/07%22]],%22documentid%22:[%222594/07%22]} [https://perma.cc/WS5T-WDKD] (highlighting ECHR examines circumstances where force used); Timtik, App. No. 12503/06 ¶ 48 (noting circumstances warrant ECHR to consider medical report); Sahin v. Turkey, App. No. 68263/01, HUDOC ¶ 50 (Dec. 21, 2006), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2268263/01%22],%22display%22:[%22languageisocode%22:[%22TUR%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%2222279/93%22]],%22documentid%22:[%2268263/01%22]} [https://perma.cc/WS5T-WDKD] (emphasizing government’s burden to provide evidence justifying use of force); Altay, App. No. 22279/93 ¶ 54 (2001).

152. See id. ¶ 76 (describing officers’ explanation for use of force insufficient).


154. See id. ¶ 76 (describing officers’ explanation for use of force insufficient).
insufficient, explanation of the widespread injuries on the body of the first applicant and on the head of the second applicant.\(^{155}\) The justification that the police officer provided claiming that the female applicant had slapped his face was not acceptable, as he was expected to react with restraint. The injuries that she suffered in retaliation, including a blow to the head, were disproportionate and not shown to be strictly necessary.\(^{156}\)

In the case of *Dembele v. Switzerland*,\(^{157}\) the applicant was approached by two gendarmes for an identity check.\(^{158}\) According to the applicant, although he had complied with the police’s request by showing his papers, they subjected him to ill treatment anyways.\(^{159}\) The medical findings made at the clinic found injuries to the arm and neck of one of the police officers and a superficial wound with inflammation on the officer’s forearm.\(^{160}\) This evidence was sufficient to establish that the applicant had offered physical resistance to the gendarmes and that the use of force by the latter had been justified in principle.\(^{161}\) It remained to be ascertained whether the force used had been proportionate to the resistance offered by the applicant.\(^{162}\) In that connection the fractured collarbone sustained by the applicant unquestionably exceeded the threshold of severity required for the treatment to fall within the scope of Article 3 of the ECHR.\(^{163}\)

Moreover, and quite apart from the direct and specific cause of the applicant’s fractured collarbone, taken overall, the methods employed by the police disclosed a disproportionate use of force.\(^{164}\) It was not disputed that the applicant was not armed with dangerous objects apart from the cigarette he was holding in his hand or that, at least in the early stages of the incident, he had not injured the police or attempted to injure them by punching or kicking them or by striking them using any other means.\(^{165}\) His resistance before being pinned to the ground and biting the arm of an officer had therefore been largely passive, albeit determined.\(^{166}\) The use of batons by the police—whether or not this had been the

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155. See *Karatepe v. Turkey*, App. No. 29766/03, HUDOC ¶ 32 (June 17, 2008), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2229766/03%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-87007%22]} [https://perma.cc/TGS4-LHQP] (detailing extent of applicants’ injuries).


158. See id. ¶ 3 (introducing circumstances of applicant’s case).

159. See id. ¶ 5 (explaining applicants attempt to comply with officers’ orders).

160. See id. ¶ 9 (detailing medical conditions of officers).


162. See id. ¶ 5 (declining to rule on appropriateness of force by gendarmes).


164. See id. ¶ 47.

165. See id.

166. See id. (analyzing whether applicant’s resistance justified gendarmes’ use of force).
direct cause of the injury to the applicant—was unjustified. 167 Accordingly, in view of the foregoing considerations, the force used to control the applicant had been disproportionate. 168 There had therefore been a violation of Article 3. 169

As has already been mentioned in the previous section dealing with Article 2 of the ECHR, 170 the use of certain arrest techniques may be justified by the violence of the suspect, but if maintained for too long, without medical intervention, the resulting death or physical or mental harm may fall under the responsibility of the authorities. 171 In Boukrourou, the ECtHR was not convinced by the government’s argument that the punches in the solar plexus had been necessary in the circumstances of the case. 172 Recalling M.B.’s serious psychiatric disorder, the ECtHR noted the violence of that technique only intensified M.B.’s agitation and resistance, and reinforced his incomprehension as to the course of events. 173 Moreover, the ECtHR also examined the treatment inflicted on M.B. inside the police van where he had been kept face downwards, handcuffed to a fixed point with three police officers standing with their full weight on various parts of his body: the first squatting on his shoulders, the second standing on his buttocks, and the third standing on his legs. 174 The ECtHR described how M.B. had been trampled by the police inside the van, disregarding M.B.’s “vulnerable situation” due to his psychiatric illness and status as a person being deprived of his liberty. 175 Without exactly defining what kind of torture, inhumane, or degrading treatment had been inflicted on M.B., the ECtHR concluded that “the repeated and inefficacious violent acts against a vulnerable person constitute an infringement of human dignity” and, as a result, found a breach of Article 3 of the ECHR. 176

Another problem experienced in the United States is the use of gas for riot control purposes. This practice was used during the 2014 Ferguson, Missouri protests following the acquittal of the officer that shot and killed Michael Brown,
an unarmed African-American. The ECtHR generally examines such situations from the angle of Article 3. In these kinds of cases, the appropriate and proportionate use of tear gas can qualify as a justified and proportionate use of force and, as a result, may comply with Article 3. Nevertheless, the ECtHR has found violations of Article 3 where legal provisions authorized the use of tear gas were lacking or in cases where the law-enforcement forces had made improper or unnecessary use of tear gas. In the judgment İzci v. Turkey, the ECtHR unanimously found breaches of the substantive aspect of Article 3 of the ECHR through the disproportionate use of force, and a violation of Article 11 of the ECHR on account of the failure to respect the applicant’s right to freedom of assembly. In this case, the applicant took part in a demonstration in Istanbul to celebrate Women’s Day, which ended in clashes between the police and protesters. Video footage of the events showed police officers hitting a large number of demonstrators with truncheons and spraying them with tear gas. Women who took refuge in shops were dragged out and beaten up by the police. The police officers did not issue any warnings to disperse demonstrators before attacking them, while the demonstrators did not respond to the attack but only tried to flee.

This case is an example of the repeated violations of the ECHR that occur in demonstrations in Turkey. What is significant about the present case is the fact that the ECtHR considered these problems as systematic, recalling that it had


178. See Çiloğlu v. Turkey, App. No. 73333/01, HUDOC ¶ 28 (Mar. 6, 2007), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2273333/01%22],%22languageisocode%22:[%22FRE%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]} [https://perma.cc/NE36-ZM89] (describing applicant’s reliance on Article 3).

179. See id. (stating injuries not serious enough to fall within scope of Article 3); Ataman v. Turkey, 2006-XIV Eur. Ct. H.R. 97, ¶ 26 (holding no violation of Article 3). In Ataman, the ECtHR did, however, find a violation of the freedom of assembly in the sense of Article 11 of the ECHR. Ataman, 2006-XIV Eur. Ct. H.R. ¶¶ 28-44.


