

FINOGENOV AND OTHERS V. RUSSIA

Application no. 18299/03

**WRITTEN SUBMISSIONS OF INTERRIGHTS
AND THE INTERNATIONAL COMMISSION OF JURISTS**

TABLE OF CONTENTS

| | |
|---|-----------|
| INTRODUCTION | 1 |
| I. BACKGROUND PRINCIPLES ON THE RIGHT TO LIFE IN THE CONTEXT OF HOSTAGE RESCUE OPERATIONS | 1 |
| 1. The fundamental, absolute and non-derogable nature of the right to life | 1 |
| 2. Conditions for the exceptional justification of use of lethal force..... | 2 |
| (i) Pursuance of a legitimate aim, notably the protection of the life and safety of hostages and securing their release..... | 2 |
| (ii) Existence of a real, imminent and serious threat..... | 3 |
| (iii) Compliance with domestic law | 3 |
| (iv) “Absolute necessity”: exceptionality of the use of force and the use of force as a last resort | 4 |
| (v) Strict proportionality | 4 |
| II. SPECIFIC OBLIGATIONS IN HOSTAGE SITUATIONS | 5 |
| 1. Obligation to adopt legislation which regulates use of force | 5 |
| 2. Obligation to provide adequate sensitisation and training of state agents..... | 6 |
| 3. Obligation to plan and control the rescue operation in accordance with the goal of minimizing the risk to life..... | 6 |
| (i) Obligation to explore peaceful means for resolving the hostage situation | 7 |
| (ii) Use of force against hostages and indiscriminate force in hostage situations..... | 8 |
| (iii) Methods and means of use of force: precautions to protect against loss of life..... | 9 |
| III. OBLIGATIONS OF THE STATE IN THE AFTERMATH OF A RESCUE OPERATION | 10 |
| 1. Positive obligations under Articles 2 and 3 to take steps to protect against foreseeable and avoidable risks to lives and health..... | 10 |
| 2. Obligations to provide emergency care to hostages whose lives or health are at risk following a criminal act or a law-enforcement operation | 11 |
| 3. Obligation to provide information necessary to address a foreseeable risk to life or inhuman and degrading treatment | 14 |
| IV. CONCLUSION | 15 |

INTRODUCTION

These written comments are submitted by INTERIGHTS (the International Centre for the Legal Protection of Human Rights) and the International Commission of Jurists pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 of the Rules of Court. They will address the human rights obligations of the High Contracting Parties to the European Convention on Human Rights (“the Convention”) in the circumstances where their authorities are engaged in hostage rescue operations. Part I of this intervention addresses the general principles regarding the duties of States under Article 2. In light of these principles, Parts II and III analyse in detail specific aspects of the states’ obligation to prevent violations of human rights. Part II addresses the requirements in relation to the regulation, planning and conduct of hostage rescue operations themselves. Part III examines the positive obligation to put in place measures that take effect after the operation, including the provision of adequate emergency response and healthcare, and the provision of essential information.¹ The analysis of these obligations will be informed by international law and practice, including human rights law beyond the European system and international humanitarian law, and by the established principles of interpretation of the Convention.

I. BACKGROUND PRINCIPLES ON THE RIGHT TO LIFE IN THE CONTEXT OF HOSTAGE RESCUE OPERATIONS

1. The fundamental, absolute and non-derogable nature of the right to life

The right to life, protected under Article 2 of the Convention – as well as under all international human rights instruments of a general scope² – constitutes one of the fundamental rights of the human person.³ The fundamental nature of the right to life implies, on the one hand, that “restrictive approaches to it are inadmissible”⁴ and, on the other, that any exceptions to the prohibition of deprivation of life “must be strictly construed”.⁵

Under the Convention and other international instruments, the obligation of protection in relation to the right to life is absolute and is included among the obligations from which a State cannot derogate under any circumstances.⁶ Accordingly,

¹ Other applicable and similarly vital aspects of the obligation to protect the right to life, such as the duty to investigate claims of unlawful killing, are left outside the scope of this brief.

² See Art. 3, Universal Declaration on Human Rights; Art. 6, International Covenant on Civil and Political Rights (ICCPR); Art. 4, African Charter on Human and Peoples’ Rights (ACHPR); Art. 4, American Convention on Human Rights (ACHR); Art. I, American Declaration of the Rights and Duties of Man; Art. 5, Arab Charter (1994); Art. 5, Revised Arab Charter (2004).

³ See, e.g., *McCann and Others v. United Kingdom* (App. 18984/91), *Series A*, No. 324, § 147; Human Rights Committee, General Comment No. 6: Article 6 (30 April 1982); *Husband of Maria Fanny Suarez de Guerrero v. Colombia* (Comm. R.11/45), Human Rights Committee, UN doc. A/37/40 (1982), p. 137, § 13.1; *Case of the “Street Children” (Villagran-Morales et al.) v. Guatemala (Merits)*, Judgment of 19 November 1999, I/ACtHR, *Series C*, No. 63, § 144; *Forum of Conscience v. Sierra Leone* (Comm. 223/98), African Commission on Human and Peoples’ Rights (2000), § 19.

⁴ *Street Children* case (above n. 3), § 144.

⁵ *Andronicou and Constantinou v. Cyprus* (App. 25052/94), *Reports 1997-VII*, § 171.

⁶ Art. 15 ECHR; Art. 4, ICCPR; Art. 27, ACHR. The ACHPR does not contain any provision allowing for derogations in times of emergency. In the absence of such a clause all rights enshrined in the African Charter are considered non-derogable and limitations on those rights can never be justified by emergencies or special circumstances. See *Media Rights Agenda and Constitutional Rights Project v. Nigeria* (Comm. 105/93, 128/94, 130/94 and 152/96), African Commission on Human and Peoples’ Rights (1998), §§ 67-68.

a State may not, even in time of war, public danger, or other emergency that threatens its independence or security, take measures suspending the obligation to protect the right to life. This holds true just as much in relation to threats arising from terrorism as in relation to other emergency situations.⁷

The absolute protection of the right to life applies to every individual under the jurisdiction of the State, and, accordingly, “the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration”.⁸ As a consequence, a hostage-taker, by taking a hostage, does not forfeit his right to the protection of his right to life under Article 2 of the Convention. A deprivation of life is permissible solely to the extent that the use of force is in compliance with the requirements of Article 2(2) of the Convention.

