MILITARY OPERATIONS AND THE RIGHT TO LIFE: THE UNEASY BEDFELLOWS

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Abstract

This article explores the challenges facing the European Court of Human Rights in relation to a High Contracting Party's right to deploy the military as a result of insurgent or terrorist activity, and the obligations under Article 2 of the European Convention on Human Rights (the Convention), concerning the right to life, that were imposed on High Contracting Parties as a result of ratifying the Convention. In considering these challenges, this article addresses firstly the ground-breaking case of McCann and Others v United Kingdom, and then focuses on the jurisprudence arising out of right to life cases brought against firstly Turkey and then Russia as a result of military operations, which have been heavily influenced by the case of McCann.

Keywords: case of McCann and others v United Kingdom; right to life and military operations

A. INTRODUCTION

The European Court of Human Rights (the Court) has a long history of dealing with cases that 'pose significant questions on the use of military force and has made relevant efforts in adapting principles [arising] from decisions on incidents [that] occurred during law enforcement operations to wide-scale armed conflicts'.[2] Strasbourg's early forays into such cases suggested, however, that military operations and the right to life would never be compatible bedfellows, because until the decision in the seminal case of *McCann* in the mid-1990s all other military cases concerning the right to life were

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1 ECt.HR 5 September 1995, McCann and Others v United Kingdom, (1995) 21 EHRR 97.

2 F. Sperotto, Violations of Human Rights during Military Operations in Chechnya, Human Rights and Human Welfare Working Paper No. 41, 1 February 2007, 5.

either screened out for failing to comply with procedural requirements,[3] or had been heard by the Commission, as it was then, with limited impact on the jurisprudence at the time.[4]

However, with the decision in the case of *McCann* came a sea change in the approach of the Court, the result being the creation of implied obligations under Article 2 of the European Convention on Human Rights (the Convention) and a method of providing a realistic securing of rights and freedoms under Article 2.[5] The decision has had far-reaching consequences and has influenced all other military cases heard by the Court under the right to life. Where once it might have been impossible to imagine reconciling military operations and a State's obligations to secure the right to life, the *McCann* decision imposed procedural and substantive obligations on High Contracting Parties in such a way that it may be possible to balance a State's need to undertake military operations and meeting its obligations to protect the right to life, although as case law suggests, this has never been, and is unlikely to be, an easy challenge for either a State or the Court to meet.

Article 2 of the Convention is perhaps the most fundamental of all its Articles because it enshrines a basic value of democratic society[6] and without it, it is clear that the other provisions would be redundant.[7]

Article 2 provides that:

> (1) Everyone's right to life shall be protected. No one shall be deprived of his life intentionally...
> (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 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.

As a result, Article 2 provides lawful exceptions to the requirement of the right to life, although those exceptions may only be justified if the State can show that the force used when carrying out lethal force was 'no more than absolutely necessary'. Consequently, where there has been loss of life as a result of lethal force, the actions that brought about that loss of life may be subject to scrutiny under Article 2.[8]

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3 For example, see ECt.HR 10 July 1984, Stewart v United Kingdom, No. 10044/82.

4 J. Chevalier-Watts, A Rock and a Hard Place: Has the European Court of Human Rights Permitted Discrepancies to Evolve in their Scrutiny of Right to Life Cases?, 14(2) The International Journal of Human Rights 302 (2010).

5 A. Mowbray, The Creativity of the European Court of Human Rights, 5 Human Rights Law Review 78 (2005).

6 ECt.HR, McCann and Others v United Kingdom, *supra* note 1, p. 147.

7 J. Chevalier-Watts, *supra* note 4, p. 301.

8 M. Janis, R. Kay and A. Bradley, European Human Rights Law Texts and Materials 130 (Oxford: Oxford University Press, 2008, 3rd ed.).

Whilst this appears theoretically to balance the rights of the State and the rights of the individual, the reality is that the Convention does not prohibit 'military operations that involve significant risk to the lives of innocent persons',[9] thus creating immediate tension between the right to life and the use of military force. This article will consider whether Strasbourg has achieved that balance, or whether the two issues remain as uncomfortable but necessary bedfellows.

Before considering the approach of the Court since the seminal case of *McCann*, it is important to consider the *McCann* case itself and the fundamental principles that the Court established during its consideration of the case, because it is these very principles that provide the basis of the subsequent jurisprudence.

B. THE CASE OF McCANN

The *McCann* case was the first lethal force case to be heard by the Court, and the narrow majority of 10–9 emphasised its difficulty in finding the United Kingdom to be in breach of its obligations under Article 2. The case arose as a result of the shooting dead of three Irish Republican Army (IRA) terrorist suspects by British Special Forces soldiers (SAS). The SAS shot dead the suspects after being deployed in an anti-terrorist operation involving British, Gibraltarian and Spanish authorities. The Court examined in detail the planning and carrying out of the operation that led to the deaths of the IRA suspects in order to determine whether:[10]

> ... the anti-terrorist operation as a whole was controlled and organised in a manner which respected the requirements of Article 2... and whether the information and instructions given to the soldiers which, in effect, rendered inevitable the use of lethal force, took adequately into consideration the right to life of the three suspects.

Thus the Court scrutinised the control and organisation of the operation, taking into consideration, inter alia, why the authorities did not arrest the IRA suspects at the border immediately on their arrival in Gibraltar; the assessments and reports made by the SAS soldiers; the purportedly insufficient allowance made for other assumptions and alternative possibilities; and the allegedly incorrect information provided by one of the SAS soldiers.[11] This critical review led the Court to determine that the soldiers' reflex actions lacked:[12]

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9 A. Zemach, The Unpleasant Responsibilities of International Human Rights Law, 38 Denver Journal of International Law and Policy 452 (2010).

10 ECt.HR, McCann and Others v United Kingdom, *supra* note 1, p. 201.

11 *Ibid.*, pp. 202–212.

12 *Ibid.*, p. 212.

> the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects...[and] [t]his failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation.

Strasbourg was therefore not persuaded that the killing of the terrorist suspects involved the use of force that was no more than absolutely necessary in order to defend persons from unlawful violence within the meaning of Article 2 of the Convention. Notwithstanding the highly critical dissenting views,[13] this method of scrutinising the planning and control of an operation has been utilised consistently by Strasbourg in all lethal force cases since the case of *McCann*, firmly entrenching the authority of the Court to examine such matters, and providing a method of determining whether the force used to achieve the objectives was strictly proportionate and of protecting all persons from recourse to lethal force to the greatest extent possible.[14]

It is also worth noting that the Court quickly ruled out any personal liability on the part of the soldiers themselves, observing that:

> It considers that the use of force by agents of the State in pursuit of one of the aims delineated in... Article 2... may be justified under this provision (art. 2–2) where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken.[15]

The Court's reasoning was that to hold otherwise would place too great a burden on a State and its agents when trying to carry out their duties, and to impose such a duty might be to the detriment of their lives and indeed of others. As a result, in the *McCann* case, and also in many lethal force cases heard since *McCann*,[16] the actions of State agents will not in themselves give rise to a violation of Article 2.[17]

Not only did the Court in the *McCann* case confirm its authority to scrutinise in detail a State's operational methodology in relation to operations that result in lethal force being employed, but the Court also created an implied procedural obligation to carry out some sort of effective official investigation when individuals are killed as a result of the use of force by State agents, which has just as many far-reaching consequences for High Contracting Parties as the authority to scrutinise State operations.