182. See id. ¶¶ 75, 90.

183. See id. ¶ 7-8 (describing injuries suffered).

184. See id. ¶ 7-9 (describing unwarranted police behavior).

185. See İzci, App. No. 42606/05 ¶ 14 (stating even those not demonstrating affected by tear gas).

186. See id. ¶ 15 (describing video footage).
already found, in over forty judgments against Turkey, that the “heavy-handed interventions of law-enforcement officials” in demonstrations had amounted to violations of Article 3 and/or Article 11 of the ECHR.\footnote{187} The common feature of these cases was the unwillingness of the police forces to show a certain degree of tolerance towards peaceful gatherings and, in some instances, a tendency to precipitate the use of force, including tear gas, by the police.\footnote{188} It further stressed that 130 applications were pending against Turkey concerning the right to freedom of assembly and the use of force by law-enforcement officials during demonstrations.\footnote{189}

\section*{C. Conclusions}

The right to life within the meaning of Article 2 of the ECHR and the prohibition of inhumane and degrading treatment in the sense of Article 3 constitute important limitations to the freedom of States in the field of policing. Considering States’ values within the Convention and in modern, democratic society, their interpretation by the ECtHR must be particularly strict. After having examined the substantial duties of States in this field—namely to use force in a proportionate manner—the next Part will address the procedural limb of the duties of States, namely the obligation to conduct an investigation in the cause of death or ill-treatment following an incident relevant for Articles 2 and 3 of the ECHR.

\section*{III. DUTY TO INVESTIGATE THE CAUSE OF DEATH OR ILL-TREATMENT}

\subsection*{A. Under the Right to Life: Article 2 of the ECHR}

Based on the previous examination of Article 2 of the ECHR, the use of lethal force may be permissible in certain circumstances. In the case of McCann, the ECtHR established, however, that there must be some form of effective official investigation aiming at ascertaining the conformity of the police action with the ECHR.\footnote{190} Without an objective scrutiny, the protection offered under Article 2 would be rendered illusionary and ineffective. The ECtHR has repeatedly held that the emphasis must be placed on effective accountability and transparency with a view to ensuring respect for the rule of law and to maintaining public confidence.\footnote{191}

\footnotesize{\begin{itemize}
\item \footnote{187} See İzci v. Turkey, App. No. 42606/05 ¶ 95 (July 23, 2013).
\item \footnote{188} See id.
\item \footnote{189} See id. ¶ 97; see also Daniel Rietiker, Strange Bedfellows? The Cross-Fertilization of Human Rights and Arms Control, 3 Cyprus Hum. RTS. L. REV. 130, 144-45 (2014) (questioning the use of tear gas in light of human rights law).
\item \footnote{191} See Ramsahai v. The Netherlands, 2007-II Eur. Ct. H.R. 183, ¶ 353 (stating lack of need to publicly display all proceedings); Avşar v. Turkey, 2001-VII Eur. Ct. H.R. 83, ¶ 395 (describing need for “promptness”).}
\end{itemize}}
investigation or procedure that should be undertaken, it identified certain features necessary for an investigation in compliance with Article 2 of the ECHR.192

First of all, the duty to launch the investigation lays upon the authorities, which cannot rely on a complaint being made by a relative of the victim. 193 In other words, the possibility of a next-of-kin to undertake civil proceedings not involving the identification and punishment of the perpetrator of an unlawful killing cannot be taken into consideration in the scrutiny of whether an investigation has been effective within the meaning of Article 2 of the ECHR.194

Second, the investigation should be conducted by an officer or unit that is independent from those implicated in the events at stake, in a hierarchical, institutional, and practical sense.195 Even a short period of control of the investigations by the police force whose members have carried out the shooting may lead to a breach of Article 2.196 In a case against Switzerland, it was the two police officers who had arrested the victim who had also conducted the initial phase of investigation, but they had never themselves been questioned by a third-party authority.197 This was one of the elements that lead to a violation of the procedural aspects of Article 2.198

Third, effective investigation requires that the authority’s steps are capable of leading to a determination of whether the force was justified as well as the identification and, if appropriate, punishment of the responsible officers.199 The ECtHR, however, held that the investigation obligation concerns the process rather

192. See Reid, supra note 35, at 1078-84.
196. See, e.g., Ramsahai v. Netherlands, 2007-II Eur. Ct. H.R. 183, ¶¶ 335-36, 340 (noting fifteen hours of investigative control by local police violative under Article 2 of ECHR); Uzun v. Turkey, App. No. 37410/97, HUDOC ¶ 59 (May 10, 2007), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22237410/97%22],%22language%22:[%22ENG%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,22CHAMBER%22],%22itemId%22:[%222001-80476%22]} [https://perma.cc/8LU4-6NFF] (lacking independent investigation over four months before independent investigator took over violated Article 2).
198. See id.
than the outcome.200 In other words, where the authorities take reasonable steps to secure evidence concerning relevant events, lack of prosecution or conviction may not automatically lead to an Article 2 violation.201 Evidence that must be preserved includes eyewitnesses and forensic evidence as well as autopsies.202 Any defect in the investigation undermining the ability to establish the cause of death or the persons responsible for it risks falling short of this standard.203 In the case of Musayev v. Russia,204 the ECtHR found that the investigative efforts shown by the authorities were so sporadic and half-hearted that it could not even perceive an attempt to establish a comprehensive picture of the circumstances of a mass killing of civilians.205 On the other hand, a judicial officer’s conclusion that the only verdict could be lawful death did not amount to a lack of effectiveness of the procedure.206

Fourth, “the investigation must commence promptly and be conducted with reasonable expedition in order to maintain public confidence in the rule of law and to prevent any appearance of collusion or tolerance of unlawful acts.”207 It is for the State to organize its judicial system so that it can deal with these cases with due expedition.208 Moreover, where a life-threatening disappearance is concerned, the State remains under a continuing obligation to provide an effective investigation, even where considerable time has elapsed since the event occurred.209

203. See Bilgin v. Turkey, 2001-VIII Eur. Ct. H.R. 151, ¶ 144. “Where the public prosecutor was unable to obtain, in his capacity as an independent civil servant in charge of the investigation, the list of the police officers on duty at the time of the alleged events, or to interview them, or arrange a confrontation with the purported eyewitnesses.” Id.; see also Kılıç v. Turkey, 2000-III Eur. Ct. H.R. 75, ¶¶ 82-83. In that case, the investigation did not include any inquiries as to the possible targeting of the victim due to his job as a journalist. See Kılıç, 2000-III Eur. Ct. H.R. ¶ 82. Moreover, there is no indication that, any steps have been taken to investigate any collusion by security forces in the incident. Id.
204. App. Nos. 57941/00, 58699/00 & 60403/00, HUDOC (July 26, 2007), https://hudoc.echr.coe.int/eng#{%22itemid%22:%222001-81908%22}) [https://perma.cc/PVR5-2KSU].
205. See id. ¶¶ 160-163 (describing investigation faults).
208. See Reid, supra note 35, at 1082.
Fifth, public confidence and appearances also require sufficient public scrutiny of the investigation and its results, but its extent may vary from case to case. For example, there is no automatic requirement that families have access to police files or any information that they demand, or that they are kept informed throughout the investigation.\(^{210}\) However, in all cases, the next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests.\(^{211}\) This apparently requires that they are provided minimal information and afforded an opportunity to assert their version of events and to be provided with the investigative conclusions and significant decisions made by the investigative and prosecuting authorities, including any reasons for avoiding prosecution.\(^{212}\) Therefore, one can conclude that an investigation, followed by a criminal trial with an adversarial procedure before an impartial judge, is generally regarded as the next way to create safeguards and effective procedures for the findings of facts and attribution of responsibility.\(^{213}\)