2. Conditions for the exceptional justification of use of lethal force

The circumstances in which such force may be justified are limited and exhaustively catalogued in Article 2(2) of the Convention. The Court has emphasized that Article 2 of the Convention must be interpreted “so as to make its safeguards practical and effective.”⁹ In this respect, the general principle that restrictions on rights must be “strictly construed” is “particularly true of the exceptions delineated in paragraph 2.”¹⁰ The Court has made clear that these exceptions provide the test for measuring the lawfulness of the use of force resulting in a deprivation of life, whether or not that outcome was intended.¹¹ An analysis of the relevant international case-law reveals that there are a number of prerequisites for the use of lethal force by State agents to be justifiable. These prerequisites will be discussed in turn.

(i) Pursuance of a legitimate aim, notably the protection of the life and safety of hostages and securing their release

The use of force may only be justified on one of the grounds listed in Article 2(2) of the Convention, namely (a) in defence of any person from unlawful violence; (b) to effect a lawful arrest or prevent escape or (c) to quell a riot or insurrection. The focus of these written comments is on “defence of any person from unlawful violence”, on the assumption that the other two are of no potential relevance in the present case.

It is natural that the primary aim of a rescue operation should be rescuing the hostages from the threat of violence posed by the hostage-takers. As the Court has held in a case involving bombardment of a village where the population was held hostage by a large group of well-equipped and well-trained fighters, “the primary aim of the operation should be to protect lives from unlawful violence”.¹² This interpretation of the primary aim of state action corresponds with the obligations of state parties to the International Convention against the Taking of Hostages of 1979 to “take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his

⁷ *McCann* (above n. 3), § 147; *Gül v. Turkey* (App. 22676/93), Judgment of 14 December 2000, § 78; see also *Human Rights and the Fight against International Terrorism, The Council of Europe Guidelines* (March 2005), Guideline XV.

⁸ See, mutatis mutandis, *Chahal v. United Kingdom* (App. 22414/93), *Reports 1996-V*, § 79.

⁹ *McCann* (above n. 3), § 146

¹⁰ *Andronicou* (above n. 5), § 171.

¹¹ *McCann* (above n. 3), § 148; see also *Ergi v. Turkey* (App. 23818/94), *Reports 1998-IV*, § 79.

¹² *Isayeva v. Russia* (App. 57950/00), Judgment of 24 February 2005, § 191.

release [...].”¹³ Similarly, the United Nations (UN) Security Council affirmed the obligation of States “urgently to take all appropriate measures to secure the [hostages’] safe release.”¹⁴

The legitimate aims contained in Article 2(2) are exhaustive. Accordingly, no other considerations, such as the protection of the reputation of the State, internal political instability or indeed public emergency, may justify the use of force which risks resulting in a deprivation of life.¹⁵

(ii) Existence of a real, imminent and serious threat

The second requirement for the use of force to be justified under Article 2(2)(a) is the existence of a direct and imminent threat of unlawful violence.¹⁶ In this regard, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials underline that the use of firearms by law enforcement officials in self-defence or defence of others is only acceptable “against the *imminent* threat of death or serious injury.”¹⁷ Similarly, the Inter-American Commission on Human Rights has expressed the view that “[t]he police and other officers in charge of enforcing the law must protect the rights to life, liberty, and security of the person, being able to employ force, only, in a case of *direct or imminent* danger of death or injuries for the agents themselves or other people.”¹⁸

The Court has recognized that, in some circumstances, the use of force resulting in deprivation of life could be justified where law enforcement officials held an honest belief that such a threat of unlawful violence existed, even if, in the event, that belief turned out to be ill-founded or mistaken.¹⁹ However, the obligation to protect the right to life requires that the State should make all efforts to ascertain the true situation and to act on reliable intelligence and information. An additional important safeguard is the requirement that the existence of the imminent threat should be ascertained with “near certainty”.²⁰

(iii) Compliance with domestic law

In accordance with the principle of legality, any use of force by State officials which risks resulting in the death of individuals under the jurisdiction of the State must be

¹³ Art. 3 (1), International Convention Against the Taking of Hostages, 17 December 1979, UNTS, vol. 205, p. 1316.

¹⁴ SC Res. 579 (1985), 18 December 1985 (on Hostage Taking), § 3.

¹⁵ See also Principle 8 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 7 September 1990 (hereinafter “UN Basic Principles”).

¹⁶ See, e.g., *Kakoulli v Turkey* (App. 38595/97), Judgment of 27 November 2005.

¹⁷ UN Basic Principles (above n. 15), Principle 9. See also *Case of Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela (Merits)*, Judgment of 5 July 2006, I/ACtHR, Series C, No. 150, § 69.

¹⁸ See the Inter-American Court’s summary of the findings of the Commission in *Case of the Miguel Castro-Castro Prison v. Peru (Merits)*, Judgment of 25 November 2006, I/ACtHR, Series C, No. 160, § 228(d) (emphasis added).

¹⁹ See, e.g., *McCann* (above n. 3), § 200; *Andronicou* (above n. 3), § 192.

²⁰ “Interim report on the worldwide situation in regard to extrajudicial, summary or arbitrary executions submitted by Philip Alston, Special Rapporteur”, September 2006, UN doc. A/61/311, 5 September 2006, (hereinafter “Alston Report 2006”), § 41.

authorized and regulated by law²¹. This is reflected in the UN Basic Principles, which indicate that laws and regulations on the use of force should be sufficiently detailed and should prescribe, inter alia, the types of arms and ammunition permitted.²² Further, the use of force should be consistent in practice with the conditions laid down in the relevant regulations.