For further discussion on the dissenting view refer to J. Chevalier-Watts, *supra* note 4, pp. 300–318.

ECt.HR, McCann and Others v United Kingdom, *supra* note 1, p. 194.

15 *Ibid.*, p. 200.

16 See ECt.HR 9 October 1997, Andronicou and Constantinou v Cyprus, (1997) 25 EHRR 491, 1997-VI, [1998] Crim.LR 823; ECt.HR 17 March 2005, Bubbins v The United Kingdom, Application No. 50196/99; ECt.HR 3 April 2001, Brady v The United Kingdom, Application No. 55151/00.

17 ECt.HR, McCann and Others v United Kingdom, *supra* note 1, p. 200.

The Court believed that a need arose to create this implied obligation to carry out an effective investigation because:[18]

> ... a general legal prohibition of arbitrary killing by the agents of a State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life... requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by... agents of the State.

Therefore, by creating such a requirement for a State, the Court is provided with another tool for ensuring that everyone's right to life is secured within the meaning of the Convention.

Thus the case of *McCann* created and imposed the twin pillars of the procedural obligation to carry out an effective investigation and the substantive obligation in relation to proportionate force that have formed Strasbourg's framework for scrutinising all subsequent lethal force. This paper now considers the evolution of these twin pillars in the context of military lethal force cases to assess the original proposition. The paper proposes to address firstly the issue of the duty to use proportionate force, and secondly the implied obligation to carry out an effective investigation.

C. THE PLANNING AND CONTROL OF AN OPERATION

The Court in the *McCann* case established its authority to examine the planning and control of an operation so as to determine whether the force used was compatible with Article 2 by reviewing not only the actions of the soldiers, but importantly whether the operation was planned and controlled so as to minimise recourse to lethal force as far as possible in the circumstances.[19]

So it was against this rubric that the case of *Ergi v Turkey*[20] was heard by the European Court, although the newly acquired authority of the Court was not received favourably by the Turkish Government. The case arose as a result of the accidental shooting dead of the applicant's sister by the military during a planned armed ambush to capture members of the Kurdish Workers' Party (PKK), a guerrilla organisation.[21] The Turkish Government determined that in the *Ergi* case it was entirely inappropriate to apply the principles so clearly enunciated in the *McCann* case. The reasons given by

18 *Ibid.*, p. 161.

19 *Ibid.*, p. 194.

20 ECt.HR 28 July 1998, Ergi v Turkey (66/1997/850/1057).

21 J. Chevalier-Watts, Has Human Rights Law Become *Lex Specialis* for the European Court of Human Rights in Right to Life Cases Arising from Internal Armed Conflict?, 14(4) The International Journal of Human Rights 589 (2010).

the Turkish Government were that the British case involved a security operation that was deliberately organised to target specific individuals and that the relevant authorities knew the identities of the suspects and the nature of the suspected crimes in advance of the operation; thus the Court's scrutiny of such an operation may have been justified.[22] Interestingly, the Turkish Government did not concur that such scrutiny was entirely justifiable, just that it '*may* have been called for'[23] in that particular case, suggesting that at this early stage in the jurisprudence of military operations and the right to life, there was little accord between the two principles. The Turkish Government suggested that because its own operation on this occasion was so very different from that in the case of *McCann*, the Court did not have the same authority to scrutinise the type of military operation that was carried out in the *Ergi* case.

In its assessment of the planning and control of the operation, the Court did acknowledge Turkey's submission that the Court did not have the authority to scrutinise such an operation, but firmly asserted that 'the Court is not convinced by the Government's submissions that it is inappropriate for the Court to review whether the planning and conduct of the operation was consistent with Article 2 of the Convention'.[24] The Court went on to confirm the implied requirements under Article 2 in order to quash any notion that it might be acting *ultra vires*. It was noted that Article 2 does not define circumstances where it is permitted for an individual to be killed intentionally but it does describe situations where a State may be permitted to use force that results, as an unintended outcome, in the deprivation of life. The utilisation of the term 'absolutely necessary' in Article 2 therefore suggests that the test of necessity is a much more stringent test than that to be expected under Articles 8–11 of the Convention. As a result, any force used must be strictly proportionate in order to achieve the aims as set out in Article 2. In order to measure such proportionality, the Court therefore has the inferred authority to consider not only the actions of those who actually administered that lethal force, but also to scrutinise the planning and control of the operation that led to those actions. That is the only way in which the Court may assess effectively whether those actions were within the parameters of Article 2, thus giving weight to the importance of the Convention in a democratic society.[25] In this one paragraph Strasbourg began the process of entrenching the principles propounded in the *McCann* case; confirmed its own mandate; and highlighted that although the right of a State to carry out military operations and the right to life may be opposing principles, there may be a method by which they can be reconciled.

22 ECt.HR, Ergi v Turkey, *supra* note 20, p. 75.

23 *Ibid.* (emphasis added).

24 *Ibid.*, p. 79.

Ibid.

Indeed, the Court went perhaps even further than just entrenching its authority to scrutinise the methodology of a State's operation as set out in the *McCann* case: Strasbourg also expounded the concept of that authority. The Court confirmed that although it had not been proven beyond reasonable doubt that the bullet that killed the applicant's sister had actually been fired by the security forces themselves, that in itself did not mean that the Court was unable to place the responsibility of her death squarely on the shoulders of Turkey itself.[26]

The authority of the Court to scrutinise the planning and execution of the operation flowed from the death of the applicant's sister, which resulted from the military operation. Thus the issue of who actually fired the lethal bullet was irrelevant; it was the planning and conduct of the operation that was the key matter for consideration. As a result, the Court agreed with the Commission (as it then was) that where a State had failed to provide direct evidence as to the validity of the control and planning of its operation within the constraints of the Convention, it was feasible for the Court to infer reasonably that insufficient precautions had been taken by the State to protect the lives of its civilians.[27] It is submitted that, jurisprudentially, this was a huge leap for Strasbourg to make from its controversial decision made in *McCann*, where not only were novel principles and obligations implied, but it was also the first time that such a lethal force case had even come before the Court. In just three short years, Strasbourg not only confirmed and approved its authority to scrutinise military operations, but also confirmed that its authority extended to inferring that a State had not taken sufficient precautions to comply with its obligations under Article 2 of the Convention. So whilst it might appear, *prima facie*, that military operations and the right to life have a limited correlation, Strasbourg has crafted a method of creating that correlation.

However, the confidence exhibited by the European Court in imposing its authority in such a manner even in the face of such limited judicial opinion must have been sorely challenged when the first lethal force cases arising out of the conflict between Russia and Chechnya were heard. It is to those cases that this paper now turns to continue its exploration of the original proposition.

1. CHECHNYA, MILITARY OPERATIONS AND PROPORTIONATE FORCE

Chechnya was conquered by Russia over a century ago but Chechnya has ever since resisted the imposition of Russian control and right up to the present day, the relationship has remained fragile and volatile. During the 1990s Chechnya announced its independence from Russia and in response, Russia launched a large-scale military

26 *Ibid.*, p. 81.

