

CONTENT OVERVIEW

Content overview.....	V
Preface.....	VII
Table of content	IX
Abbreviations	XXIII
Literature.....	XXVII
Scientific Studies	XLIII
Materials and reports.....	XLV
Decrees	XLIX
Manuals and Regulations.....	LIII
I. Introduction	1
II. Interpretation of the right to life by the case law	3
III. Ensuring physical security.....	15
IV. Pre-operational duties	143
V. Operational duties	249
VI. Post-operational duties.....	429
VII. Summary of theses	503
VIII. Concluding remarks	511
Table of Judgments.....	513

TABLE OF CONTENT

Content overview.....	V
Preface.....	VII
Table of content	IX
Abbreviations	XXIII
Literature.....	XXVII
Scientific Studies	XLIII
Materials and reports.....	XLV
Decrees	XLIX
Manuals and Regulations.....	LIII
I. Introduction	1
II. Interpretation of the right to life by the case law	3
1. Use of Force as an object of the case law of the ECtHR.....	3
2. From Gibraltar (1988/1995) to Beslan (2004/2017)	4
2.1. McCann and others v. The United Kingdom (GC).....	4
2.2. Finogenov and others v. Russia	6
2.3. Tagayeva and others v. Russia.....	7
2.4. Isayeva v. Russia	9
2.5. Giuliani and Gaggio v. Italy (GC).....	10
2.6. Other Judgments	10
3. The importance of the case law and methodology of work	11
3.1. The special nature of fundamental rights.....	11
3.2. Police Operations.....	12
3.3. Relevance for the present work.....	12

III. Ensuring physical security	15
1. Forms of terrorist action	15
2. The right to life under Article 2 ECHR.....	22
2.1. Principle and exceptions.....	22
2.2. Positive obligation.....	25
2.2.1. A dogmatic challenge.....	25
2.2.2. General protection of life by the legal and administrative framework.....	28
2.2.3. Special precautions in case of dangerous activities	31
2.2.4. Duties to protect against natural hazards?	36
2.2.5. Real and immediate risk.....	41
a. Limitation.....	41
b. Threat to public security?	46
c. Aversion of a risk or danger	47
2.2.6. Assumptions in case of special responsibility of the state	51
2.2.7. Limits of the positive obligation	54
a. Knowledge	55
b. Informed consent	57
c. Licensing and supervision responsibilities.....	59
d. Limits of priorities and resources.....	60
e. Third parties' rights	61
2.2.8. Evolution.....	63
2.3. Negative obligation	65
2.3.1. Prohibition of unlawful killing	66
2.3.2. Regulations on the use of coercive means	67
2.3.3. International standards as benchmarks for the use of force	68
2.3.4. Excursion: Non Refoulement.....	71
2.3.5. Excursion: "Core contents" of fundamental rights.....	72
2.4. Procedural obligation.....	72

2.4.1. The duty to investigate in general.....	73
2.4.2. Nature of the investigation	75
2.4.3. Particularities of the type of investigation in the health-care sector.....	78
2.4.4. Effectiveness of the investigation.....	79
2.4.5. Relationship to the positive and negative obligation.....	83
2.5. The scope of application of Article 2 ECHR	84
2.5.1. Exercise of sovereign authority (jurisdiction)	84
a. Previous cases on the territorial scope of the Convention.....	85
b. Custody over persons	89
c. Recent cases on the territorial scope of the Convention....	92
d. Assessment of the case law	96
2.5.2. Temporal scope and effective range.....	100
2.6. Significance of Article 2 ECHR for the use of force	101
3. Public emergency.....	103
3.1. Prerequisites and limitations for the suspension of Convention guarantees	103
3.2. The state of emergency in the example of the Northern Ireland conflict	104
3.2.1. Division of the Island and the Special Powers Act.....	105
3.2.2. The IRA's border campaign and the public emergency in Ireland	105
3.2.3. Troubles and Northern Ireland (Emergency Provisions) Act of 1973.....	107
3.2.4. Good Friday Agreement and return to peace.....	108
3.3. Characteristics of the state of emergency	109
3.3.1. The fundamental debate on the Irish–Northern Irish conflict	110
3.3.2. Re-interpretation after 09/11	112
3.3.3. Present status and scope for assessment of the Convention States.....	114