(iv) ***“Absolute necessity”: exceptionality of the use of force and the use of force as a last resort***

Article 2(2) of the Convention provides that the use of force in question must be “absolutely necessary” in order to achieve one of the specified purposes. This Court has elaborated on the scope of “absolute necessity” in relation to Article 2, noting that “a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is ‘necessary in a democratic society’ under paragraph 2 of Articles 8 to 11 of the Convention.”²³

An analysis of the jurisprudence of other international human rights bodies similarly clearly reveals that recourse may be made to the use of force only exceptionally and as a matter of last resort. In the recent case of *Zambrano Vélez et al. v. Ecuador*, the Inter-American Court has reaffirmed the principle that the use of force by State officials “must be defined by exceptionality”²⁴ and that “force or coercive means can only be used *once all other methods of control have been exhausted and have failed*.”²⁵ The Inter-American Court noted:

“The use of lethal force and firearms against individuals by law enforcement officials – which must be forbidden as a general rule – is only justified in even more extraordinary cases. The exceptional circumstances under which firearms and lethal force may be used shall be determined by the law and restrictively construed, so that they are used to the minimum extent possible in all circumstances and never exceed the use which is ‘absolutely necessary’ in relation to the force or threat to be repealed. When excessive force is used, any resulting deprivation of life is arbitrary.”²⁶

Similarly, the UN Basic Principles state that law enforcement officials may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.²⁷ Further, Principle 9 emphasises that firearms shall only be used “when less extreme means are insufficient” to achieve one of the legitimate objectives set forth in that provision, including in self defence or defence of others and that “[i]n any event, intentional lethal use of firearms may only be made when *strictly unavoidable* in order to protect life.”²⁸ The requirement that force only be used as a matter of last resort is also apparent in Article 3 of the UN Code of Conduct for Law

²¹ *Makaratzis v. Greece* [GC] (App. 50385/99), *Reports 2004-XI*, § 58. See also *Zambrano Vélez et al. v. Ecuador*, Judgment of 4 July 2007, I/ACtHR, *Series C, No. 166* (2007), § 84; *Montero-Aranguren* (above n. 17), § 68. See UN Basic Principles (above n. 15), Principle 1.

²² UN Basic Principles (above n. 15), Principle 11 (a).

²³ *McCann* (above n. 3), § 149; see also *Andronicou* (above n. 5), § 171.

²⁴ *Zambrano Vélez* (above n. 21), § 83. See also *Montero-Aranguren* (above n. 17), § 67.

²⁵ *Zambrano Vélez* (above n. 21), § 83 (emphasis added). See also *Montero-Aranguren* (above n. 17), § 67.

²⁶ *Zambrano Vélez* (above n. 21), § 84. See also *Montero-Aranguren* (above n. 17), §§ 68-69.

²⁷ UN Basic Principles (above n. 15), Principle 4. See also *ibid.*, Principle 5, which sets out a number of precautions to be followed “whenever the lawful use of force and firearms is unavoidable.”

²⁸ UN Basic Principles (above n. 15), Principle 9. See also *Montero-Aranguren* (above n. 17), § 69.

Enforcement Officials, which requires that force be used by law enforcement officials “only when strictly necessary.”²⁹

(v) *Strict proportionality*

Finally, the amount of force used must be “strictly proportionate” to the aim pursued, in light of the circumstances of the case and the particularly high value accorded to the right to life.³⁰ Proportionality does not involve balancing of the number of lives expected to be saved against the number of those lost or jeopardised. It requires that, even where the force to be used is considered necessary, an assessment of all the circumstances must be made to determine whether the particular course of action is “strictly proportionate”.³¹

A similar approach has been consistently adopted by the Inter-American Court of Human Rights. In *Neira-Alegría v. Peru*, a case concerning a riot in a prison allegedly involving convicted members of the guerrilla group *Sendero Luminoso*, the Court held that the level of force used by the State agents, which had resulted in demolition of the prison buildings in which the prisoners were located using plastic explosives, had been excessive and unjustified.³² The Court noted that the fact the Peruvian security forces had been fighting armed and highly dangerous opponents did not constitute “sufficient reason[...] to justify the amount of force used [...]”.³³ Further, the Inter-American Court has underlined the importance of the principles of necessity, proportionality and humanity as guiding principles in assessing compliance with the obligation to protect the right to life of the use of force by state agents in the context of security operations.³⁴

II. SPECIFIC OBLIGATIONS IN HOSTAGE SITUATIONS

1. Obligation to adopt legislation which regulates use of force

As noted above, under the Convention and other human rights instruments, and, as stated by the Court in *Makaratzis v. Greece*, any use of force by State agents must be authorized by law and subject to detailed regulation, including in relation to the types of arms and ammunition permitted for use by the law enforcement agencies.³⁵

In line with the requirement of a clear and foreseeable legal framework regulating the use of lethal force, the UN Human Rights Committee has held that the State’s legal framework must thus “strictly control and limit the circumstances” in which law enforcement officers may resort to lethal force.³⁶ Similarly, the Inter-American Court in the case of *Zambrano Vélez* required that “[d]omestic law must establish standards clear enough to regulate the use of lethal force and firearms by members of the State security forces.”³⁷ The Inter-American Court has relied upon the UN Basic Principles in

²⁹ Adopted by General Assembly Res. 34/169, 17 December 1979 (hereinafter “UN Code of Conduct”).

³⁰ *McCann* (above n. 3), § 149; see also *Andronicou* (above n. 5), § 171.

³¹ *McCann* (above n. 3), § 149.

³² *Neira-Alegría et al. v. Peru (Merits)*, Judgment of 19 January 1995, I/ACtHR, *Series C, No. 20*.

³³ *Ibid.*, § 74.

³⁴ *Zambrano Vélez* (above n. 21), § 85. See also the approach of the Human Rights Committee in its 2003 *Concluding Observations* on Israel’s report (UN doc. CCPR/CO/78/ISR, 21 August 2003, § 15).

³⁵ See above, section I.2 (iii).

³⁶ *Baboeram v. Suriname* (Comm. 146/1983), UN doc. CCPR/C/24/D/146/1983 (1985), § 14.