27 *Ibid.*

campaign to quell the insurgency. These confrontations resulted in huge losses of Russian and Chechen lives as well as grave human rights violations.[28] It is against this backdrop of violence and human rights issues that lethal force cases citing breaches of Article 2 of the Convention have now been inundating the European Court of Human Rights. Russia has consistently denied that it is at war with Chechnya, thus avoiding any obligations under the Geneva Conventions. As there is no international criminal court with jurisdiction over Chechnya, victims and families of victims have sought justice from the European Court of Human Rights.[29] The first three judgments to be delivered by Strasbourg relating to military operations in Chechnya were given in 2005; this was the first time that the Court had had the opportunity to consider a situation of extreme armed conflict and apply the principles that were dramatically created in *McCann* and then developed in *Ergi*. For the purposes of analysis, this paper proposes to concentrate initially on two of the three original judgments given in 2005, those of *Isayeva, Yusupova and Bazayeva v Russia*[30] (*Isayeva I*) and *Isayeva v Russia*[31] (*Isayeva II*).

Isayeva I concerned the indiscriminate bombing by the Russians of civilians as they attempted to leave the town of Grozny after the Russian military announced that it would open a humanitarian corridor to allow civilians to escape the fighting in Grozny. The case of *Isayeva II* arose as a result of sustained aerial bombing by the Russians near the village of Katyr-Yurt, and then a further attack by the Russians on civilians attempting to escape from the village the following day. In both cases, the Court found that Russia had breached its substantive and procedural obligations under Article 2.[32]

To all intents and purposes, regardless of Russia's denial this type of military activity resembled a war. As such, it was a huge challenge for the Court to try to reconcile the right of Russia to defend itself against insurgents with the right to life. It might have been expected therefore that Strasbourg would be restrained in its judgment in taking into consideration that the case of *Isayeva I* involved a set of novel and extreme circumstances, as yet untested by the European Court. Instead, however, the Court tackled the case with self-assured zeal and confidently asserted their authority to scrutinise the planning and control of the military operation in Grozny.

The Court took time to set out the obligations under Article 2 and in particular highlighted the fact that in 'light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny,

28 V. Popovski, Terrorising Civilians as a "Counter-Terrorist Operation": Crimes and Impunity in Chechnya, 7(3) Southeast European and Black Sea Studies 432–433 (2007).

29 *Ibid.*, p. 434.

30 ECt.HR 24 February 2005, Isayeva, Yusupova and Bazayeva v Russia, Application Nos. 57947/00, 57948/00 and 57949/00 (*Isayeva I*).

31 ECt.HR 24 February 2005, Isayeva v Russia, Application No. 57950/00 (*Isayeva II*).

32 J. Chevalier-Watts, *supra* note 21, p. 591.

taking into consideration not only the actions of State agents but also all the surrounding circumstances',[33] thereby reaffirming the Court's authority to undertake detailed scrutiny of the planning and conduct of an operation that led to the death of a person. It was to this issue that the Court then turned.

It acknowledged that it was undisputed that the applicants were subject to aerial missile attack and that this was as a result of the operation of the Russian Government. Russia, however, asserted that the use of force was justified under Article 2(2) and that the harm was not an intended consequence.[34] The Court adopted a similar methodology to that adopted in the earlier case of *Ergi*: it tackled the issue of the lack of information provided by the respondent State. It will be recalled that in the case of *Ergi* the Court determined that it could infer liability based on the lack of evidence to the contrary, which Turkey had failed to provide. Similarly, in the case at hand the Court saw no reason to deviate from this approach, which provides a very effective method of assessing the legitimacy of an operation by appearing to place the onus on the State to provide sufficient evidence to rebut any inference of human rights breaches. This implies that in the matter of balancing the right to life and the right of a State to carry out military operations, the right to life may take precedence.

Nonetheless, the Court was clearly aware not only of the very difficult situation with which it was being faced, that of having to assess whether a State utilised disproportionate force when trying to counteract terrorist activities, but also that 'the situation that existed in Chechnya at the relevant time called for exceptional measures on behalf of the State in order to regain control...'.[35] This acknowledgement in itself would perhaps have been sufficient to recognise a State's autonomy and acknowledge the voluntary nature of the European Convention on Human Rights but then surprisingly the Court outlined the types of measure this might cover. It considered that these 'could presumably include employment of military aviation equipped with heavy combat weapons'[36] and it was also prepared to accept 'that if the planes were attacked by illegal armed groups, that could have justified use of lethal force'.[37] At first sight, this appears to be allowing a High Contracting Party a wide margin of appreciation[38] with respect to the right to life and stands in sharp contrast to the stringent approach taken to date by the European Court to military cases. However,

33 ECt.HR, Isayeva I, *supra* note 30, p. 170.

34 *Ibid.*, p. 174.

35 *Ibid.*, p. 178.

36 *Ibid.*

37 *Ibid.*

38 The margin of appreciation is the variable discretion awarded to High Contracting Parties by the European Court of Human Rights when examining whether a State has violated its obligations under the European Convention on Human Rights, usually in relation to rights under Articles 8–11, although it has been utilised less frequently when considering other Articles under the Convention. For further information, refer to A. Mowbray, Cases and Materials on the European Convention on Human Rights 449–460 (London: Butterworths, 2001).

the Court then proceeded to provide an assessment of the evidence submitted by the Russian Government in order to support its submissions that its use of force was proportionate in the circumstances. This scrutiny allayed any doubt that Strasbourg might be awarding a State a wide margin of appreciation in such circumstances; its attack on Russia was stinging.

The Court noted that the Government had failed to produce any evidence that legitimised the attack or that supported its submissions. There were testimonies submitted by the two pilots involved in the aerial bombardment and the air traffic controller, but these testimonies were taken over a year after the attack, thus minimising their accuracy, and the testimonies were incomplete, brief and inconsistent with other witness statements. The Government also failed to submit documentation outlining the pilots' mission, their debriefing and discrepancies in documented evidence.[39] In its conclusion, the Court confirmed that even if the military were pursuing a legitimate aim in launching unguided air-to-ground missiles, the actual planning and control of the operation itself was not undertaken in such a way as to have taken the lives of the civilian population into consideration.[40] This is an interesting conclusion. On the one hand, the Court is acknowledging the supremacy of a State in deploying massive weaponry in anti-terrorist operations in non-war situations, but on the other, the Court actually undermines the supremacy of the State by imposing its own authority in scrutinising such operations with such vigour and offering such critical commentary on a State's actions. The right to life and military operations may be balanced, but the relationship is strained.

This awkward balance was also evident in the case of *Isayeva II*. The Court concurred that the presence of a large body of armed fighters in Katyr-Yurt and their active resistance to State authorities could have justified the use of lethal force, but equally that there must be a balance between the aim pursued and the means employed to achieve that aim. Thus the Court was able to scrutinise vigorously the planning and execution of the operation, regardless of whether such military force was justifiable.[41] The Court did not deviate in its rigour and determined that the use of this degree of military force 'in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society'.[42]

However, the Court was not yet finished and continued in its explicit criticism of Russia:[43]

39 ECt.HR, Isayeva I, *supra* note 30, pp. 179–180.

40 *Ibid.*, p. 199.

41 ECt.HR, Isayeva II, *supra* note 31, p. 181.

Ibid., p. 191.

Ibid.

> The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents.