Table of content

3.4.	Significance of the state of emergency	116
3.4.1.	Expanding state options for action and their political cost.....	116
3.4.2.	Restriction of further Convention guarantees.....	117
3.4.3.	Significance for Art. 2 of the ECHR	119
4.	International Humanitarian Law and International Human Rights Law....	120
4.1.	Changing forms of conflict.....	121
4.2.	Protection of civilians.....	122
4.3.	Further international treaties.....	125
4.4.	Partial coexistence of IHRL and IHL	126
4.4.1.	Inclusion of international law norms for the interpretation of Article 2 ECHR	127
4.4.2.	Relevance of the ECHR in armed conflicts?	128
4.4.3.	Wartime emergency as a hinge?	134
4.5.	Relevance of International Humanitarian Law for the use of force....	135
5.	Conclusion: guaranteeing the right to life as a mandate and a constraint..	137
IV.	Pre-operational duties	143
1.	Creation and development of the legal and administrative framework.....	143
1.1.	Obligations under international treaties	144
1.2.	Countering terrorism within the framework of the UN	145
1.2.1.	Resolutions of the UN Security Council.....	146
1.2.2.	Counter Terrorism Committee und UN Action Plan.....	147
1.3.	International guidelines and recommendations.....	147
1.3.1.	Council of Europe Guidelines.....	148
1.3.2.	Code of Conduct for Law Enforcement Officials	149
1.3.3.	UN Basic Principles.....	151
a.	General provisions	151
b.	Special Provisions	153
1.4.	Requirements under Article 2 ECHR	154
1.4.1.	The legal guarantee to life as an obligation to counter terrorism?.....	155

a.	Countering terrorism within the legal and administrative framework	155
b.	Legal definition of “terrorism”?	155
c.	Special provisions for real and immediate risk	158
1.4.2.	Regulation of the use of force	159
a.	Comprehensive rules as a principle	159
b.	Special challenges and special requirements	162
c.	Principle of (legal) certainty	168
d.	Extraordinary situation and state of emergency	171
1.4.3.	Regulating police operations	173
1.5.	Concluding thoughts	176
2.	Intelligence	179
2.1.	Common operational picture and intelligence gathering	180
2.2.	State responsibility	187
2.3.	Identification and assessment of threats and risks	190
2.3.1.	Risk assessment and risk evaluation	190
2.3.2.	Concretisation of threats and risks	191
a.	Reference to the relevant context	191
b.	The opposing party	192
c.	Potential targets	194
d.	Temporal aspects	198
2.3.3.	Situational picture versus criminal evidence	199
2.3.4.	Intelligence advantage versus police intervention	200
2.4.	Decision-making	200
3.	Planning	203
3.1.	Adequacy of police conduct	204
3.1.1.	General mandate of the police	204
3.1.2.	Anticipation of exceptional situations, emergency planning and crisis management	206
a.	Balancing the eligible obligations	207

b.	Application in anti-terrorist operations	207
c.	Implications for planning and crisis management	209
3.2.	Focused collection, processing and dissemination.....	210
3.2.1.	Focusing on a threat	212
3.2.2.	Intelligence and other preventive measures.....	214
a.	Dissemination of the situational picture or intelligence...	214
b.	Specific safeguards	214
c.	Specific information.....	214
d.	General information versus confidentiality	214
e.	Preventive controls.....	216
f.	The extent on preventive measures	216
3.2.3.	Dissemination.....	217
3.3.	Means of intervention	219
3.3.1.	In general.....	219
3.3.2.	Personnel resources	220
3.3.3.	Means of intervention and coercion	222
a.	Offensive means.....	223
b.	Shoot to stop in particular	225
c.	Shoot to kill in particular	225
d.	Defensive means.....	226
e.	Qualification depending on a situation.....	227
3.3.4.	Logistics	227
3.4.	Creating the conditions for command and control.....	229
4.	Selection and training.....	233
4.1.	Selection of members of intervention forces	233
4.2.	Education, training and retraining	237
4.3.	Specific preparedness and use of potentially lethal force	241
4.3.1.	Preparation for specific and exceptional situations.....	241
4.3.2.	Training on special intervention resources.....	242
4.3.3.	Training of specialists.....	243