B. Under the Prohibition of Inhuman and Degrading Treatment: Article 3 of the ECHR

In order to render the fundamental safeguards enshrined in Article 3 concrete and practical, the court has, following its approach in Article 2 ECHR, interpreted the provision as requiring an effective, official investigation where an individual raises an arguable claim that he or she has been seriously ill-treated by the authorities or by individuals.\(^{214}\) According to Karen Reid, notwithstanding the differences between Articles 2 and 3, in both substance and form, the procedural obligations under the former “have been transferred lock, stock and barrel under the latter, flowing presumably from the court’s concern to ensure the effective implementation” of guarantees against torture.\(^{215}\) Therefore, the present article only summarizes the relevant principles.


\(^{211}\) See Öğür v. Turkey, 1999-III Eur. Ct. H.R. 519, ¶ 92 (indicating Court observed lack of access by family to case file or administrative council proceedings).

\(^{212}\) See Reid, supra note 35, at 1082.


\(^{214}\) See Šečić v. Croatia, App. No. 40116/02, HUDOC ¶ 49-60 (May 31, 2007), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22240116/02%22],%22languageisocode%22:%22ENG%22},%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-80711%22]} 
[https://perma.cc/Q2KP-JBES]; see also Vasilyev v. Russia, App. No. 32704/04, HUDOC ¶ 101-104 (Dec. 17, 2009), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%223270404%22],%22languageisocode%22:%22ENG%22},%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-96339%22]} 
[https://perma.cc/V54V-HF9G].

\(^{215}\) See Reid, supra note 35, at 1043.
First of all, the investigation should be thorough and diligent, disclosing a serious attempt to find out what happened.216 Moreover, it should be capable of leading to the identification and punishment of those responsible, and requires appropriate independence, public scrutiny, promptness and expedition.217 Systemic defects which prevent applicants from obtaining independent and effective investigation of their allegations may also constitute procedural violations.218 Furthermore, the effectiveness requirement also extends from the preliminary investigation stage to the examination of the complaint before the courts, which are required to carry out a careful scrutiny ensuring the deterrent effect of the judicial system and upholding the prohibition of ill-treatment.219 As an example, a procedural breach arose in a case where the court proceedings become time-barred for undue delay and the facts were never established by a competent court.220

C. Conclusions

The procedural limb of Articles 2 and 3 of the ECHR constitutes a powerful tool in the fight against ill-treatment, such as torture, and also against the impunity of its authors. As a result, the procedural limb enhances the effectiveness of the ECHR system as a whole. The procedural limb should be considered an alternative responsibility of the States to conduct an appropriate, prompt, and effective investigation in cases of death or ill-treatment of a person relevant under Article 2 or 3 of the ECHR. As a minimum requirement, once an incident

216. See Mikheyev v. Russia, App. No. 77617/01, HUDOC ¶ 108 (Jan. 26, 2006), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2277617/01%22],%22languageisocode%22:[%22ENG%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-72166%22]} [https://perma.cc/SM8G-89MJ]; see also Chitayev v. Russia, App. No. 59334/00, HUDOC ¶ 163 (Jan. 18, 2007), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2259334/00%22],%22languageisocode%22:[%22ENG%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]} [https://perma.cc/6DV8-8YM4].


218. See Macovei v. Romania, App. No. 5048/02, HUDOC ¶¶ 46-57 (June 21, 2007), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%225048/02%22],%22languageisocode%22:[%22ENG%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]} [https://perma.cc/945W-X9Q7]. The prosecutor had a monopoly as to the characterization of offences going before the courts, which had led in that case to the dismissal of complaints of serious bodily harm. See id.

219. See Beganović v. Croatia, App. No. 46423/06, HUDOC ¶ 77 (June 26, 2009), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2246423/06%22],%22languageisocode%22:[%22ENG%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]} [https://perma.cc/B2SD-DU] (discussing requirement of effectiveness); Duran v. Turkey, App. No. 42942/02, HUDOC ¶¶ 61-62 (Apr. 8, 2008), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2242942/02%22],%22languageisocode%22:[%22ENG%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-85767%22]} [https://perma.cc/6XFM-4KM7] (highlighting importance of careful scrutiny required under Articles 2 and 3).

220. See Beganović, App. No. 46423/06 ¶¶ 85-88.
IV. GUARANTEES AGAINST VIOLENCE ON RACIAL GROUNDS: ARTICLE 14 OF THE ECHR AND THE EXAMPLE OF THE ROMA POPULATION

A. General Considerations

Recent U.S. experience shows that police violence is often based on racial motivation. The shooting of Michael Brown in Ferguson and countless others across the United States has highlighted a widespread pattern of racially discriminatory treatment by law enforcement officers.\(^{221}\) This adds a further dimension to the already difficult fight against police violence.

The present study focuses on the Roma population and travelers in Central Europe, with which the case law of the ECtHR is particularly rich. Violence, hatred, and discrimination are particularly widespread against those people and cases decided by the court, which concern very diverse aspects of their existence, lifestyle and culture, such as attacks by private individuals.\(^{222}\) These attacks include: attacks on Roma villages and destruction of houses and possessions, forced evictions, death in a medico-social institution, death in an arson attack, death in police custody or in detention, forced sterilization, prohibition of slavery and forced labor, right to liberty and security, access to medical records, ban on begging, verbal abuse and threats, refusal to recognize validity of Roma marriage for purposes of establishing entitlement to survivor’s pension, right to education, or the right to free elections.\(^{223}\)

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\(^{221}\) See Amnesty Int’l, supra note 1, at 10. According to Mapping Police Violence, of the 1,149 people killed by police in 2014, 304 (26%) were black. Black individuals represent approximately 13.2% of the U.S. population.

\(^{222}\) See generally Angelova v. Bulgaria, App. No. 55523/00, HUDOC (July 26, 2007), https://hudoc.echr.coe.int/eng#{%22fulltext%22: [%2255523/00%22],%22languageisocode%22:[%22ENG%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-81906%22]} [https://perma.cc/9HPC-7VXR] (holding victim attacked for Roma ethnicity violation of Article 2 and 14); Šečić v. Croatia, App. No. 40116/02 (May 31, 2007).