What the Court made clear is that Russia focused on the incorrect aim where the 'primary aim of the operation should be to protect lives from unlawful violence'.[44] Instead, Russia's primary aim appeared to have been to annihilate the insurgents. Russia may have been pursuing a legitimate aim, but it did not utilise the requisite care required in order to achieve that aim and Strasbourg was bold in its review and its criticism.

It is possible that the Court felt it was necessary to be so critical because the number of cases being brought before it as a result of human atrocities perhaps called for authoritative condemnation of activities that had been allowed to continue unchecked for many years. So the Court, although 'sensitive to the subsidiary nature of its role'[45] and aware that it must be cautious in taking the role of first instance tribunal when a complaint has been made under Article 2, is duty bound to apply a 'particularly thorough scrutiny'.[46] The Court therefore appeared to follow the critical approach that it originally took in *McCann* and ensured that the right to life was a paramount consideration, even in the face of existing State sovereignty.

The cases of *Isayeva I* and *II* reflect Strasbourg's assertion of the paramountcy of the right to life, even in the face of terrorist activity. Perhaps this staunch approach is, however, a result of the extreme nature of the cases themselves, thus echoing the approach taken by the Court in the case of *McCann*: extreme cases call for extreme measures. The question could therefore be asked: has the Court's uncompromising manner been tempered in its hearing of subsequent cases? This paper therefore now takes a chronological journey to assess whether Strasbourg has refined its balancing act between sovereign rights and the right to life or whether those bedfellows still remain in an uneasy truce, and considers four Russian cases since those of *Isayeva I* and *II*.

The judgment of *Khatsiyeva and Others v Russia*[47] was released in July 2008. The Russian Government did not dispute that it was responsible for the deaths of the applicants' relatives although the facts surrounding the deaths were disputed. It was alleged by the applicants that the victims, and others, were cutting grass near Arshty in Chechnya. Two military helicopters appeared, circled low over the field in which the workers were cutting grass and fired a burst from a machine gun, terrifying the group of men. The men ran to their car, discarding their scythes and drove in the direction of Arshty. The helicopters hovered above the car and the men left the vehicle

44 *Ibid.*

45 *Ibid.*, p. 178.

46 *Ibid.*

47 ECt.HR 7 July 2008, Khatsiyeva and Others v Russia, Application No. 5108/02.

and ran for cover. The helicopters launched unguided missiles and began firing machine guns, damaging the car; the helicopters then began chasing the men. One of the helicopters fired a missile at the place where the victims were hiding, killing two and injuring another.[48]

The Russian Government stated that since the beginning of counter-terrorist operations within the Chechen Republic, it had taken all necessary measures to protect civilians, including, inter alia, notifying civilians near the administrative border with Chechnya that if they were challenged by federal forces, they were to indicate that they did not belong to illegal armed groups by marking themselves with a white cloth and waiting for the arrival of servicemen for identity checks. The Government confirmed that on the day of the victims' deaths it was carrying out an operation to search for and detain illegal fighters near the village of Arshty. During that operation a helicopter was shot out of the sky and the rescuers came under fire from the illegal fighters. Later that day, when two military helicopters were patrolling near the area, the pilots reported seeing men carrying light machine guns near a car and received orders to fire warning shots. The pilots reported that the men did not wait as directed for servicemen to check their identity; rather they got into the car and attempted to drive away. The pilots were ordered to fire a second round of warning shots, which they stated were ignored, and then to open fire on the car and the occupants, which resulted in two deaths and an injury. The Government further confirmed that there was no information as to whether the residents of Arshty had been warned in advance about the operation that day, nor whether the grass-cutters had used firearms against the pilots.[49]

The Government contended that its use of lethal force in the present case was no more than what was absolutely necessary for the purposes of Article 2 of the Convention, and indeed, the Court confirmed that a use of force that deprives life may fulfil the criteria of Article 2, although such deprivation must be justified and the circumstances strictly interpreted.[50] The Court reiterated its acknowledgement of 'the difficult situation at the material time in the neighbouring region, the Chechen Republic, which called for exceptional measures on the part of the State to suppress the illegal armed insurgency...'.[51] Nonetheless, the Court confirmed that State responsibility was engaged because the victims were killed by State agents; thus its scrutiny of the situation leading up to the deaths had to be meticulous, as authorised by preceding case law.

The Court professed doubts as to the accuracy as to the evidence submitted by the Government. On the one hand, the Government 'seemed ready to admit that the

48 *Ibid.*, pp. 12–18.

49 *Ibid.*, pp. 21–26.

50 *Ibid.*, pp. 128–129.

51 *Ibid.*, p. 134.

applicant's relatives had been unarmed'[52] but asserted that actually the victims were responsible for their own deaths because of their negligent behaviour in failing to mark themselves as civilians; on the other, the Government also contended that the men had been armed and could have belonged to a group of illegal fighters.[53] Then in an interesting turn of events the Court observed it was not 'necessary to establish the facts in this respect'.[54] This was because the Court did not consider that the honest belief of the pilots was enough to justify the use of lethal force against the victims. As stated earlier in the paper, it has long been established that the honest belief of a State agent that the use of lethal force was essential at the time in itself will give rise to a personal defence and will not automatically give rise to a violation of Article 2, but this consideration of the Court provides an alternate interpretation of this defence. In other words, it appears that the personal defence available to individual State agents may also be a defence for the State responsible for those agents utilising the lethal force, thus suggesting a widening in the margin of appreciation available to a State.

Nonetheless, the Court quickly asserted that in this particular case honest belief was not enough to negate disproportionate force as a number of circumstances had to be taken into consideration.[55] These included the fact that evidence consistently suggested that the pilots acted under the orders of their superiors; thus it was for the Court to ascertain whether the decisions of the superior officers 'exercised the necessary degree of caution and appropriate care to be expected'[56] in such an operation. In light of the lack of information requested by the command centre from the pilots about the visibility, terrain, risk of threat, population, or any other details, the Court could only conclude that there had been a lack of appropriate care in carrying out the operation and that as a result the use of force had been greater than was absolutely necessary in pursuing aims under Article 2 of the Convention.[57]

The Court then embarked on a fascinating course of observation and critique that appears to be a double-edged sword in the development of the jurisprudence in this area and one can sense the conflicting tension in the Court as it tries to balance the rights of the State and the requirement to observe fully the right to life. The first edge of the sword is damaging to the authority of the Court. Firstly, the Court refers to the issue raised by the Russian Government that the civilians were complicit in their own deaths due to their negligence in running away from the helicopters instead of following alleged earlier instructions to wait for servicemen to identify them as civilians.

52 *Ibid.*, p. 132.

53 *Ibid.*

54 *Ibid.*, p. 133.

55 *Ibid.*, p. 134.

56 *Ibid.*, p. 135.

57 *Ibid.*, pp. 136–138.

As far as the author is aware, this is the first time that the Court has addressed the issue of victim negligence in a situation such as this. In response to this matter, the Court explicitly avoided addressing the question whether a State could be justified in using lethal force against civilians for failing to comply with official safety instructions, and instead focused on other matters that would reflect the lack of justification for utilising lethal force.[58]

It is accepted that the issue of victim negligence is an entirely novel concept for the Court in these circumstances and thus would pose difficult questions for the Court. I would submit, however, that this was an ideal opportunity for the Court to assess the relevance of a matter that it obviously considered important enough to outline on a number of occasions; instead, the Court merely left the question open. This failure to engage with such a pertinent detail leaves a sense of unease as it does not appear to address concerns relating to victims' actions and the right to life, which clearly is highly relevant when considering such cases as these.