³⁷ *Zambrano Vélez* (above n. 21), §§ 88-90.

requiring that the domestic rules and regulations by law enforcement officials should include guidelines that:

- “(a) specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;
- (b) ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;
- (c) prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;
- (d) regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;
- (e) provide for warnings to be given, if appropriate, when firearms are to be discharged;
- (f) provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.”³⁸

This Court has examined the existence of such legislation as part of the analysis in relation to the proportionality of the use of force, and the failure to invoke provisions of the domestic legislation governing the use of force is a relevant factor in the Court’s examination of a case.³⁹

2. Obligation to provide adequate sensitisation and training of state agents

In the words of the Inter-American Court, “appropriate legislation would not fulfil its goal if, *inter alia*, States would not educate and train members of their armed forces and security agencies on principles and rules of human rights protection and on the limits to which the use of weapons by law enforcement officials must be subject to in all circumstances.”⁴⁰ The training of law enforcement officials increases the potential to control extreme situations in an effective manner, and in a way consistent with the human rights obligations of the State. In this regard, the UN Special Rapporteur on Summary Executions, Philip Alston, in his 2006 Report has emphasised that “States facing terrorist or other threats alleged to require exceptional measures should instead clarify the implications of human rights law for law enforcement officers through training and written guidance.”⁴¹ As for the scope of the training, the State must provide for “education and training of all members of its armed forces and its security agencies on principles and provisions of human rights protection and regarding the limits to which the use of weapons by law enforcement officials is subject, even in a state of emergency.”⁴²

3. Obligation to plan and control the rescue operation in accordance with the goal of minimizing the risk to life

As the Court held in the *McCann* case, in assessing compliance with Article 2, it is necessary to consider, quite apart from the actual actions of the agents of the State who administer force, all the circumstances surrounding the operation, including the

³⁸ See *Montero-Aranguren* (above n. 17), § 75.

³⁹ See, e.g., *Isayeva* (above n. 12), § 199.

⁴⁰ *Zambrano Vélez* (above n. 21), § 87.

⁴¹ Alston, Interim Report 2006 (above n. 20), § 48.

⁴² *El Caracazo v. Venezuela*, Judgement of 29 August 2002, I/ACtHR, *Series C, No. 95*, § 127.

planning and control of the actions of the State officials.⁴³ A State may violate the right to life if it embarks on a law enforcement operation which is not adequately planned and the execution of which is not adequately supervised, such that the lack of planning and control which results is ultimately a contributing factor to a deprivation of life.

The importance of adequate *planning* in order to minimize risk of loss of innocent life has been emphasized by the Court in a line of cases, involving hostage rescue operations, raids on villages, armed clashes resulting in death from misdirected uses of force/stray bullets and other situations.⁴⁴ As indicated above, a key part of the planning process consists of ascertaining the factual situation,⁴⁵ even where it is exceptionally challenging to access all the necessary information in order to assess with the requisite “near certainty” the full factual picture, including regarding the imminence of the deadly threat.⁴⁶ Insofar as possible, State forces should take account of the difficulty of accessing reliable information when deciding whether use of lethal force is necessary.

It is also clear that the obligation to secure the right to life involves obligations to *control and supervise* the officers involved in the actual execution of such operations.⁴⁷

(i) *Obligation to explore peaceful means for resolving the hostage situation*

As noted above in relation to the principle of absolute necessity, the use of force should be the last resort when solving a hostage situation.⁴⁸ All possible non-violent alternatives must be explored before having recourse to force, and a failure to do so results in a breach of the right to life. The UN Basic Principles require that law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force.⁴⁹ Principle 20 requires states to explore alternatives to the use of force, including peaceful settlement, and requires the use of *persuasion, negotiation and mediation*, as well as of technical means, with a view to limiting the use of force. In hostage situations, the authorities have an obligation to explore and exhaust negotiations and other tactical solutions in order to attempt to secure the safe release of the hostages.

⁴³ *McCann* (above n. 3), § 150. In finding a violation of Art. 2 in relation to the operation carried out by the British authorities which had resulted in the deaths of three terrorist suspects, the Court referred to the “serious miscalculation by those responsible for the operation” in permitting the three suspects to enter Gibraltar and that, “as a result, the scene was set in which the fatal shooting, given the intelligence assessments which had been made, was a foreseeable possibility if not a likelihood” (ibid., § 205). See also *Gül v. Turkey* (App. 22676/93), Judgment of 14 December 2000, § 78; *Andronicou* (above n. 5), § 171.

⁴⁴ Ibid., § 181; *Ergi v. Turkey* (above, n. 11), § 79 (on civilians); *Isayeva, Yusupova and Basayeva v. Russia* (App. 57947-49/00), Judgment of 24 February 2005, § 171.

⁴⁵ See above, section I.2 (ii).

⁴⁶ Such challenges are particularly great in situations where the hostage-taker captures and holds the hostages in a blockaded and isolated location. In a recent case concerning a challenge to a law which authorised the shooting down of a hijacked aircraft, the German Constitutional Court considered that it was impossible to expect that the authorities would have a complete picture of the factual situation at the moment when they took such a drastic decision as shooting down the aircraft or that the factual situation could be assessed correctly at that point. That consideration was one of the relevant factors in determining that there was a violation of, *inter alia*, the right to life. See German Constitutional Court (Bundesverfassungsgericht), judgment of 15 February 2006, 1 BvR 357/05.

⁴⁷ *El Caracazo v. Venezuela* (above n. 42), § 127.

⁴⁸ See *Zambrano Vélez* (above n. 21); see also UN Basic Principles (above n. 15), Principles 4 and 6.

⁴⁹ See UN Basic Principles (above n. 15), Principle 4.

Where states have failed to take adequate steps to find a peaceful solution to the crisis, they have been found to have violated the right to life. In a case before the Inter-American Court involving suppression of a riot in a prison, Peru was found in violation of the right to life for, *inter alia*, having rejected offers for facilitation of negotiations by the International Red Cross and the Inter-American Commission on Human Rights.⁵⁰ In the practice of the Court and of the European Commission for Human Rights, the adequacy and effectiveness of the negotiation efforts have been taken into account in hostage rescue cases resulting in loss of life.⁵¹ Among the relevant factors when assessing the effectiveness of the attempted peaceful means are the amount of time available to the authorities, the available means of communication with the hostage-taker, any efforts to build up confidence between the police negotiator, the coordination of messages given to the hostage-taker and allowing the aggressor to make a correct assessment of the situation at hand, measures to minimize external interferences, e.g., by bystanders, and others.