In case there is a racial aspect underlying the allegation of human rights abuse, the ECtHR brings Article 14 into play, enshrining the right not to be discriminated against. This was also the case in situations concerning police violence and effective investigations that were brought to the ECtHR mainly under Articles 2 and 3. On the other hand, it is important to stress that the clause under Article 14 does not entail a general and absolute prohibition against discrimination. It is generally a rather weak guarantee with a limited scope, as “enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Regarding protection against discrimination, the court reiterates that Article 14 of the ECHR only complements the other substantive provisions of the Convention and the protocols thereto. It has no independent existence because it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. On the other hand, the application of Article 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary but also sufficient for the facts of the case to fall “within the ambit” of one or more of the Articles of the Convention or its protocols. Finally, Article 14 enumerates, in a non-exhaustive manner, different reasons for the discriminatory treatment. It is obvious that in the

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224. See ECHR, supra note 6, art. 14.
227. See ECHR, supra note 6, art. 14 (listing grounds of discrimination).
cases relevant for the present analysis, “race” or “association with a national minority” enter into play.228

B. The Leading Article 14 Case of Nachova v. Bulgaria

1. Summary of the Facts and the Reasoning of the Court

The leading case of Nachova v. Bulgaria,229 delivered by the Grand Chamber on July 6, 2005, concerned the killing of the applicants’ relatives, both aged 21, by a military policeman who was trying to arrest them.230 Two men of Roma origin were conscripts serving compulsory military service in an army division dealing with the construction of apartments.231 The two individuals escaped from the construction site outside the prison where they were assigned to and took refuge in the home of one of their grandmothers.232 Neither of the two individuals were armed.233 Three days later, the local military police unit received an anonymous tip of the individuals whereabouts, and dispatched four military police officers under the command of Major G. to the village.234 They had instructions to arrest the fugitives using all the means and methods dictated by the circumstances.235 Major G. was armed with a handgun and a Kalashnikov automatic rifle.236 Having noticed the military vehicle in front of their house, the fugitives tried to escape.237 While running away they were shot by Major G. after he had given them a warning to stop.238 Both men died on their way to hospital.239 One neighbor claimed that several of the policemen had been shooting and that at one stage Major G. had pointed his gun at him in a brutal manner and had insulted him saying: “You damn Gypsies.”240

The autopsy report found that both men had died from gunfire wounds, fired from an automatic rifle from a distance.241 Mr. Petkov had been shot in the chest and Mr. Angelov in the back.242 The military investigation report concluded that Major G. had acted in accordance with the regulations and had tried to save the fugitives’ lives by warning them to stop and not shooting at their vital organs.243

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228. See id.
230. See id. ¶s 2, 13.
231. See id. ¶s 11, 13.
232. See id. ¶s 14-15.
234. See id. ¶s 17-18.
236. See id. ¶ 20.
237. See id. ¶ 24.
238. See id. ¶s 24-29.
240. See id. ¶ 35.
242. See id. ¶s 41-42.
243. See id. ¶ 50 (discussing conclusions of preliminary investigation report).
The military prosecutor accepted the conclusions and closed the investigation. The applicants’ subsequent appeals were dismissed.

Before the ECtHR, the applicants alleged that their relatives had been deprived of their lives in violation of Article 2 of the ECHR, resulting from deficient law and practice that permitted the use of lethal force without absolute necessity. They further alleged that prejudice and hostile attitudes towards people of Roma origin had played a decisive role in the events leading up to the shootings and the fact that no meaningful investigation had been carried out, relying on Article 14 of the Convention in conjunction with Article 2.

As far as the non-autonomous character of the prohibition of discrimination under the Convention is concerned, the court could link Article 14 to Article 2 of the ECHR. As mentioned above, the court held that there had been a violation of Article 2 of the Convention in respect of the deaths of the applicants’ relatives. The ECtHR also held that Article 2 had been violated where the authorities failed to conduct an effective investigation into these deaths. The following subsections will examine whether the killings had been racially motivated, and whether there had been an adequate investigation into possible racist motives.

2. The Substantive Aspect: Were the Killings Racially Motivated?

The case proceeded against the backdrop of substantial general evidence of widespread discrimination against Roma in Bulgaria, as well as a body of reports and opinions authored by relevant institutions within the Council of Europe and the United Nations, some of which had been contested by the Bulgarian authorities. In this regard, of note to stress that the Chamber, which first dealt with the case, developed a novel approach reversing the burden of proof if there is evidence of a culture of impunity with respect to treatment of race in the ensuing police investigation and by general background circumstances. The Grand Chamber undertook a full assessment of all the evidence before it and, contrary to the Chamber, concluded that Article 2 had not been racially motivated, in violation of Article 14 of the ECHR because it was not established beyond a reasonable doubt that racist attitudes played a role in the applicants’ treatment by police.

244. See id.
246. See id. ¶ 87.
248. See supra Section II.A.4.b.
250. See infra Section IV.B.2.
251. See infra Section IV.B.3.
the police.\textsuperscript{254} The court did recognize the generally problematic situation experienced by Roma in Bulgaria, but made clear that “its sole concern [was] to ascertain whether in the case at hand the killing of Mr. Angelov and Mr. Petkov [had been] motivated by racism.”\textsuperscript{255}

The organization Interights had argued before the court that the standard of proof “beyond reasonable doubt” was inappropriate in a human rights context and provides too significant of an evidentiary obstacle for applicants in such cases.\textsuperscript{256} The Grand Chamber, disapproving the novel approach of the Chamber, did not consider it appropriate to reverse the burden of proof to the Government:

The Grand Chamber cannot exclude the possibility that in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination and—if they fail to do so—find a violation of Article 14 of the Convention on that basis. However, where it is alleged—as here—that a violent act was motivated by racial prejudice, such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned. While in the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the provision of services, that approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated. The Grand Chamber, departing from the Chamber's approach, does not consider that the alleged failure of the authorities to carry out an effective investigation into the supposedly racist motive for the killing should shift the burden of proof to the Government with regard to the alleged violation of Article 14 of the Convention taken in conjunction with the substantive aspect of Article 2.\textsuperscript{257}

Even though this outcome is disappointing from the outset, it is worth nothing that the Grand Chamber did not completely shut the door for a reversal of burden of proof imposed on the Government in case of allegation of discrimination during a police intervention. Indeed, in a subsequent case \textit{Stoica v. Romania}\textsuperscript{258} the ECtHR did exactly that in relation with a case involving ill-treatment within the meaning of Article 3 of the ECHR.

\textsuperscript{254} See id. ¶¶ 158-159 (outlining Court’s findings).

\textsuperscript{255} See id. ¶ 155 (noting Court’s sole role to evaluate racial basis for killings).

\textsuperscript{256} See id. ¶¶ 140-142 (articulating position of Interights and reasonable doubt requirement).

\textsuperscript{257} See Nachova, 2005-VII Eur. Ct. H.R. ¶ 157 (explaining authorities’ failure to effectively investigate does not shift burden of proof).