4.4. Training for deployment	244
5. Conclusion: Significant shift of state obligations to the preliminary stages of operations	245
V. Operational duties	249
1. Use of force: Particularities in anti-terrorist operations	249
1.1. Police operations.....	249
1.1.1. Terminological approach.....	249
1.1.2. Need for coordination.....	250
1.1.3. The level of an operation.....	252
1.2. Adequate protection of the highest legal assets.....	254
1.2.1. Threat as a benchmark.....	254
1.2.2. Ex ante-assessment	256
1.2.3. Overlapping of state duties.....	256
1.3. Principle of distinguishing according to IHRL.....	258
1.3.1. Legal forms of armed conflicts	258
1.3.2. Protection of civilians	259
1.3.3. Combatants.....	261
1.3.4. Direct participation in hostilities	263
1.3.5. Significance.....	265
2. Control and organisation.....	266
2.1. General requirements on the surveillance.....	267
2.2. Command structure and responsibility.....	269
2.2.1. The aim of police command and control	269
2.2.2. Overall responsibility.....	270
a. Command, control and law enforcement	270
b. Legal assessment.....	271
c. Binding on the legal bases	272
2.3. Special requirements.....	274
2.3.1. Situation assessment.....	275

2.3.2. Temporal aspects and contingency planning.....	276
2.3.3. Compliance with the relevant legal framework.....	277
2.3.4. Internal communication and transfer of information	277
2.3.5. Stability and clarity.....	279
2.3.6. Documentation.....	279
2.4. Political influence on operations?	280
3. Rules of engagement and means of engagement	282
3.1. Rules of engagement.....	283
3.1.1. Concept and function	283
3.1.2. Legal relevance.....	284
3.2. Civilian and military (task) forces.....	287
3.2.1. Regular police forces.....	287
3.2.2. Special operations forces.....	288
3.2.3. Regular military units.....	289
3.2.4. Requirement with regard to fundamental rights	290
3.3. Release of coercive means.....	291
3.3.1. General or individual release.....	291
3.3.2. Proportionality.....	291
3.3.3. Release of lethal means of coercion	292
3.3.4. Release of non-lethal means of coercion	293
3.3.5. Delegation	293
3.4. Abstract limitations on the use of coercive means.....	295
3.4.1. Legal foundations in the Convention States.....	295
a. Principle.....	295
b. Exception regarding the existence of a duty to protect under Art. 2 ECHR	296
3.4.2. Principle of distinction.....	298
3.4.3. Chemical agents in particular	299
a. Ban on chemical weapons.....	299

b.	Permissibility of riot control agents	301
c.	Narcotic gases as a means of restraint.....	303
4.	Absolute necessity to the recourse of lethal force.....	305
4.1.	The benchmark for the proportionality test	306
4.2.	Risk assessment and honest belief.....	307
4.2.1.	Base of trust.....	307
4.2.2.	Actions based on honest belief.....	309
4.2.3.	Accountability in building a base of trust	311
4.2.4.	Robustness of the ex ante-assessment.....	312
4.3.	Assessing the effect of coercive means.....	313
4.3.1.	Deterministic perspective.....	313
4.3.2.	Probabilistic perspective.....	314
4.3.3.	Fundamental rights practice	314
4.4.	Prohibition of excess and minimisation of risk.....	317
4.4.1.	Prohibition of excess in concrete situations	317
4.4.2.	Risk minimising in particular	320
4.4.3.	Use of special means	323
a.	Heavy means of intervention.....	323
b.	Alternative non-lethal means of intervention.....	325
c.	Legal bases at national level.....	326
4.5.	Distinction	327
4.5.1.	Lethal means of coercion.....	328
4.5.2.	“Non-lethal” means of coercion	328
a.	Use of narcotic gas: the ECtHR’s rationale.....	329
b.	Criticism and opposing opinions.....	330
c.	Statement	331
4.6.	Collision of fundamental rights obligations.....	332
4.6.1.	Particularity of the conflict of fundamental rights aspects according to Article 2 ECHR	333