It follows from these obligations that the State should make available to this Court information about their attempts to negotiate and other tactical solutions, in order to allow the Court to verify that all possible efforts were made to avoid use of force. Undoubtedly, the authorities enjoy a certain margin of appreciation in choosing the tactics to be employed in such a sensitive matter as a terrorist hostage situation. However, given the utmost importance of protecting human life, the Court should subject attempts to achieve peaceful resolution to the most rigorous scrutiny.

(ii) *Use of force against hostages and indiscriminate force in hostage situations*

The use of indiscriminate force against a group consisting of hostages and hostage-takers cannot be justified in law. Resort to indiscriminate force is inconsistent with the standard of care required to protect life, and the strict requirements of necessity, proportionality, and the duty to avoid and minimise loss of life. This Court has held that “the massive use of indiscriminate weapons stands in contrast with the aim, and cannot be considered compatible with the standard of care prerequisite to an operation involving use of lethal force by state agents.”⁵²

It is inherent in the requirement that any use of force be “necessary” to defend against a real and imminent threat that the force is directed only against the source of the threat. Hence, while it may be necessary to use force against hostage-takers (provided all other requirements are met and losses are minimised), it cannot be “necessary” to deliberately direct force against hostages or to attack indiscriminately in a way that affects hostages and hostage takers alike. In this vein the Inter-American Court for Human Rights has held:

“[i]n peacetime situations, state agents must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury and persons who do not present such a threat, and use force only against the former.”⁵³

⁵⁰ See *Miguel Castro-Castro Prison* (above n. 18), § 244.

⁵¹ See, e.g., *Andronicou* (above n. 5).

⁵² *Isayeva v Russia* (above n. 12), § 191.

⁵³ *Zambrano Vélez* (above n. 21), § 85, and *Miguel Castro-Castro Prison* (above n. 18), § 216.

Adhering to this stringent approach, the German Constitutional Court found incompatible with the right to life a law authorizing use of force to shoot down a hijacked aircraft believed to be intended for a terrorist attack. It found that the use of lethal force against persons on board, who were not participants in the crime, was incompatible with their right to life and human dignity:

“The passengers and crew members who are exposed to such a mission are in a desperate situation. They can no longer influence the circumstances of their lives independently from others in a self-determined manner. This makes them objects not only of the perpetrators of the crime. Also the state which in such a situation resorts to [shooting the aircraft down] treats them as mere objects of its rescue operation for the protection of others. Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.”⁵⁴

Further, pursuing the general aim of saving hostages’ lives cannot justify operations which expose to real and serious risk the lives of some of the hostages. The principles of necessity and proportionality do not allow innocent lives to be lost in order to protect other innocent lives.⁵⁵ General international law in the field of State responsibility explicitly rejects the possibility of justifying on the basis of “distress” (i.e. the need to save lives) State actions which lead to a “comparable peril” to the one sought to be averted.⁵⁶ Risking the lives of some hostages in order to prevent risk to lives of others is a typical example of such “comparable peril” and is therefore not permissible.

Finally, it may be noted by way of analogy that even in situations of armed conflict, governed by the more permissive regime of international humanitarian law, directing force against civilians and the carrying-out of an indiscriminate attack is incontrovertibly prohibited; Article 51(4) of the 1977 Additional Protocol I to the 1949 Geneva Conventions describes attacks as “indiscriminate” where they employ a method or means of combat which cannot be directed at an objective, or where their effects cannot be limited, and consequently, in each such case, they strike military objectives and civilians or civilian objects without distinction.⁵⁷ International humanitarian law also requires that in case of doubt as to whether a person is a civilian, the person should be presumed to be a civilian, and not be attacked.⁵⁸

(iii) *Methods and means of use of force: precautions to protect against loss of life*

Where resort to force is absolutely necessary and unavoidable, the State must take all feasible measures to ensure that injury and suffering is minimized and that life is

⁵⁴ German Constitutional Court, judgment of 15 February 2006, 1 BvR 357/05 (above n.46).

⁵⁵ See above section I.2 (v).

⁵⁶ See Article 24, ILC Articles on State Responsibility of States for Internationally Wrongful Acts, Report of the Work of the ILC at its 53rd Session, UN doc. A/56/10 (2001), Ch. IV.

⁵⁷ Additional Protocol (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), Art. 51, section 4 (b) and (c).

⁵⁸ AP I, Art. 50.

preserved.⁵⁹ The State is obliged to take into account all relevant circumstances when deciding what methods and means of force to use in the operation.⁶⁰ The particular vulnerability of people held hostages should be a key factor when determining whether to use force, and what kind and amount of force would be proportionate.

A critical aspect of the State's responsibility relates to its decisions on methods and means of use of force, including choice of appropriate weapons. Principle 2 of the UN Basic Principles requires the State to develop a broad range of weapons and ammunition for a differentiated use of force. It supports the use of incapacitating non-lethal weapons "in appropriate situations" which clearly include hostage rescue operations.

Principle 3 is directly applicable to hostage situations; it provides: "[t]he development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled."

Even in situation of armed conflict, there is an obligation to take all feasible precautions in the choice of means and methods of attack with a view to avoiding incidental loss of civilian life and injury to civilians.⁶¹

In proceedings before the Court, the State should present evidence to demonstrate that all relevant factors and dangers were considered and played a significant part in the planning of the operation, and that recourse to lethal force was "absolutely necessary" and "proportionate" to the legitimate aim of protecting lives of hostages. Failure to exercise due diligence to protect against foreseeable consequences of use of force entails responsibility under Article 2 (and 3) of the Convention.⁶²

III. OBLIGATIONS OF THE STATE IN THE AFTERMATH OF A RESCUE OPERATION

1. Positive obligations under Articles 2 and 3 to take steps to protect against foreseeable and avoidable risks to lives and health

Articles 2 and 3 of the Convention require States to take steps to protect against foreseeable and avoidable risks to lives and health. Article 2 of the Convention imposes positive obligations, including to put in place a sufficient legal and regulatory framework to protect life,⁶³ to plan and establish systems for risk assessment to allow a quick response in an emergency;⁶⁴ and to take operational measures to safeguard the lives of those within the jurisdiction of the State.⁶⁵ The obligation is one of means rather than result: the question is whether, given the circumstances of the case, the State did all that could have been required of it to prevent lives from being avoidably put at risk.⁶⁶

⁵⁹ See, e.g., UN Basic Principles (above n. 15), Principle 5 (b).

