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### International human rights law and the law of armed conflict in the context of counterinsurgency: With a particular focus on targeting and operational detention

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## Chapter VI IHRL

In Chapter IV we have identified the right to life as the principal human right governing the concept of targeting. It follows from the practice of the human rights supervisory bodies as well as soft law documents that the converged substantive scope of non-arbitrary deprivation of life can be distributed among a number of requirements. These include four substantive requirements, i.e. (1) the requirement of a sufficient legal basis; (2) the requirement of absolute necessity; (3) the requirement of proportionality; and (4) the requirement of precaution, as well as the procedural requirement to carry out a post-facto investigation. Paragraph 2 of this chapter identifies and examines the substantive content of the principal conceptual requirements within conventional and non-conventional IHRL determinative for the *non-arbitrariness* of the deprivation of life under IHRL. Before we turn to exercise, paragraph 1 briefly examines the complementarity of the notions of ‘arbitrary’ in Article 6 ICCPR and Article 4 ACHR, and ‘intentional’ in Article 2 ECHR.

### 1. ‘Arbitrary’ and ‘Intentional’: Complementary?

As noted, a preliminary remark must be made in respect of the term ‘arbitrary’ as used in Article 6 ICCPR and Article 4 ACHR, and the term ‘intentional’ as used in Article 2 ECHR. The use of the terms ‘arbitrary’ and ‘intentional’ demonstrates that, while the deprivation of life is prohibited and may not be derogated from under any circumstances during peacetime, the right to life and the commensurate scope of prohibited deprivation of life is nevertheless *not absolute*.<sup>1120</sup> Reasoned *a contrario*: the *non-arbitrary* and *non-intentional* deprivation of life falls outside the *principally prohibitive scope* of the right to life and thus provides a basis for *exceptional permissible* use of lethal force. The above calls for a closer examination of the concepts of ‘arbitrary’ and ‘intentional’ and more in particular of the scope and requirements determining whether the deprivation of life resulting from the use of force is (non-)arbitrary or (non-)intentional.

While the *travaux préparatoires* offer little assistance, it is submitted that both terms share a similar function, i.e. the lawfulness of a deprivation of life is subject to the outcome of the interpretation of what is ‘arbitrary’ or ‘intentional’ in a particular context. As can be further corroborated by relevant case-law and international practice in the interpretation of the right to life,<sup>1121</sup> “there is no or no significant discrepancy between deprivations of life that are

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<sup>1120</sup> Also: Boyle (1985), 6, 11, 15; Vande Lanotte & Haack (2004), 92, § 13; Ducheine (2008), 416; Melzer (2008), 92.

<sup>1121</sup> See, for example, (2003h), *Myrna Mack Chang v. Guatemala*, Judgment of 25 November 2003, § 157; (2003f), *Juan Humberto Sanchez Case*, Judgment of 7 June 2003, § 112, where the IACtHR refers to ‘intentional’ deprivation of life. Similarly, for the HRC: (1985a), *Baboeran et al v. Suriname*, Comm. No. 146/1983 and 148-154/1983, 10 April 1984, UN Doc. Supp. No. 40 (A/40/40), § 14.3 and (1979c), *Maria Fanny Suarez de Guerrero v. Colombia*, Comm. No. 11/45 of 5 February 1979, § 13.2. The ECtHR regularly speaks of ‘arbitrary’ deprivation of life, see e.g. (2004m), *Makaratzis v. Greece*, App. No. 50385/99, Judgment of 20 December 2004, § 58; (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, § 97 and 99; (2001l),

unlawful under Article 2 ECHR, and deprivations of life that are arbitrary within the meaning of Article 6 ICCPR, Article 4 ACHR and Article 4 ACHPR.”<sup>1122</sup> For that reason, this study will continue to use the term (non-)arbitrary deprivation of life.

## 2. Normative Substance of the Requirements of (Non-)Arbitrary Deprivation of Life

### 2.1. The Requirement of a Sufficient Legal Basis

The requirement of legal basis follows from the principle of legality. It implies the positive obligation upon each State to *prevent* arbitrary killing by its own security forces. This obligation entails, *inter alia*, that the application of potentially lethal force by a State’s authorities in the exercise of law enforcement tasks requires a national law, available to the public, which strictly controls and limits the circumstances in which a person may be deprived of his or her life by the authorities of a State.<sup>1123</sup> This implies that it must make “the recourse to lethal force dependent on a careful assessment of the surrounding circumstances, including both the nature of the offence committed and the threat posed by the suspect or fugitive.”<sup>1124</sup> In doing so, the national law must take account of the internationally recognized principles, further addressed below, that determine when and how force is to be used.<sup>1125</sup> The UN Basic Principles on the Use of Force by Law Enforcement Officials stipulates that

Rules and regulations on the use of firearms 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.<sup>1126</sup>

A State’s *failure* to adopt national legislation that regulates and controls the use of lethal force in conformity with international legal standards results in arbitrary deprivations of life

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*Streletz, Kessler and Krenz v. Germany*, App. Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001, §§ 92 ff., 94.