4.6.2. Absolute limitations	334
4.6.3. Distinctions.....	336
a. Complementarity between the possibility of intervention and the duty to act.....	336
b. Collision of the possibility of intervention with the duty to protect.....	338
c. On the “degree of damage to victims” in particular	339
4.6.4. Link to the duty to investigate	343
4.7. Significance of the absolute necessity when protecting persons	344
5. The right of state actors to be protected and self-defence.....	347
5.1. Right to life and physical integrity	348
5.1.1. Personal scope of Article 2 ECHR.....	348
5.1.2. Rules for the protection of soldiers’ lives (positive obligation)	350
5.1.3. Special duty to protect life	353
5.1.4. Procedural obligation	355
5.1.5. Significance and further development.....	356
5.2. Self-defence.....	358
5.2.1. Invocation of self-defence by state security forces	359
a. Acting in honest belief.....	359
b. Proportionality.....	361
5.2.2. Erroneous assessments by the authorities.....	363
5.2.3. Obligation to exclude self-defence situations?.....	364
a. In general.....	365
b. Legal bases of self-defence in particular	367
c. Additional state obligations with respect to a “real and immediate risk”?.....	369
d. Limitation of obligations due to an impossible or disproportionate burden?.....	370
e. Predictability	372

5.2.4. Importance of the procedural obligation	373
5.2.5. Assessment of the individual right of self-defence for state action.....	375
6. Information interests – and their limits	377
6.1. Public interest in information versus complicity of the media	378
6.1.1. The terrorist's primary target and advantage.....	379
6.1.2. The media's importance.....	380
6.2. Scope and limitations of freedom of the media.....	383
6.2.1. Guidelines under the Convention.....	383
6.2.2. Exceptions to the scope of protection	388
6.2.3. Duties and responsibilities	392
6.2.4. Censorship versus sanctioning.....	398
6.3. Restrictions on the freedom of the media in the case of use of force	399
6.3.1. Principles.....	399
6.3.2. Strategic level.....	403
6.3.3. Operational level.....	407
6.3.4. Tactical level.....	413
a. Anti-terrorist actions carried out under command	413
b. Individual actions and spontaneous use of force.....	415
6.4. Specifics of the internet and social media.....	416
6.4.1. Scope of protection of the freedom of the media	416
6.4.2. Importance of the fundamental rights classification as a medium	418
6.4.3. Special restrictions for online and social media?.....	419
6.4.4. Streaming as a challenge	420
6.5. Role of the media between public watchdog and catalyst	423
7. Conclusion: A tightly meshed network and far-reaching guidelines.....	426

VI. Post-operational duties.....	429
1. Special importance of the positive as well as the procedural obligation.....	429
2. Care for injured persons.....	430
2.1. Duty to provide aftercare.....	430
2.2. Requirements for rescue operations	432
2.3. Duty of aftercare towards state actors.....	434
3. Lessons learned	437
4. Duty to investigate after any use of force.....	439
4.1. Duty to carry out an effective investigation.....	440
4.2. Criteria of an effective investigation in the case of a use of force	443
4.2.1. Organisational-formal element: Independence of the investigating authority	443
4.2.2. Substantive element: Adequacy of the investigation (objectivity)	448
a. Finding facts and securing evidence.....	449
b. Plausibility.....	451
c. Overall assessment	452
4.2.3. Temporal elements	455
a. Promptness and reasonable expedition as the main principle.....	455
b. Exceptions on factual impediments	457
c. Long duration of proceedings.....	458
d. Entitlements to a retrial?.....	460
e. Excursus: "Retroactive" effect of the right to an effective investigation?.....	461
4.2.4. Shifting the burden of proof in special circumstances?.....	464
a. Persons in custody of the state	466
b. Exclusive control of the authorities of the state	467
c. Use of force by state security forces.....	468
d. Importance of a shift in the burden of proof	469
e. Relevance.....	471

4.3. Specific questions	474
4.3.1. Participation of relatives and creation of publicity	474
4.3.2. Admissibility criteria	480
4.3.3. International cooperation	483
4.3.4. Restriction of the investigation due to national interests?	485
a. Factual restriction and shift of the duty to investigate	486
b. Reasons for restrictions	487
c. Alternatives and areas of tension with the publicity of an investigation.....	488
4.3.5. Sanctioning of those responsible.....	489
4.4. Relationship of Article 2 to Article 13 ECHR	492
4.5. Damages to avoid procedural obligations?	494
4.5.1. Damages as an efficient alternative to an investigation?	494
a. Principle of primacy of the procedural obligation.....	494
b. Simultaneous claims for damages	495
c. The special nature of non-pecuniary damage in the case of excessively long proceedings	495
4.5.2. Recognition of mistakes and satisfaction	496
4.6. Conclusion: The importance of an effective investigation	497
5. Conclusion: Highlighting of all three obligations.....	500
VII. Summary of theses	503
VIII. Concluding remarks	511
Table of Judgments	513