Perhaps the Court felt that it had already imposed its will firmly enough not to have to address this issue, and could implicitly have been balancing Russia's autonomy and its own authority. However, this is not a strong argument because as will be seen below, in the *Isayeva I* case the Court had no qualms about striking down the Government's allegations that the applicants caused delays in the investigations into the deaths owing to their failure to present themselves in a timely fashion to the relevant authorities, and by failing to provide addresses. The Court in that case believed it pertinent to remind the Russian Government that the applicants were subject to terrible circumstances and thus were not able to respond as appropriately as might be expected in normal circumstances. I would contend that this same argument can be deployed equally in the *Khatsiyeva* case, in which the victims were placed in a terrifying situation and could not necessarily have been expected to act in a rational manner. If the Court in *Khatsiyeva* had taken this firm stance, it would have provided valuable jurisprudence in the matter of negligence and the right to life in an armed conflict situation. However, the Court did not, and the matter remains unanswered, adding a sense of disquiet as to future developments if a State were to try to rely on this justification of the use of lethal force.

The second edge of the double-edged sword in the Court's observations is in direct contrast, however, and implicitly denigrates the Russian Government. As noted, the Court cast aside the issue of negligence on the part of the victim and instead focused its attention on the actions of the State in relation to the incident. The Court observed that it could not:[59]

> ... perceive any justification for the use of lethal force in the circumstances of the present case, given that the authorities had never warned the residents of Arshty about the

[58] *Ibid.*, p. 139.

[59] *Ibid.*

> operation... and that it is highly doubtful that the residents... were ever apprised of the conduct required when confronted with federal servicemen.

Here Strasbourg falls just short of actually accusing the Russian Government of lying, but its meaning is clear, even if implicit, and in this one small paragraph asserts its authority to criticise a State's actions, thereby refocusing attention on the validity of the right to life.

Thus the Court's observations in this part of the judgment reflect the issues facing Strasbourg: on the one hand, the Court must respect the voluntariness of ratifying the Convention, and with that the implicit autonomy awarded to all States, but on the other, have at its heart at all times the fundamental principles of the Convention, that of protecting human rights, and in this instance, that of the right to life. The *Khatsiyeva* case suggests that the bedfellows are just as uneasy in one another's company.

The case of *Taysumov and Others v Russia*[60] was heard almost a year after *Khatsiyeva*. In this case, the applicants lived in the village of Chechen-Aul in the Chechen Republic and their house came under artillery fire, causing the destruction of the house and a number of deaths. The applicants argued that it was beyond reasonable doubt that the victims had been killed by federal forces. For its part the Russian Government contended that federal military involvement had not been proven, that the deaths had been caused by the detonation of an explosive device near the house, and thus that there was no causal link between military activity and the deaths. The Government further contended that the investigators hypothesised that the explosive device had been placed by illegal armed groups or through an erroneous use of weapons by federal forces, but identification was not possible currently because the investigation was on-going.[61]

In relation to establishing the facts, the Court observed that a number of general principles had been established in *Bazorkina v Russia*[62] that could be applied to the case at hand. These principles included situations where the facts may be in dispute and the standard of proof is that of 'beyond reasonable doubt' and that proof 'may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact'.[63] In light of the lack of information and the withholding of information by the Russian Government, and the convincing and coherent facts presented by the applicants with substantive evidence, the Court had the jurisdiction to draw inferences from the Government's conduct in this regard.[64] The burden of proof therefore shifted to the Government when the applicant made out a prima facie case, and the limited evidence presented by the Russian Government did

60 ECt.HR 14 May 2009, Taysumov and Others v Russia, Application No. 21810/03.

61 *Ibid.*, pp. 74–79.

62 ECt.HR 27 July 2006, Bazorkina v Russia, Application No. 69481/01, at pp. 103–109.

63 *Ibid.*, p. 105.

64 ECt.HR, Taysumov v Russia, *supra* note 60, pp. 84–90.

not discharge this burden of proof; thus the Court adduced that the victims were killed as a result of Russian military activity.[65]

Such an approach by the Court reflects an unusual ease in the balancing of the twin pillars of the right to life and military operations: the State is given the opportunity to rebut the prima facie case made out by the applicant, which appears to balance equally the rights of both parties without undue burdens. The author submits, however, that this balance may not be so straightforward. The Court had the jurisdiction to infer that the deaths occurred as a result of State military activity, thus breaching the substantive right to life of the victims under Article 2 of the Convention. What is then noticeable by its absence is the Court's assessment of the proportionality of the use of the force by the Government in carrying out the operation, which had been a core consideration for the Court in previous military cases. It is not clear why the Court avoids such a discussion, and its absence suggests a discreet shifting of the balance between the twin pillars in favour of the right to life. It would be valuable in situations such as these for Strasbourg to set out, even briefly, its purpose in leaving out such scrutiny to provide clarity in the evaluation of its jurisprudence. This discreet shift in the balance became less discreet in a case heard the following year, that of *Abuyeva and Others v Russia*,[66] where the Court showed an increase in its determination to condemn Russian military activities.

This case was connected with the earlier case of *Isayeva II*. Since late 1999, the village of Katyr-Yurt had been regarded as a 'safe zone' from the anti-terrorist operations being undertaken by the Russian military and local residents and displaced persons lived there. In 2000, a large group of Chechen fighters captured the village and as a result, Russia carried out a large-scale assault. The applicants in *Abuyeva* lost many family members in the assault or sustained serious personal injuries.[67]

The Russian Government argued, but without referring to any specific provision of Article 2 of the Convention, that its attack on the village and the resulting consequences were absolutely necessary to protect Katyr-Yurt and the neighbouring villages from further unlawful violence. It noted that the deployment of lethal force resulted from the active resistance of the insurgents and that it was the latters' actions that threatened the civilians and State agents as well as the general interests of society and the State. The Government also wished to draw the Court's attention to the fact that the insurgents used the villagers as a 'human shield' and prevented them from leaving the village, using cellars and houses as places from which they could attack federal forces. As a result of the anti-terrorist operation, the village was liberated and the majority of the insurgents were captured.[68]

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65 *Ibid.*, pp. 91–92.

66 ECt.HR 2 December 2010, Abuyeva and Others v Russia, Application No. 27065/05.

67 *Ibid.*, pp. 7–9.

68 *Ibid.*, pp. 193–195.

The Court acknowledged that the presence of such a large group of armed fighters in the village could have justified the use of lethal force,[69] thus confirming the autonomy of the State, but this is where the Court's empathy ended. The Court could see no reason to depart from its findings in the *Isayeva II* case, to the effect that the planning and execution of the operation in Katyr-Yurt was 'in blatant violation of the principles of interpretation of Article 2'[70] and that whilst that operation had pursued a legitimate aim, its planning and execution had fallen well below the standard imposed by Article 2.[71] However, the more recent case of *Udayeva and Yusupova v Russia*[72] suggests that the Court may be adopting a slightly more lenient frame of mind when scrutinising most carefully all the surrounding circumstances leading up to a death.