<sup>1122</sup> Melzer (2008), 118-120.

<sup>1123</sup> (1979c), *Maria Fanny Suarez de Guerrero v. Colombia*, Comm. No. 11/45 of 5 February 1979, §§ 13.1-13.3; Human Rights Committee (1982a), § 3; Also: (2001), *Streletz, Kessler and Krenz v. Germany*, App. Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001, § 87 and 102; (2004m), *Makaratzis v. Greece*, App. No. 50385/99, Judgment of 20 December 2004, §§ 67, 70; (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, §§ 99 ff; (1995f), *McCann and Others v. United Kingdom*, App. No. 18984/91, Judgment of 5 September 1995, § 154. See also United Nations (1979) (Article 1); Principles 1 and 11, United Nations (1990b).

<sup>1124</sup> Melzer (2008), 287.

<sup>1125</sup> (1995f), *McCann and Others v. United Kingdom*, App. No. 18984/91, Judgment of 5 September 1995, § 152.

<sup>1126</sup> Principle 11, United Nations (1990b).

following the actual application of force “not dissimilar to that of being extra-judicial.”<sup>1127</sup> In addition, it implies a violation of that State’s positive obligation to protect the right to life even if force is not applied.<sup>1128</sup> Thus, in *Makaratzis v. Greece*,<sup>1129</sup> concerning the shooting by Greek police officers of an arrestee, the ECtHR held that Greece had violated the right to life as at the time of the event

[...] a law commonly acknowledged as obsolete and incomplete in a modern democratic society was still regulating the use of weapons by State agents. The system in place did not afford to law-enforcement officials *clear guidelines and criteria governing the use of force in peacetime*. It was thus unavoidable that the police officers who chased and eventually arrested the applicant should have enjoyed a greater autonomy of action and have been left with more opportunities to take unconsidered initiatives than would probably have been the case *had they had the benefit of proper training and instructions*. The absence of clear guidelines could further explain why a number of police officers took part in the operation spontaneously, without reporting to a central command.<sup>1130</sup>

Also, in *Suarez de Guerrero v. Colombia*<sup>1131</sup> the UNHRC held that in relation to the killing of seven individuals merely suspected of involvement in a kidnapping at close range and without prior warning by Colombian police officers, the Colombian Legislative Decree No. 0070 of 20 January 1978, while providing a legal basis for the police action, did not adequately protect the right to life. According to the UNHRC, the law provided a ground that would exonerate police forces from conviction for otherwise prohibited conduct exercised “in the course of operations planned with the object of preventing and curbing the offences of extortion and kidnapping, and the production and processing of and trafficking in narcotic drugs.”<sup>1132</sup>

Similarly, in the case of *Streletz et al v. Germany*, the border-policing policy adopted by the German Democratic Republic, which permitted border guards to use lethal force against fugitives, was held to be contrary to Article 2 ECHR, as a result of its failure to comply with the requirement of a sufficient legal basis. According to the ECtHR it could not even “be described as “law” within the meaning of Article 7 of the Convention.”<sup>1133</sup>

In the context of the present study, it is relevant to note that counterinsurgent forces resorting to the use of lethal force under the concept of law enforcement act on the basis of “national laws and doctrines, rules of engagement and other legislative or executive instruments” that fully reflect the requirements of absolute necessity, proportionality and precaution of the right to life under IHRL examined below and that clearly distinguishes such use of force from that under the concept of hostilities.<sup>1134</sup>

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<sup>1127</sup> Lubell (2010), 171.

<sup>1128</sup> Human Rights Committee (1982a), § 3; (1979c), *Maria Fanny Suarez de Guerrero v. Colombia*, *Comm. No. 11/45 of 5 February 1979*, §§ 13.1-13.3; (1985a), *Baboeran et al v. Suriname*, *Comm. No. 146/1983 and 148-154/1983, 10 April 1984, UN Doc. Supp. No. 40 (A/40/40)*, § 14.3; (2003h), *Myrna Mack Chang v. Guatemala*, *Judgment of 25 November 2003*, § 153.