3. The Procedural Limb: Did the Investigation Cover Possible Racially-Based Motives?

As far as discrimination in the sense of Article 14, combined with the procedural limb of Article 2 is concerned, the Grand Chamber recalled the applicable general principles as follows:

[W]hen investigating violent incidents and, in particular, deaths at the hands of State agents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.259

Applying those principles to the specific case, the Grand Chamber held that the authorities investigating the deaths of Mr. Angelov and Mr. Petkov had before them the statement of Mr. M.M., a neighbor of the victims, who had stated that Major G. had shouted “[y]ou damn Gypsies” while pointing a gun at him immediately after the shooting.260 That statement required verification due to the amount of prejudice and hostility against Roma that existed in Bulgaria.261 The Grand Chamber considered further—“as the Chamber did—that any evidence of racist verbal abuse being uttered by law enforcement agents in connection with an operation involving the use of force against persons from an ethnic or other minority [was] highly relevant to the question whether or not unlawful, hatred-induced violence took place.”262 “Where such evidence comes to light in the investigation, it must be verified and—if confirmed—a thorough examination of all the facts should be undertaken in order to uncover any possible racist motives.”263

The ECtHR also held the fact that Major G. had used grossly excessive force against two unarmed and nonviolent men also called for a careful investigation.264 In sum, the investigator and prosecutors involved had plausible information that was sufficient to warrant an investigation into possible racist overtones in the events that led to the death of the two men.265 “However, the

260. See id. ¶ 35.
261. See id. ¶ 163 (noting consequences of statement).
262. Id. ¶ 164.
264. Id. ¶ 165.
authorities did nothing to verify . . . M.M.’s statement.” In light of what precedes, the ECtHR found that the authorities had failed in their duty under Article 14 of the ECHR taken in conjunction with Article 2 to take all possible steps to investigate whether or not discrimination played a role in the events. Therefore, the court held that there was a violation of Article 14 of the ECHR, as well as of Article 2’s procedural aspect.

4. Summary

As to whether the killings were racially motivated, the Grand Chamber departed from the Chamber’s approach, finding it was not established that racist attitudes had played a role in the applicants’ relatives’ deaths. It therefore held that there had been no violation of Article 14 of the Convention taken together with the material limb of Article 2. In contrast, regarding whether there had been an adequate investigation into possible racist motives, the Grand Chamber found that the authorities had failed in their duty to take all possible steps to investigate whether or not discrimination may have played a role in the events. The duty to investigate is triggered when the circumstances suggest that the death or ill-treatment of the minority concerned was due to racial prejudice.

C. The Follow-up Cases

The ECtHR was faced with a couple of follow-up cases to Nachova, which it examined either under Article 2 (right to life) or Article 3 of the ECHR (ill-treatment).

1. Article 14 of the ECHR in Conjunction with Article 2

Less than two years after Nachova, the ECtHR decided the case of Karagiannopoulos v. Greece. In this case, the Greek Government alleged, on one hand, that the police, who suspected that the Karagiannopoulos family was involved in drug trafficking, carried out a search at the family home, on January 26, 1998. Among others, they arrested the applicant, who was seventeen years old, and he

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266. Id. ¶ 167 (discussing authorities’ actions and omissions).
267. See id. ¶ 168.
268. See id. (noting violations).
270. See id. ¶ 168 (finding authorities violated Article 14 and Article 2’s procedural limb).
271. See Harris et al., supra note 18, at 814 (discussing when duty to investigate racial motives gets triggered).
272. See infra Sections IV.C.1-2 (exploring whether the Court found breach of Article 14’s discrimination prohibition).
273. See Karagiannopoulos v. Greece, App. No. 27850/03, HUDOC (June 21, 2007), https://hudoc.echr.coe.int/eng#{%22fulltext%22:%2227850/03%22},%22languageisocode%22:%22ENG%22},%22documentcollectionid%22:%22GRANDCHAMBER%22,%22CHAMBER%22},%22itemid%22:%222001-81236%22} [https://perma.cc/A3MF-DUGJ].
offered to take the police officers to a place where cannabis was hidden. Upon arrival, the two police officers unlocked the applicant’s handcuffs, he shoved them away and attempted to escape.\textsuperscript{274} One of the policemen caught the applicant, but he managed to grab the latter’s gun and the two men fought; the gun went off accidentally and wounded the applicant in the head. On the other hand, the applicant alleged that, on arrival at the family home, the policemen fired into the air, caught him by the hair, and then handcuffed him. Instead of taking him to the police station, they took him to a nightclub car-park and began beating him so that he would name other places where drugs were hidden. The applicant told them that he did not know of any such places. The policeman responsible for starting the beating then took out his weapon and placed it against the applicant’s head, threatening to kill him if he did not speak; he finally shot him in the head, wounding him.\textsuperscript{275}

Independently from the different versions, on the day of the incident, the policeman in question was arrested and criminal proceedings were brought against him for negligently causing injury; he was released the following day.\textsuperscript{276} The applicant alleged, in particular, that one of the police officers who had taken part in the operation had stated before the criminal court that “the majority of gypsies are criminals.”\textsuperscript{277} The court considered that while their trivialization meant that the statements made by that witness during the trial were clearly insulting for persons of Roma origin and were thus unacceptable, there had not been a violation of Article 14 taken together with Article 2.\textsuperscript{278} As a result, it did not find a violation of the prohibition of discrimination.

A case with particularly alarming circumstances involving violence by private persons is the case of \textit{Angelova v. Bulgaria}.\textsuperscript{279} The applicants were the mother and brother of a man of Roma origin who was killed in an unprovoked attack by a group of seven teenagers in April 1996.\textsuperscript{280} The police made immediate arrests. Upon questioning the youths, they learned that the attack had been racially motivated although the intention had been to give the victim a beating, not to kill him.\textsuperscript{281} However, one of the group produced a knife and stabbed the victim, who, according to the autopsy, died of massive internal bleeding.\textsuperscript{282} There was conflicting evidence as to who had wielded the knife.\textsuperscript{283} In June 1996, one of the group members was charged with negligent homicide and the charges against the

\begin{footnotes}
\item[274] See id. ¶ 8.
\item[275] See id. ¶ 9.
\item[276] Id. at ¶ 17.
\item[277] See Karagiannopoulos, App. No. 27850/03 ¶ 73.
\item[278] See id. ¶ 79 (failing to specify whether procedural or substantive duty at stake).
\item[281] Id. ¶ 3.
\item[282] See id. ¶ 14 (discussing autopsy’s medical conclusions).
\item[283] See id. ¶ 16 (noting four assailants charged).
\end{footnotes}
other members included aggravated hooliganism.\textsuperscript{284} The pace of the investigation then slowed with occasional investigative steps continuing until June 2001.\textsuperscript{285} Thereafter there were no further developments until March 2005, when the prosecutor’s office dismissed under the statute of limitations the aggravated hooliganism charges against five members of the group who had been juveniles at the time of the attack.\textsuperscript{286} It also dismissed the negligent homicide charge against N.B. and remitted the case for further investigation with instructions for G.M.G. to be charged with the murder.\textsuperscript{287} A hooliganism charge remained in relation to another of the accused, who was an adult at the time of the attack.\textsuperscript{288} In April 2005, the applicants and the victim’s three sisters filed a request to be joined as civil claimants in the criminal proceedings.\textsuperscript{289}