In this case, the sons of the applicants were walking home from school when they were hit by a missile launched from a nearby settlement where Russian troops had been stationed; both boys died at the scene. The Government did not challenge this information although it was pointed out by the Government that the deaths could have been caused by shelling by an illegal armed group.[73] The question for the Court in scrutinising the actions of the State was therefore whether the State authorities were responsible for the deaths of the applicants' sons.

There was no dispute that the boys were killed as a result of an explosion; however, the Court was presented with conflicting accounts of the events, which, it will be recalled, had also been a key issue for the Court in *Ergi v Turkey*. The Court in the present case observed that '[w]hen...the respondent Government have exclusive access to information able to corroborate or refute the applicants' allegations, any lack of cooperation by the Government without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicants' allegations'.[74]

This does not depart from the approach taken by the Court in the early case of *Ergi* and indeed, in *Udayeva* it goes on to note that when facts are in dispute, the Court requires that the standard of proof must be beyond reasonable doubt. It is not entirely clear in the case of *Ergi* how that standard of proof was acquired because at no stage was it evidenced that Turkey was responsible for Havva Ergi's death; however, in *Udayeva* the Court provides a clear commentary on how this should be approached. It noted that the required standard of proof may be attained where there is 'sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.

69 *Ibid.*, p. 197.

70 *Ibid.*, p. 200.

71 *Ibid.*, p. 203.

72 ECtHR 21 December 2010, Udayeva and Yusupova v Russia, Application No. 36542/05.

73 *Ibid.*, p. 15.

74 *Ibid.*, p. 72.

In this context, the conduct of the parties when evidence is being obtained has to be taken into account.'[75]

The Court reiterated its established position concerning cases such as these where it is difficult for applicants to obtain the necessary evidence to support their allegations because the Government is in possession of the relevant information and does not submit it. When this occurs, the applicant has made out a prima facie case and the Court cannot reach a realistic conclusion because of a lack of information coming from the respondent State, it is for the respondent State to rebut by stating definitely why information cannot be presented to support the Government's arguments, or to explain convincingly how the events actually occurred. On that basis, the burden of proof then shifts from the applicant to the respondent State.[76]

In applying this to the present case, the Court observed that it had requested a copy of the entire investigation file concerning the deaths of the boys but the Government had failed to produce the file on the basis that it was precluded from doing so under Article 161 of the Code of Criminal Procedure, although the Court noted that it had already been established that this was an insufficient explanation in previous case law.[77] What is interesting is that whilst in the present case the Court was critical of this lack of compliance by the State, such lack of compliance may not be enough to determine a State's liability for a person's death. This is in contrast to previous case law, which suggests that a lack of compliance and evidence is strongly persuasive in favour of the applicant.

Thus in *Udayeva* the Court observed that whilst it had readily found the Russian military responsible for the death of civilians in Chechnya in a number of cases, it had done so on the 'basis of a number of pieces of evidence and the information demonstrating the authorities' awareness of the military operations conducted in the area'.[78] In addition, Strasbourg noted that there was a lack of information relating to the incident and a lack of convincing evidence supporting the applicants' allegations. There was also little evidence that the authorities would have known, or ought to have known, that there was a real and immediate risk to the lives of the boys. As a result, the Court confirmed that the burden of proof had not been shifted to the State because it was not beyond reasonable doubt that the Russian military were implicated in the boys' deaths. Therefore, Russia did not violate the substantive limb of Article 2.[79]

I respectfully submit that this decision is difficult to reconcile with the dogmatic approach taken in the preceding years by Strasbourg in relation to internal armed conflicts. The Court appears to take an almost peremptory approach in the present case, spending little time in examining the alleged violation of the right to life and

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75 *Ibid.*, p. 73.

76 *Ibid.*, pp. 74–75.

77 *Ibid.*, p. 76 and see ECt.HR 9 November 2006, Imakeyeva v Russia, Application No. 7615/02.

78 *Ibid.*, p. 77.

79 *Ibid.*, pp. 78–80.

providing little explanation for its rejection of the lack of cooperation by the State, which in previous cases had been of great concern and had played a pivotal role in findings of State responsibility. I submit that the applicants and witnesses did provide substantial evidence and information in relation to the incident, and that it should have been clear to the Russians that if military activities were being undertaken they should have known *prima facie*, or ought to have known, that there was a real and immediate risk to civilians in the area. However, my arguments are for the time being academic because the Court saw fit to determine otherwise. Its decision suggests discrepancies in the approach of the Court in examining the substantive obligation to enforce the right to life. Notwithstanding the author's concerns about possible judicial discrepancy, what this decision does highlight is the difficulties facing Strasbourg when adjudicating on such matters when having to balance the rights of the State with those of civilians and State agents. In this one case, the Court has perhaps shifted the balance between the right to life and State autonomy back towards the latter, a move that may be uncomfortable in many respects but in others reflects the Court's desire to ensure recognition of the voluntary nature of the Convention and of a State's sovereignty.

However, the matter of proportionality of force in relation to Article 2 is just one consideration for the Court in evaluating whether a State has violated its Article 2 obligations, and it is now to the matter of the implied obligation to carry out an effective investigation that this paper turns to assess the original proposition.

D. AN EFFECTIVE AND ADEQUATE INVESTIGATION

This procedural obligation was first recognised by Strasbourg in the *McCann* case where the Court observed that:[80]

> ... a general legal prohibition of arbitrary killing by the agents of the State would be ineffective... if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life... requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force...

This jurisprudential step taken by the Court was ground-breaking because it was the first time that it expressly recognised that a State is obligated to ensure that it carries out an efficient and effective investigation in order to comply with its duties under Article 2, thus imposing greater burdens on a State in ensuring it complies with its obligations. What is noteworthy, however, is that in the case of *McCann*, the very launch pad for this novel jurisprudential obligation, this duty was actually given little consideration, in spite of substantial criticisms made by the applicants as to the

80 ECt.HR, McCann and Others v United Kingdom, *supra* note 1, p. 161.

investigation process and clear acknowledgment by the Court that there had been various shortcomings in the inquest proceedings and that those shortcomings had substantially hampered the actual investigation. The Court nevertheless held that those shortcomings did not render the investigation ineffective.[81] Instead, the Court observed that 'it is not necessary...for the Court to decide what form such an investigation should take and under what conditions it should be conducted...'.[82]

However, this reluctance by the Court to enforce the obligation more stringently was perhaps not surprising when one considers the context of the decision. As I explored in a recent article, the conservative approach of the Court might have resulted from certain implicit constraints. First, the duty to investigate is only an implied provision and has no jurisprudential history, so on its first foray into new judicial territory, the Court perhaps took the pragmatic approach of awarding the State a higher margin of appreciation than would normally be expected in matters arising under Article 2. Secondly, the concept of an effective investigation is a novel one, so to expect the Court to impose stringent requirements might have been unrealistic at that stage. Thirdly, it was perhaps a reflection of the Court's onerous task of balancing two opposing interests: the right to carry out military operations and the right to life.[83]

However, the reluctance of the Court to impose stringent obligations under this duty ended with the judgment in *McCann* and in the subsequent case of *Ergi v Turkey* it showed a more authoritative stance.