⁶⁰ See *Andronicou* (above n. 5), § 181.

⁶¹ 57(2) (a) (ii) AP I.

⁶² See, e.g., *Oğur v. Turkey* (App. 21594/93), *Reports 1999-III* (gross negligence in conducting the operation in that a warning shot was fired not vertically as is usual, but horizontally). See also the 1998 *Concluding Observation* of the Human Rights Committee on Israel, where the State party is criticized for using rubber bullets in dispersing demonstrations and is urged to "enforce rigorously the strict limitations on the operational rules as to the use of firearms and the use of rubber bullets against unarmed civilians" (UN doc. CCPR/C/79/Add.93, 18 August 1998, § 17).

⁶³ *Osman v. United Kingdom* (App. 23452/94), *Reports 1998-VIII*; *McCann* (above n. 3).

⁶⁴ *Budeyeva v Russia* (App. 15339/02), Judgment of 20 March 2008, §§ 154-158; *Öneryıldız v. Turkey* [GC] (App. 48939/99), Judgment 18 June 2002, § 90.

⁶⁵ *Osman* (above n. 63); *Mahmut Kaya v. Turkey* (App. 22535/93), 28 March 2000

⁶⁶ *L.C.B. v. United Kingdom* (App. 23413/94), *Reports 1998-III*, § 36.

Article 2 positive obligations have been found to arise where lives are placed at real and immediate risk through criminal acts of third parties;⁶⁷ environmental hazards;⁶⁸ or acts of the State.⁶⁹ In determining whether the obligation has been met, an important criterion is the foreseeability of the threat to life: whether the State “knew or ought to have known” of the risk. The more predictable a hazard, the greater the obligation to protect against it:⁷⁰ *a fortiori*, where the origin of a threat to life is the State itself, as a result of a planned use of force or release of substances known to be hazardous, the State must be expected to foresee and plan for the consequences of these acts and the positive obligation to protect will be correspondingly high. Similarly, Article 3 of the Convention imposes positive obligations on the State to take steps to prevent torture and inhuman and degrading treatment of those within its jurisdiction, including to put in place a sufficient legal and regulatory framework for effective prevention, and to take necessary operational measures.⁷¹

It is recognised that provision of healthcare may engage positive obligations of the State under Article 2 of the Convention.⁷² In particular, Article 2 may be violated where individuals’ lives are put at risk by denial of access to healthcare which the State has undertaken to provide to the general public.⁷³ Article 3 of the Convention also imposes an obligation to provide healthcare in certain circumstances,⁷⁴ in particular where the State has assumed special responsibility or exercises particular control, such as in cases of detention,⁷⁵ or where the actions of the State in expelling an individual will lead to deprivation of healthcare which places him at risk of inhuman or degrading treatment.⁷⁶

2. Obligations to provide emergency care to hostages whose lives or health are at risk following a criminal act or a law-enforcement operation

Violations of Articles 2 and 3 of the Convention may result from the failure to provide care or medical treatment in the aftermath of a terrorist act or counter-terrorist

⁶⁷ *Osman* (above n. 63); *Mahmut Kaya v. Turkey* (above n. 65), Judgment of 28 March 2000.

⁶⁸ *Öneryıldız* (above n. 64), § 90; *Budeyeva v Russia* (above n. 64), §§ 130-137.

⁶⁹ *Özkan v Turkey* (App. 21689/93), Judgment of 6 April 2004; *L.C.B. v. United Kingdom* (above n. 66).

⁷⁰ *Budeyeva v Russia* (above n. 64), §137.

⁷¹ *A. v. United Kingdom* (App. 25599/94), *Reports 1998-VI*; *M.C. v. Bulgaria* (App. 39272/98), *Reports 2003-XII*; *Z. v. United Kingdom* [GC] (App. 29392/95), *Reports 2001-V*.

⁷² *Calvelli and Ciglio v. Italy* (App. 32967/96), *Reports 2002-I*; *Erikson v. Italy* (App. 37900/97), Admissibility decision 26 October 1999; *Powell v United Kingdom* (App. 45305/99), *Reports 2000-V*; *Tarariyeva v. Russia* (App. 4353/03), Judgment 14 December 2006.

⁷³ *Cyprus v Turkey* [GC] (App. 25781/94), *Reports 2001-IV*, § 219

⁷⁴ *İlhan v. Turkey* [GC] (App. 22277/93), *Reports 2000-VII*, § 87; *Tysiac v. Poland* (App. 5410/03), Judgment of 20 March 2007. See also the decision of the Human Rights Committee in *Mika Miha v Equatorial Guinea* (Comm. 414/1990), UN doc. CCPR/C/51/D/414/1990 (1994).

⁷⁵ *Hurtado v Switzerland* (App. 17549/90), *Series A, No. 280-A*; *McGlinchey v United Kingdom* (App. 50390/99), *Reports 2003-V*; *Yakovenko v Ukraine* (App. 15825/06), Judgment of 25 October 2007; *Keenan v. United Kingdom* (App. 27229/95), 3 April 2001, § 116. See also the judgment of the Inter-American Court in *Montero-Aranguren* (above n. 17). Under the statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) “other inhumane treatment”, one of the enumerated crimes against humanity, has been defined as including denial of medical care; *Prosecutor v. Krnojelac* (Case IT-97-25), Trial Chamber, Judgment of 15 March 2002, § 44. The UN Committee Against Torture has also recognised the obligation to provide medical care in detention as an element of the positive obligation to prevent torture; see General Comment No. 2: Implementation of Article 2 by States Parties, UN doc. CAT/C/GC/2, 24 January 2008, § 13.