The applicants alleged that the authorities failed to carry out a prompt, effective, and impartial investigation capable of leading to the trial and conviction of the individuals responsible for the ill treatment and death of their relative who was of Roma origin.\textsuperscript{290} The applicants further alleged that the authorities failed in their duty to investigate and prosecute a racially motivated violent offence and that the length of the criminal proceedings against the assailants was excessive.\textsuperscript{291}

The ECtHR found that the authorities were aware of the assailants’ racist motives at an early stage in the investigation because one of the assailants provided a statement detailing their reasons for carrying out the attack.\textsuperscript{292} The ECtHR found that the authorities failed to adequately perform their duties to distinguish between racially and non-racially motivated offenses.\textsuperscript{293} As a result, the ECtHR concluded that this behavior constituted unjustified treatment, violating both Article 14 of the ECHR and the procedural aspects under Article 2 of the ECHR.\textsuperscript{294}

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\textsuperscript{284} See Angelova v. Bulgaria, App. No. 55523/00 ¶ 26 (July 26, 2007) (noting charges).
\textsuperscript{285} See id. ¶¶ 30-50 (explaining investigative steps taking place through 2001).
\textsuperscript{286} See id. ¶ 52 (discussing charge dismissal).
\textsuperscript{287} See id. (discussing prosecutor’s actions).
\textsuperscript{288} See Angelova, App. No. 55523/00, Eur Ct. H.R. ¶ 53 (noting charges against G.R.G. remained).
\textsuperscript{289} See id. ¶ 53 (including monetary damage amount).
\textsuperscript{290} See Angelova v. Bulgaria, App. No. 55523/00 ¶177 (July 26, 2007) (discussing applicants’ complaints).
\textsuperscript{291} See id. ¶ 107 (noting alleged failures). In fact, it took the authorities more than eleven years to investigate. Id. ¶ 116 (detailing authorities’ defective investigation).
\textsuperscript{292} See id. (explaining authorities knew racial motives for attack on applicants’ relatives on April 19, 1996).
\textsuperscript{293} See id. ¶ 117 (finding violation of Article 14 of ECHR to prevent discrimination). The ECtHR noted that the authorities’ inability to perform a speedy investigation and bring the assailants to trial, despite knowing the attack was racially motivated, was unacceptable. See id. ¶ 116 (commenting on widespread issues of racism and need to protect minorities).
\textsuperscript{294} See Angelova, App. No. 55523/00 ¶ 117 (concluding findings of ECtHR). The ECtHR further concluded that it was unnecessary to examine whether there was an additional violation under Article 14 in conjunction with the procedural aspect of Article 3 of the ECHR. See id. ¶ 118.
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In *Petrov v. Bulgaria*, two police officers chased and fired shots at the applicant, a man of Roma origin, because they believed he was stealing hens. Relying on Articles 2 and 14 of the ECHR, the applicant complained that the life-threatening force used against him had been unwarranted and the subsequent investigation was ineffective, partly due to his ethnic origin. The ECtHR concluded the evidence failed to establish that any racist motives played a role in the shooting of the applicant, and thus, taken in conjunction with Article 2, there was no violation of the substantive aspects of Article 14 of the ECHR. Further, under the procedural aspects of the ECHR, the ECtHR found that the authorities did not have enough information to require an investigation into any possible racist motives behind the officers’ pursuit and use of force upon the applicant. Therefore, no violation of Article 14 in conjunction with Article 2 was found.

A particularly tragic case where the ECtHR did not find a problem either under the prohibition of discrimination in the context of police violence is the case of *Mižigárová v. Slovakia*. In that case, the applicant’s husband, a twenty-year-old Roma man in good health, was arrested on suspicion of bicycle theft. He was questioned by four policemen and then by a lieutenant, an off-duty officer with whom he had had previous encounters with. During the latter interrogation, he was shot in the abdomen with the lieutenant’s service pistol. He died four days later in the hospital. The investigation concluded that he had forcibly taken the gun from the lieutenant and shot himself. Subsequently, a jury convicted the lieutenant of injury to health caused by negligence in the course of duty and sentenced him to one year’s imprisonment and suspended for a two-and-a-half-year probationary period. The ECtHR held that while the lieutenant’s conduct during the applicant’s detention called for serious criticism, there had
been no evidence that it had been racially motivated.303  In addition, the ECtHR did not consider that the authorities’ failure to carry out an effective investigation into the alleged racist motive for the incident should shift the burden of proof regarding the use of force by the government.304

In its procedural analysis of the case with respect to Article 14, in conjunction with Article 2, the ECtHR was not persuaded that the objective evidence was sufficiently strong in itself to suggest the existence of a racist motive.305 Therefore, the ECtHR did not hold that the authorities had before them information that was sufficient to bring into play their obligation to investigate possible racist motives on the part of the officers.306 This conclusion was taken by a majority of six votes to one.307 In his partly dissenting opinion, Judge David Thór Björgvinsson justified his vote in the following terms:

I do not agree that there has been no violation of the procedural head of Article 14 taken in conjunction with Article 2 of the Convention. These are my reasons: Mr. Lubomír Šarišský was of Roma origin. He was 21 years old when he was shot dead in police custody. This tragic event took place on 12 August 1999. I note that paragraphs 57–63 of the judgment refer to numerous international reports of alleged police brutality in respect of persons of Roma origin in Slovakia. The reports referred to, which are all from the years 1999-2001, clearly show that police brutality in respect of persons of Roma origin was, at the relevant time, systemic, widespread and a serious problem in Slovakia. Still, the majority, in paragraph 123, albeit concerned about these reports, comes to the conclusion that it is not persuaded that the objective evidence is sufficiently strong in itself to suggest the existence of a racist motive. I disagree. There is, in my view, enough objective evidence to suggest the existence of a hostile racist motive. Furthermore, the persistent criticism from international bodies manifested in these reports should have alerted the authorities to the possible existence of such a motive. Thus, the authorities were, in my view, under the obligation to conduct an investigation as to whether racist motives played a part in Mr. Lubomír Šarišský’s death. Since no such investigation was carried out I conclude that there has been a violation of the procedural head of Article 14 in conjunction with Article 2 of the Convention.308

From our point of view, there is nothing to add to the convincing opinion. We share the point of view that the ECtHR should have found a breach of Article 14, combined with the procedural aspect of Article 2 of the ECHR, but in particular