In the latter case, Strasbourg refuted the Turkish Government's assertion that a State's obligations were confined only to cases in which it was clearly established that the killing was caused by a State agent; thus the implied procedural obligation to carry out an effective investigation should rightly be imposed on Turkey.[84] And further, the Court made it clear that 'the mere knowledge of the killing on the part of the authorities gave rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death.'[85] Thus Strasbourg imposed a stringent obligation that is triggered on mere knowledge alone. However, the Court was mindful of the fact that 'loss of life is a tragic and frequent occurrence in the security situation in south-east Turkey', so highlighting the Court's own obligation to weigh and measure the principles of State autonomy and the right to life. Having paid due deference to this concern, it did not shy away from ensuring that the rights provided under Article 2 must and should be recognised because:[86]

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81 *Ibid.*, pp. 161–163.

82 *Ibid.*, p. 163.

83 J. Chevalier-Watts, Effective Investigations under Article 2 of the European Convention on Human Rights: Security the Right to Life or an Onerous Burden on a State?, 21(3) *The European Journal of International Law* 705 (2010).

84 ECt.HR, Ergi v Turkey, *supra* note 20, p. 82.

85 *Ibid.*

86 *Ibid.*, p. 85.

> neither the prevalence of violent armed clashes or the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into the deaths arising out of clashes involving the security forces...

As a result, Turkey was found to have breached its implied obligations to carry out an effective investigation under Article 2. If there were any doubts that in *McCann* the Court might have imposed a liberal implied duty, the decision in *Ergi* should have put paid to any such perception. The question must be, however, why the sudden imposition of what may be construed as an onerous duty? There is no judicial answer to this question but perhaps the answer is to be found in Article 2 of the Convention itself. The duty to protect the right to life under this provision, when read in conjunction with Article 1, would be ineffective if there existed no procedure under which to review the lawfulness of the use of lethal force; thus by implication, a State is required to carry out some form of effective investigation.[87] This novel concept may have only been first acknowledged in *McCann*, but its paramount importance was clearly understood. As a result, the Court may have wished to ensure that the obligations triggered as a result of its existence should be entrenched firmly as quickly as possible in European jurisprudence. As a result, military operations and the right to life became bedfellows, albeit uncomfortable ones.

In the Russian military cases of *Isayeva I* and *II*, the Court did not deviate from its authoritative approach and addressed the matter of effective investigations in some detail. Since the case of *Ergi*, the jurisprudence had expanded and *Isayeva I*, noting that evolution,[88] observed that an investigation may be construed as being effective when it is capable of leading to a determination of whether the force was justified, and to the identification and punishment of those responsible, although the Court was quick to confirm that this obligation was one of means, not of results.[89] Thus it was not imperative that a person or persons had specifically been called to account but that it might be possible to place responsibility as a result of the investigation.

The Court implied yet further requirements of this obligation, noting that 'a requirement of promptness and reasonable expedition is implicit'[90] and that whilst there may be obstacles or difficulties that hamper the investigation a prompt response will do much to ensure public confidence,[91] which clearly was sadly lacking as a result of actions taken against Chechnya by Russia. So whilst the European Court was concerned to ensure its judicial independence from political matters, it felt it prudent to comment on this matter. However, this was not the extent of the Court's commentary

87 ECt.HR, McCann and Others v United Kingdom, *supra* note 1, p. 161.

88 See the Northern Irish cases: ECt.HR 4 May 2001, McKerr v United Kingdom, Application No. 28883/95; ECt.HR 4 May 2001, Hugh Jordan v United Kingdom, Application No. 24746/94; ECt.HR 4 August 2001, Kelly and Others v United Kingdom, Application No.30054/96.

89 ECt.HR, Isayeva I, *supra* note 30, pp. 210–211.

90 *Ibid.*, p. 212.

91 *Ibid.*

on State issues that may impact on its ability to carry out its obligations. The Court took it upon itself to observe that '[t]here are other elements of the investigation that call for comment'.[92] The Court believed it pertinent to address the criticisms that the Russian Government had levelled at the applicants themselves. The Russian Government asserted that its investigations were hampered by the applicants' failure to present themselves to authorities or to leave an appropriate address.[93] However, the Court was derisive of such considerations and took the uncharacteristic approach of advancing that Russia should have taken into consideration the mental state of the applicants at that time.[94] The applicants had been forced to flee Grozny, were undoubtedly insecure and vulnerable and would have had no permanent address to lodge with the authorities; thus the Government's criticisms were invalid. The personal circumstances of the applicants therefore imposed greater burdens on the State to ensure that the investigation was carried out effectively.

In the *Isayeva II* case, the Court was equally dismissive of Russia's alleged investigations into the deaths and took it upon itself to comment on specific aspects of the investigation and its failings.[95] The burden imposed on Russia to carry out an effective investigation seems onerous indeed; however, it must always be borne in mind that Article 2 of the Convention enshrines a fundamental value of democratic society and without it all other rights are redundant. Such heavy burdens are to be expected when the Court is faced with such extreme circumstances as military operations being carried out at huge risk to civilians and State agents. It is therefore for the State to ensure that military operations and the right to life receive equal attention, even though they are seemingly incompatible.

As has been noted in case law, the Court has made it clear that whilst the 'the investigation must...be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances',[96] this is an obligation of means and not of results.[97] However, in the cases of *Taysumov* and *Abuyeva* the Court took the unusual step of commenting specifically on the investigation and, in the latter case, of actually criticising the results of the investigation.

In the former case, the Court fell short of actually accusing Russia of lying about not knowing the identities of those responsible 'for the artillery guns within the military units located in the vicinity of Chechen-Aul'[98] or of those actually involved in the attack, or that it would not be difficult to establish such identities immediately

92 *Ibid.*, p. 224.

93 *Ibid.*

94 J. Chevalier-Watts, *supra* note 83, p. 717.

95 ECt.HR, Isayeva II, *supra* note 31, pp. 217–222.

96 ECt.HR, Bazorkina v Russia, *supra* note 62, p. 118.

97 *Ibid.*

98 ECt.HR, Taysumov v Russia, *supra* note 60, p. 102.

after the attacks. The Court further criticised the ineffectiveness and incompleteness of the investigation[99] and assumed that 'no meaningful results ha[d] been achieved in more than three years',[100] thus providing further evidence as to the lack of effectiveness of the investigation. As a result, the Court concluded that Russia had violated its procedural obligations under Article 2. The approach of the Court in the later case of *Abuyeva* reflects equal vilification of Russia's ability to carry out an effective investigation.

In the case of *Abuyeva*, Strasbourg observed that 'it cannot discern any steps taken to clarify the crucial issues of responsibility for the safety of the civilians' evacuation... and it does not appear that any additional questions about these aspects of the operation...were posed to the... authorities'.[101] This observation in itself may not seem unduly harsh; however, the concluding comment reveals the real purpose of the Court: it notes that '[n]o one was charged with any crime'. On the one hand, the jurisprudence of the duty to carry out an effective investigation has consistently shown that the investigation is not results-focused, yet here on the other hand, in a mere seven words, Strasbourg has suggested that the results are indeed relevant and implied that it is unacceptable that no charges were brought.

However, the Court does go on to explain its extreme comment. It refers to the essential purpose of an investigation, which has two limbs. Its effectiveness will lead firstly to a sense of whether the use of force that resulted in the death was justifiable, in the circumstances, and secondly to the identification and punishment of those responsible.[102] But in considering this second limb the Court has historically shied away from outright criticism of a lack of results and has always relied on the fact that it is means-tested, not results-driven. Nonetheless, in the *Abuyeva* case the Court no longer appears to be hindered by such constraints and states clearly that:[103]

> In the circumstances of the present case, the Court considers that the tasks could not be achieved without identifying the individual agents in the military, and possibly, civilian administration, who had borne responsibility for the taking and implementation of the decisions which had entailed such a heavy toll on the civilian population.