⁷⁶ *D. v United Kingdom* (App. 30240/96), Judgment of 2 May 1997, where the applicant had advanced AIDS and would have been unable to receive treatment for his condition following expulsion.

operation. Disregard for casualties may breach Article 2 of the Convention, even where it does not in fact lead to death, or is not clearly established as the sole or only possible cause of death. In *Özkan v Turkey*, this Court found that, following an attack on a village where there was PKK activity, the security forces had “failed to make any attempt to verify whether there were any civilian casualties, which – given the amount and nature of the ammunition used by the security forces – was a realistic possibility”.⁷⁷ Although it could not be clearly established that the applicant’s daughter in that case had died as a direct consequence of the security forces’ failure to secure medical treatment for her, it was nevertheless held that: “the callous disregard displayed by the security forces as to the possible presence of civilian casualties amounted to a breach of the Turkish authorities’ obligation to protect life under Article 2”⁷⁸

Violations of the right to life as a result of failures in medical care following security operations have been found on a number of occasions by the Inter-American Court of Human Rights. In *Miguel Castro-Castro Prison*, which concerned the suppression of a prison riot, the Court found a violation of the right to life arising from a number of aspects of the security operation. Amongst these was the lack of proper emergency medical attention, since: “many of the persons injured were maintained without medical attention for several days, and the injured that were transferred to the hospital did not receive the medical attention required. These omissions caused complications in the health of some of the inmates and in others it caused their deaths”.⁷⁹ Violations of the right to life were also found in the similar case of *Neira-Alegría*, where the Court noted that “there was lack of interest in rescuing the surviving rioters after the demolition”.⁸⁰

Where neglect of casualties of a law enforcement operation causes severe suffering, beyond that inherent in the resolution of the situation concerned, the positive obligation to prevent inhuman or degrading treatment may also be breached. The Inter-American Court of Human Rights addressed this point in *Montero-Aranguren v. Venezuela*, concerning a disturbance at a prison during which guards opened fire on prisoners.⁸¹ The Inter-American Court found that the authorities had failed to adopt the necessary measures to ensure timely and efficient medical treatment to those injured as a result of the incidents,⁸² and held that “lack of adequate medical assistance could be considered per se a violation of Articles 5(1) and 5(2) of the Inter-American Convention for Human Rights, depending on the specific circumstances of the person, the type of disease or ailment, the time spent without medical attention and its cumulative effects”.⁸³ In the *Miguel Castro-Castro Prison* case, the Inter-American Court found that the lack of medical attention was also a factor in a violation of the prohibition on cruel, inhuman or degrading treatment, under Article 5 of the American Convention on Human Rights,⁸⁴ concluding that “it is evident that all those injured as a consequence of the so-called ‘Operative Transfer 1’ and of the acts that followed that operation required urgent

⁷⁷ *Özkan v Turkey* (above n. 74), § 307.

⁷⁸ *Ibid.*, § 308.

⁷⁹ *Miguel Castro-Castro Prison* (above n. 18), § 197 (47), See further *ibid.*, §§ 216; 246.

⁸⁰ *Neira-Alegría* (above n. 32), § 76. See also *Durand and Ugarte v. Peru (Merits)*, Judgment of 16 August 2000, I/ACtHR, Series C, No. 68, arising from the same incident, where the Court also found a violation of the right to life as protected by Article 4 of the American Convention on Human Rights, one of the grounds being that there was “no interest by the authorities to rescue the detainees who were alive after the demolition” of part of the prison (§ 68).

⁸¹ *Montero-Aranguren* (above n. 17).

⁸² *Ibid.*, § 60 (21), § 101.

⁸³ *Ibid.*, § 103.

⁸⁴ *Miguel Castro-Castro Prison* (above n. 18), § 301.

medical attention, especially if you take into consideration the magnitude of the attack, the type of wounds caused, and the characteristics of the weapons used [...]. The lack of adequate medical attention caused additional psychological and physical suffering, and determined that the injuries caused were not adequately attended to and resulted in chronic suffering.”⁸⁵

The obligations to care for and treat casualties under Articles 2 and 3 of the Convention, and under analogous provisions of international human rights law, are reflected in international humanitarian law. Even in extreme situations of international or internal armed conflict, international humanitarian law recognises that the principle of humane treatment of both civilians and combatants requires emergency assistance and medical care of the injured and sick.⁸⁶ Moreover, international humanitarian law imposes specific obligations to take precautions against the effects of attacks including, for example, effective mobilisation in the course of or after attacks.⁸⁷

These obligations are also reflected in non-binding international standards. The UN Basic Principles state that: “whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: [...] ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment.”⁸⁸ Likewise, the UN Code of Conduct states in Article 6 that: “law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.”⁸⁹ The commentary to this provision states that “law enforcement officials shall also secure medical attention for victims of violations of law or of accidents occurring in the course of violations of law.”

Where casualties result directly from terrorist acts, rather than a law enforcement operation, similar standards apply. At a European level, Principle II of the Guidelines of the Committee of Ministers of the Council of Europe on the Protection of Victims of Terrorist Acts states that “[i]n order to cover the immediate needs of the victims, States should ensure that appropriate (medical, psychological, social and material) emergency assistance is available free of charge to victims of terrorist acts.”⁹⁰ The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states that: “victims should receive the necessary material, medical, psychological and social

⁸⁵ Ibid., § 302.

⁸⁶ AP I states in Article 10: “1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected. 2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.”

An equivalent protection in respect of internal armed conflict is set out in Additional Protocol (II) to the Geneva Conventions of 21 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II) in Article 7. See further (III) Geneva Convention relative to the Protection of Civilian Persons in Time of War, Articles 16-23, and, in respect of internal armed conflicts, common Article 3 to the Geneva Conventions. See further Inter-American Commission on Human Rights, Case 11.137, *Juan Carlos Abella (Argentina)* where the Commission found that following an attack on a military base which gave rise to a situation of internal armed conflict, the American Convention on Human Rights, interpreted in light of Common Article 3 of the Geneva Conventions, placed a duty on the State to treat the wounded humanely.

⁸⁷ AP I, Art. 58.

⁸⁸ UN Basic Principles (above n. 15), Principle 5 (c).

⁸⁹ UN Code of Conduct (above n. 29).