303. See id. ¶ 117.
304. See Mižigárová, App. No. 74832/01 ¶ 116 (evaluating burden shifting in Article 14 context).
305. See id. ¶ 117 (explaining police conduct insufficient basis for racially motivated conclusion).
307. See id. ¶ 28.
308. Id. ¶ 34 (Björgvinsson, J., dissenting) (outlining reasons for disagreements with majority).
the findings of the ECtHR in the last two cases show, however, that the threshold of a breach of Article 14 of the ECHR in such situations is considerably high. It can be generally asserted that, even where there are distressing reports of brutality towards Roma people, this may not necessarily be enough to trigger the obligation to launch an investigation as to any racial motivation and still requires objective evidence related to the particular incident.309

2. Article 14 of the ECHR in Conjunction with Article 3

Already some months after the Grand Chamber delivered the Nachova judgment, a chamber of the ECtHR decided the case of Bekos v. Greece,310 regarding physical and verbal abuse of two Roma gypsies during police custody.311 The ECtHR found that there had been no violation of Article 14, taken together with Article 3, concerning the allegation that racist attitudes played a role in the applicant’s treatment by police, but held that the authorities failed in their duty to take all possible steps to investigate whether or not discrimination might have played a role in the events at issue.312 Its reasoning is similar to the Nachova approach, a case that was decided in light of Article 14 combined with Article 2 of the ECHR.313

The ECtHR held that in the present case, despite the plausible information available to the authorities indicating that the alleged assaults had been racially motivated, there was no evidence that they carried out any examination into this question.314 In particular, nothing was done to verify the statements of the first applicant that they had been racially verbally abused or the other statements referred to in the open letter of the Greek Helsinki Monitor and the Greek Minority Rights Group alleging similar ill-treatment of Roma; nor does any investigation appear to have been conducted into how the other officers of the Mesolonghi police station were carrying out their duties when dealing with ethnic minority groups.315 Furthermore, although the court indicated that although the Greek Helsinki Monitor provided the requisite evidence of the racial motives behind the incident, it did not consider this aspect in reaching its verdict and treated the case in the same way that it would if the case did not involve racial undertones.316 As a result, the court failed in undertaking its duty as required by Articles 3 and 14 of the ECHR to properly investigate the acts of discrimination and to determine, as it should have, that there was a violation of those Articles.317

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309. See Reid, supra note 35, at 669; see, e.g., Harris et al., supra note 18, at 814 n. 263 (finding violation largely relied on prosecutor’s tendentious remarks).
311. See id. ¶ 74.
312. See id.
313. See id.
315. Id.
317. Id. ¶ 75.
In 2008, in the remarkable case of *Stoica v. Romania*, cited above, a Chamber of the ECtHR departed from the approach of the Grand Chamber in *Nachova*, confirmed by the subsequent judgments, insofar as it shifted the burden of proof to the government regarding the existence—or absence—of racist motives behind the alleged acts. In other words, it applied exactly what had been proposed by the Chamber of the ECtHR that dealt with the *Nachova* case at first instance.

In this case, during a clash between officials and a group of Roma, the fourteen-year-old applicant, a Romanian national of Roma origin, was allegedly beaten by a police officer despite a warning that he had recently undergone head surgery. The government denied this, claiming that villagers armed with bats had attacked the deputy mayor’s car. The applicant was taken to the hospital the same evening. A subsequent medical report certified that he had bruises and grazes caused by a blunt instrument and a thoracic concussion. Shortly afterwards he was declared severely disabled. Upon the investigation into the applicant’s criminal complaint, a military prosecutor decided not to prosecute the police officers involved as the evidence against them was insufficient, and concluded that the conflict had not been of a racist nature. The villagers’ statements corroborating the applicant’s version of the events were disregarded as biased and unreliable. In the meantime, the local police informed the military prosecutor that no report had been filed to bring criminal proceedings for insulting behavior against the Roma involved in the incident because it was considered to be “pure Gypsy behavior.”

The applicant complained that the ill-treatment that he received and the reason the police officers who beat him were not prosecuted was due to his Roma ethnicity, which is contrary to the principles set forth in Articles 3, 13, and 14 of the ECHR prohibiting discrimination.

The ECtHR reiterated the duty State authorities have when investigating violent incidents to uncover any racist motives, and noted that the military prosecutor found no racial aspect to the incident in this case. The ECtHR found problematic, however, that the villagers’ statements were pushed aside as biased,
while the police officers’ statements were fully accepted and used in the reasoning and conclusion of the military prosecutor. 330 Additionally, the ECtHR condemned the military prosecutor for not recognizing that the Suceava Police report, which described the Roma villagers behavior as “purely Gypsy,” was clearly stereotypical. 331 All in all, the ECtHR considered that the authorities had not done everything in their power to investigate the possible racist motives behind the situation. 332

In contrast to the Nachova case, the ECtHR did not find an autonomous violation of Article 14 in conjunction with the procedural obligation to investigate, but took the findings under the procedural aspect of Article 3 into account in the examination of a “substantive” violation of Article 14 of the ECHR. 333 Here would lie the added value of the Stoica case. In this regard, the ECtHR acknowledged that, “where it is alleged—as here—that a violent act was motivated by racial prejudice, shifting the burden of proof to the respondent Government might amount to requiring the latter to prove the absence of a particular subjective attitude on the part of the person concerned.” 334

There is no dispute that the incident took place between Roma villagers and police forces and the applicant himself was of Roma origin. 335 According to the villagers, the police officers asked F.L. if he was Gypsy or Romanian before beating him upon the deputy mayor’s request “to teach the Roma a lesson.” 336 Further, the ECtHR noted that the Suceava Police report’s description of the villagers’ behavior was stereotypical, establishing that the police officers had racist motives during the incidents and throughout the investigation. 337 As such, there was “no reason to consider that the applicant’s aggression by the police officers was removed from this racist context.” 338 For all those reasons, the ECtHR considered that the burden of proof rested with the government, due to the evidence of discrimination ignored by the police and the military prosecutor and the racially biased investigation into the incidents. 339 The ECtHR held that the evidence was clear that there were racial motives behind the officials actions, and the government failed to put forth any racially neutral arguments. 340 There had accordingly been a violation of Article 14 of the ECHR taken in conjunction with

331. See id. ¶ 122.
333. See id. ¶ 125.
334. See id. ¶ 127.
335. See id. ¶ 128.
336. See Stoica, App. No. 42722/02 ¶¶ 8-9, 128.
337. See id.
339. See id. ¶ 130 (explaining burden of proof requirements considered).
340. See id. ¶¶ 8-9, 131 (outlining lack of racially neutral arguments to combat officers’ actions).
Article 3, without specifying whether it is a procedural or a substantive violation.\textsuperscript{341}

The \textit{Stoica} approach remained, however, an isolated case in the practice of the ECtHR and was not confirmed in cases decided subsequently, in which the ECtHR, entirely in line with the approach of the Grand Chamber in the \textit{Nachova} case, examined separately allegations of violations of the procedural and substantive limb of Article 14 ECHR. In more recent cases against Romania, the ECtHR found some violations of the procedural limb of Article 14, combined with Article 3 ECHR, but never, to our knowledge, of its substantive part.\textsuperscript{342} In none of the cases, the ECtHR shifted the burden of proof to the government regarding racist motives behind the impugned acts.