I believe that this steely resolution on the part of the Court to ensure that some kind of real responsibility is placed on the shoulders of those responsible is a reassuring step to have taken. It is a reflection of the keenly felt disapproval of the continuing occurrences of human rights violations as the troubles between Russia and Chechnya have persisted. However, the actual effectiveness of the Court may be limited because

99 *Ibid.*, p. 103.

100 *Ibid.*, p. 106.

101 ECt.HR, Abuyeva and Others v Russia, *supra* note 66, p. 210.

102 *Ibid.*, p. 211.

103 *Ibid.*

whilst Turkey appears to be addressing its Convention failings adequately,[104] 'the Russian Federation should urgently address the systemic issue that is quite apparent from the accumulation of cases'.[105]

Additionally, the Court generally limits itself to ordering the respondent State to pay monetary compensation to the victims or their families, as opposed to ordering it to take measures beyond financial compensation.[106] The Court has given itself the authority to require a State to undertake measures to ensure that similar violations do not occur again. It is the Committee of Ministers which ensures that the State undertakes such measures,[107] and the Court took just this opportunity in the *Abuyeva* case although, I submit, with little vehemence.

Even after delivering such extreme criticisms of Russia in the cases of *Isayeva I* and *II*, and noting its disappointment that Russia had not carried out effective investigations,[108] the Court observed that it 'does not consider it necessary to indicate general measures required at national level for the execution of this judgment'[109] and instead 'finds... it falls to the Committee of Ministers, acting under Article 46 of the Convention, to address the issue of what...may be required of the respondent Government by way of compliance'.[110] So it would appear that the tenacity of Strasbourg is watered down in some respects in relation to its imposition of ensuring State compliance. The Court did further comment that 'it considers it inevitable that a new, independent, investigation should take place'[111] but that suggestion appears to have little weight when taking into consideration its previous limited authority, and may even be construed as being in *obiter*.

The most recent case of *Udayeva* offers conflicting evidence with regard to the Court's approach to a State's obligation to carry out an effective investigation. It will be recalled from earlier in the paper that the Court failed to find Russia in violation of its substantive obligation to protect the right to life in regard to the planning and control of the operation, but in relation to the matter of an effective investigation, the Court found quite the opposite. *Prima facie*, this suggests that the Court was willing to impose a strict approach in interpreting the implied obligation on a State, even when the State did not actually breach its substantive obligations. And indeed, the Court was willing to levy some criticisms at the State in relation to, *inter alia*, the

104 Committee on Legal Affairs and Human Rights, Member States' Duty to Co-Operate with the European Court of Human Rights, Council of Europe 1 October 2007, [25] and addressed by the Committee of Ministers Doc 12067, 13 October 2009.

105 *Ibid.*

106 O. Solyang, Chechnya and the European Court of Human Rights: the Merits of Strategic Litigation 3 Security and Human Rights 213 (2008).

107 See ECt.HR 13 July 2000, Scozzari and Giunta v Italy, Application Nos. 39221/98 and 41963/98.

108 ECt.HR, Abuyeva and Others v Russia, *supra* note 66, p. 239.

109 *Ibid.*, p. 240.

110 *Ibid.*, p. 243.

111 *Ibid.*

State's failure to establish the basic circumstances of the events, its failure to exercise due diligence and promptness, and lengthy periods of inactivity during proceedings.[112] As a result, the Court found that Russia had failed to carry out an effective investigation into the deaths of the two boys;[113] however, the Court's examination of the issues in question were dealt with in a peremptory fashion and without the explicit criticism exhibited in the *Isayeva* cases, *Taysumov* and in *Abuyeva*. The response of the Court in the *Udayeva* case appears to stand in stark contrast to previous cases and as a result, to be paying mere lip service to the very real obligations on States under the Convention.

There may be an argument that the peremptory approach is because there is uncertainty as to whether State agents really were involved in the deaths of the victims, and this argument may carry some weight because the Russian Government was able to discharge its burden of proof with regard to establishing the required standard of proof that the military forces were implicated in the deaths of the boys. Nonetheless, the Court was still able to establish that Russia breached its procedural obligations under Article 2 and if that was so, then the consideration of those issues should have been addressed more rigorously to reflect previous jurisprudence.

It is unfortunate that the Court chose to take such a minimalist approach in this final case because although it appears that Strasbourg has been very critical of a State's inability to carry out an effective investigation, the reality is that the actual authority of the Court may be limited and that Russia in particular shows few signs of complying as fully as it should with its obligations under Article 2.

E. CONCLUSION

Thus, the twin pillars of military operations and the right to life continue to sit alongside one another, jostling for position; one may gain ground in one respect, whilst the other rallies in other respects. Overall, the approach of the Court is a rigorous one in its determination to enforce the right to life, as without the right to life, all other rights under the Convention cease to be relevant. Equally, the Court is charged with ensuring the sovereignty of a State is acknowledged and duly considered.

The cases of *McCann* and *Ergi* were critical in establishing the Court's authority to scrutinise the actions of a State with such vigour. Subsequent case law has confirmed that authority, with often extraordinary criticisms of the State concerned, as reflected in the cases of *Isayeva I* and *II*, *Khatsiyeva*, *Taysumov* and *Abuyeva*.

The case of *Udayeva* stands apart from its predecessors in the manner in which the Court has addressed a number of the issues, suggesting a certain reticence in its

112 ECt.HR, Udayeva and Yusupova v Russia, *supra* note 72, pp. 64–67.

113 *Ibid.*, p. 69.

scrutiny, although the reason for this anomaly may be that the Court was not convinced of Russia's involvement in the deaths of the boys. Unfortunately, this does not necessarily explain all the inconsistencies.

Thus Strasbourg's task of finding a middle ground that pays due deference to both the State and the individual is an onerous one, and one that is shouldered on the one hand with zeal and on the other with trepidation. Overall, the author considers that whilst the Court attempts to balance the right to life and the duties of the State, the balance often falls in favour of the right to life; and submits that if there are going to be any issues in imbalance, then this is the only way in which an imbalance can be tolerated because it is the right to life that underpins all other Convention rights, and if this right is not enforced, then all other rights become valueless. Thus so long as the Court has due regard for a State's autonomy in its considerations, then its vigorous scrutiny acts as a watchdog in ensuring that State actions give the right to life its due recognition.

Only further cases will provide evidence of whether the European Court has been able to accommodate the two opposing principles in the same bed that they must ultimately share. It is hoped that the *Udayeva* case remains an anomaly because it suggests a shift in the balance towards the State. This cannot be construed as being favourable and would suggest a reversion to the case law that existed prior to *McCann*, which fundamentally undermined the ethos of the Convention and the rights of those protected under it. The author believes it is more likely, however, that due to the weight of authority provided by cases subsequent to *McCann*, Strasbourg will continue to shoulder its onerous burden in a competent manner and that the rigour of its scrutiny will reflect the implicit balancing of State duties in the face of terrorist activities and a State's obligation to ensure its civilians' right to life.