⁹⁰ Adopted by the Committee of Ministers on 2 March 2005 at the 917th meeting of the Ministers’ Deputies.

assistance through governmental, voluntary, community-based and indigenous means.”⁹¹

Therefore, where there is a foreseeable risk that (a) a terrorist attack, or (b) a law enforcement operation in response to such an attack, or (c) a combination of the two, will result in risk to the life of individuals, then, irrespective of the justification for the use of force relied on by the law enforcement authorities, there is a positive obligation to take all possible steps to minimise and address that risk. A parallel positive obligation applies to take measures to avert suffering which would amount to inhuman or degrading treatment. Where a particular weapon or hazardous substance is used which is known, or should have been known, to create risks to life or health, then the use of that weapon by agents of the state triggers an obligation to mitigate the risk, including by:

- Ensuring adequate attention to and care for victims in the immediate aftermath of the incident, including through emergency medical attention at or near the scene;
- Putting arrangements in place for rapid transfer of the injured or sick to hospital;
- Ensuring that adequate medical care is available in hospital and that adequate information is available to medical personnel to treat those affected.

The extent of the obligations depends on the circumstances: where an operation is planned in advance, and casualties are foreseeable, then the obligation to make plans for the care of casualties is correspondingly high.

3. Obligation to provide information necessary to address a foreseeable risk to life or inhuman and degrading treatment

An element of the positive obligation under Article 2 of the Convention to protect victims of a criminal act or law enforcement operation is the obligation to provide such information as is necessary for effective medical treatment, where denial of information potentially relevant to the nature of victims’ injuries or illness could endanger life. *L.C.B. v. United Kingdom* recognised that there could in principle be an obligation under Article 2 of the Convention to provide information to the applicant on the radiation to which her father had been exposed “if it had appeared likely at that time that any such exposure of her father to radiation might have engendered a real risk to her health.”⁹²

In *Öneryildiz v. Turkey*, the Grand Chamber also recognised a right to information necessary to protect life: it considered that, in defining positive obligations regarding hazardous activities “particular emphasis should be placed on the public’s right to information, as established in the case-law of the Convention institutions. [T]his right, which has already been recognised under Article 8 may also, in principle, be relied on for the protection of the right to life.”⁹³ A duty to provide medical information to avert a risk to life has also been imposed in relation to prison healthcare. For instance, in *Paul*

⁹¹ Adopted on 29 November 1985 by the UN General Assembly (UN doc. A/RES/40/34) (quotation from para. 14).

⁹² *L.C.B. v. United Kingdom* (above n. 66), § 38.

⁹³ *Öneryildiz* (above n. 64), § 90. See also *Budeyeva v Russia* (above n. 64), §§ 132-133. Regarding the equivalent obligation under Art. 8, see *Guerra v. Italy* (App. 14967/89), *Reports 1998-I*, § 60, where the Court found a violation of positive obligations under Art. 8 in failing to provide information to the applicants on pollution from a nearby factory, which was essential for them to assess risks to their health.

and *Audrey Edwards v United Kingdom*, where a prisoner with a history of violence murdered his cellmate, the Court found that the authorities had failed to meet their positive obligation to protect life, in particular as a result of the failure of the police to share information which would have enabled the prison authorities to make an informed decision about whether to place the prisoner in a shared cell.⁹⁴

Consistently with this case-law, Article 3 should also be interpreted to impose an obligation, parallel to those under Articles 2 and 8 of the Convention, requiring the State to provide essential information necessary to prevent or protect against suffering that amounts to torture or inhuman or degrading treatment. Such an obligation reflects the fundamental nature of Article 3, and is consistent with other positive obligations of prevention, protection and investigation which it imposes.

As noted above, public interest considerations, including the threat of terrorism cannot operate to limit obligations to protect the rights under Article 2 of the Convention. The absolute and fundamental nature of rights under Article 3 of the Convention, including when countering terrorism, is equally established.⁹⁵ Therefore, where positive obligations arise to provide information necessary to protect life or freedom from inhuman and degrading treatment, national security considerations cannot justify non-disclosure of that information.

Therefore, a positive obligation to provide information essential for the care of victims of a terrorist or counter-terrorist operation forms an inherent part of the positive obligation to provide medical and other emergency care to those victims. Where the State authorities refuse to reveal the nature of a weapon used by them, and which is likely to have put lives or health at risk, this will hamper diagnosis and the medical treatment which can be provided to victims, and will therefore breach the positive obligations to protect life, and to prevent inhuman and degrading treatment. In accordance with the absolute nature of rights under Articles 2 and 3, public policy interests such as national security cannot be used to justify the failure to take positive steps necessary to protect life, or to prevent suffering amounting to inhuman and degrading treatment.

IV. CONCLUSION

Due to their particular vulnerability and helplessness, people held as hostages are in exceptional need of protection. The primary aim of rescue operations must be to protect their lives and health and to secure their safe release. Choices as to methods and means of the rescue operation should reflect all relevant factors, including the state of the hostages and their capability of surviving the operation. Non-violent alternatives and tactical solutions to hostage crises should be exhausted before having recourse to force. If use of force is strictly unavoidable, non-lethal force against the source of threat should be attempted first. The weapons and means used should be authorized under national and international law.

The use of indiscriminate lethal force against a group consisting of hostages and hostage-takers is inconsistent with the duty of care and the strict requirements of “necessity” and “proportionality”. Exposing the lives of some hostages to serious and real risk in order to protect the lives of other hostages is not allowed in law, as

⁹⁴ *Paul and Audrey Edwards v United Kingdom* (App. 46477/99), *Reports 2002-II*, §§ 61-62.

⁹⁵ *Saadi v. Italy* (App. 37201/06), Judgment of 28 February 2008, §§ 137-138.

balancing of the number of lives likely to be saved against the number of lives jeopardised cannot be justified as “necessary” and “proportionate”.

Where there is a foreseeable risk that a terrorist attack, a law enforcement operation in response to such an attack, or a combination of the two, will result in risk to the life or health of individuals, there is a positive obligation to take all possible steps to minimise and address that risk. Where a particular weapon or hazardous substance is used which is known, or should have been known, to create risks to life or health, then the use of that weapon by agents of the state triggers an obligation to mitigate the risk, including by ensuring adequate attention to and care for victims in the immediate aftermath of the incident. Inherent in this is an obligation to provide information essential for the care of victims. In accordance with the absolute nature of rights under Articles 2 and 3 of the Convention, public policy interests such as national security cannot be used to justify the failure to take positive steps necessary to protect life, or to prevent suffering amounting to inhuman and degrading treatment.