\textbf{V. CONCLUDING REMARKS}

On one hand, the conclusion of the Grand Chamber in the \textit{Nachova} case regarding the substantive limb of Article 2 of the ECHR may appear disappointing and the standard and burden of proof too ambitious for an international human rights mechanism that wants to be effective. Moreover, in spite of those cases in which the ECtHR has found a violation of the prohibition of discrimination (Article 14 ECHR), combined with the right to life or the prohibition of ill treatment, there are other applications brought to Strasbourg in which the ECtHR did not criticize the national authorities’ assessment due to the difficulty to prove racial motives behind a certain act in violation of Articles 2 or 3 of the ECHR. Regarding the substantive limb, an assertion only that police commonly commit racist assaults by itself is not enough to show an incident had discriminatory overtones.\textsuperscript{343} Likewise, reprehensible conduct by itself towards a Roma in and of itself is not evidence of racist motivation.\textsuperscript{344}

\textsuperscript{341} See id. ¶ 132. The judgment nevertheless indicates the ECHR “will further look into the implication of this finding for the examination of the allegations of a ‘substantive’ violation of Article 14.” See id. ¶ 125.

\textsuperscript{342} See Boaca v. Romania, App. No. 40355/11, HUDOC ¶ 104 (Jan. 12, 2016), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%222240355/11%22],%22languageisocode%22:[%22ENG%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%222001-159914%22]} [https://perma.cc/3RBK-9V59] (holding no violation of Article 14); Ciorcan v. Romania, App. No. 29414/09, HUDOC ¶ 152 (Jan. 17, 2015), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22229414/09 %22],%22languageisocode%22:[%22ENG%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22 ,%22CHAMBER%22]} [https://perma.cc/P7BU-HZ7X] (noting alleged violation of Article 14). In \textit{Soare}, the ECtHR did not find a violation of either the procedural nor the substantive limb of Article 14. See \textit{Soare} v. Romania, App. No. 24329/02 ¶ 204 (Feb. 22, 2011). The ECtHR held that while the conduct of the police officer who fired the shot was open to serious criticism, this did not provide a sufficient basis for concluding that it had been racially motivated. See id. There was no evidence to suggest, either, that the police officers implicated in the incident made racist remarks. See id. Lastly, the fact that on the evening of the incident, the police officer who fired the shot stated that he had been “attacked by a Gypsy” was not sufficient in itself to require the authorities to ascertain whether the incident had been sparked by racist motives. See id. ¶ 208.

\textsuperscript{343} See \textit{Reid}, supra note 35, at 669.

\textsuperscript{344} See id.
Of course, in most of the cases the ECtHR did find violations of the substantive or procedural aspects of Article 2 and 3, but a separate violation of Article 14 would have strengthened the judgments and conveyed important signals in the fight against racially motivated violence against the Roma minority. For this reason also, it is regrettable, from our point of view, that the Stoica approach, implying a reversal of burden of proof for the absence of racist motives behind the repugnant acts, remained an isolated episode in the practice of the Strasbourg Court, even more so considering that the threshold for a violation of Article 14 of the ECHR, combined with the substantive limb of Article 2 or 3, is extremely high.

On the other hand, after being very reluctant to find a violation of the prohibition of discrimination against Roma in such cases before, the ECtHR, in the Nachova case, finally set an strong signal in the fight against violence against that population by finding a violation of Article 14, combined with the procedural limb of Article 2 of the ECHR, for lack of proper investigation of the question whether racial considerations had played a role in the tragic events. It has also been shown that, in the aftermath of Nachova, raising issues of discrimination in light of the right to life, similar cases where dealt with by the ECtHR under Article 14, combined with Article 3. Finally, it can also be mentioned that the ECtHR has acknowledged that the special investigative duties imposed on the state also apply when the actual treatment contrary to Article 2 (or 3) of the ECHR was inflicted by private individuals.345

In conclusion, this Article argues that the ECtHR’s practice in the field of use of force by the police is strict and demanding, and views protecting the rights enshrined in the Convention in a practical and effective manner. Its judgments are generally well-reasoned, detailed, and well-received among the State’s Parties, civil society, and academia. It can be said that this is an area where the ECtHR still enjoys high respect and credit, probably because the fundamental value enshrined in the rights at stake is broadly recognized. The ECtHR is not reluctant to find violations of the right to life, the prohibition of ill-treatment, or discrimination if it is of the opinion that the use of force has not been proportionate (substantive limb) or if it considers that the investigation after the incident has occurred has not been thorough enough and capable of leading to the establishment of the facts and the identification and, if appropriate, punishment of the responsible agents (procedural limb). The articulation between the substantive limb and the procedural limb is often sound and logical. The procedural duty is a significant and precious “invention” by the ECtHR to increase the effectiveness of the ECHR system.

Regarding racial violence, the ECtHR has recognized the need for special protection and vigilance and has decided many cases concerning discrimination of the Roma population, a particularly vulnerable group in Central Europe in various fields. Regarding police violence, the practice of the ECtHR has developed

significantly, encompassing today racially motivated brutality, discrimination, and hatred originating from private individuals or groups. The Grand Chamber has recognized the necessity of the fight against discrimination for the dignity of the human being, in particular when expressed by physical violence, and held as follows in the Nachova case:

Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment.346

The duty to investigate police violence and possible racist motives behind such acts has not been foreseen by the drafters of the ECHR but is a useful invention by the Strasbourg judges. This “procedural” limb of Articles 2 and 3 is a significant tool to enhance the effectiveness of the ECHR system.

In light of what precedes, this is an area where the ECtHR’s contribution to the improvement of human rights standards in Europe has made a huge difference. It is important to recall that the finding of a violation of the relevant guarantees is not the end of the story, but the beginning, because each judgment has to be implemented by the State Party concerned. In other words, a state that has been found in violation of the ECHR must ensure that the consequences of such a violation have been remedied and potential repetition of similar violations have been excluded. This can imply, on the one hand, so-called individual measures, such as the payment of the sum attributed to a victim in light of just satisfaction (Article 41 ECHR) or an effective investigation to be conducted in case the ECtHR finds a violation of the procedural limb of Article 2 or 3 of the ECHR, but can also encompass, on the other hand, so-called general measures, including enacting of laws and regulations, as well as training of police officers in the planning of the use of force and in the handling of lethal and non-lethal weapons. In the İzci case on ill-treatment as a result of inappropriate use of tear gas in Turkey, explained above, the ECtHR indicated that it expected law enforcement to act in accordance with Articles 3 and 11 of the ECHR when using force, and for judicial authorities to conduct effective investigations against such police officers.

The fact that the implementation of judgments is supervised by the Committee of Ministers of the Council of Europe is another guarantee for the effectiveness of the ECHR system as a whole.