<sup>1129</sup> (2004m), *Makaratzis v. Greece*, *App. No. 50385/99, Judgment of 20 December 2004*. The case concerned the use of force during the pursuit by the Greek police of a vehicle which ignored a red traffic light in the centre of Athens, in the course of which it broke through five police road blocks and hit several other vehicles, injuring two drivers (§ 11 ff.)

<sup>1130</sup> (2004m), *Makaratzis v. Greece*, *App. No. 50385/99, Judgment of 20 December 2004*, § 70.

<sup>1131</sup> (1979c), *Maria Fanny Suarez de Guerrero v. Colombia*, *Comm. No. 11/45 of 5 February 1979*.

<sup>1132</sup> (1979c), *Maria Fanny Suarez de Guerrero v. Colombia*, *Comm. No. 11/45 of 5 February 1979*, §§ 13.1-13.3.

<sup>1133</sup> (2001l), *Streletz, Kessler and Krenz v. Germany*, *App. Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001*, § 87.

<sup>1134</sup> Melzer (2008), 287.

Most of the examples used above relate to domestic situations. In extraterritorial counterinsurgency operations, this requirement also applies. Thus, in OCCUPCOIN, the legal basis for targeting must be available in the domestic law of the occupied territory already (or still) in force, or must, in the alternative, find a basis in the law introduced by the Occupying Power. In SUPPCOIN and TRANSCOIN, the counterinsurgent forces are generally entitled to act in self-defense or defense of others on the basis of their own criminal law, or on the basis of specific domestic laws pertaining to the targeting of insurgents abroad. In addition, a basis may be found in the domestic law of the receiving State, in so far the counterinsurgent forces' presence is consent based.

## 2.2. The Requirement of Absolute Necessity

In general terms, the requirement of absolute necessity entails that, in view of the concrete circumstances at hand, only that measure is lawful which is *strictly required* (and thereby 'strictly proportionate'<sup>1135</sup>, or 'indispensable'<sup>1136</sup>) to attain a recognized legitimate objective to maintain or restore the preceding state of affairs in law and order in a given society. Generally, the concept of legitimate aim can be summarized to include

self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape.<sup>1137</sup>

The requirement of absolute necessity finds a firm basis in the conventional<sup>1138</sup> and non-conventional<sup>1139</sup> normative frameworks pertaining to the right to life, the practice of the relevant human rights supervisory bodies<sup>1140</sup> as well as doctrine.<sup>1141</sup> In relation to this gener-

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<sup>1135</sup> (1986d), *Wolfgram v. Germany*, App. No. 11257/84, Decision of 6 October 1986; (1993c), *Kelly v. the United Kingdom*, App. No. 17579/90, Decision of 13 January 1993; (1997f), *Ayetkin v. Turkey*, App. No. 22880/93, Decision of 18 September 1997; (1995f), *McCann and Others v. United Kingdom*, App. No. 18984/91, Judgment of 5 September 1995, § 149; (1997d), *Andronicou and Constantinou v. Cyprus*, App. No. 25052/94, Judgment of 9 October 1997, § 171; (2001i), *McKerr v. the United Kingdom*, App. No. 28883/95, Judgment of 4 May 2001, § 110; (2001h), *Kelly and Others v. the United Kingdom*, App. No. 30054/96, Judgment of May 4, 2001, § 93; (2001k), *Sbanaghan v. the United Kingdom*, App. No. 37715/97, Judgment of 4 May 2001, § 87; (2001g), *Jordan v. United Kingdom*, App. No. 24726/94, Judgment of 4 May, 2001, § 104; (2000g), *Gül v. Turkey*, App. No. 22676/93, Judgment of 14 December 2000, § 77; (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, § 94.

<sup>1136</sup> (1976d), *Handyside v. the United Kingdom*, App. No. 5493/72, Judgment of 7 December 1976, § 48.

<sup>1137</sup> Principle 9, United Nations (1990b). Similarly: Article 2(2) ECHR, which justifies the use of force that is no more than absolutely necessary to "(1) to remove a threat posed to human life materializing from unlawful violence, (2) to effect a lawful arrest or to prevent the escape of a person lawfully detained, and (3) to lawfully quell a riot or insurrection."

<sup>1138</sup> Article 2(2) ECHR.

<sup>1139</sup> Article 3, United Nations (1979); Principles 4, 9, 13-14, United Nations (1990b).

<sup>1140</sup> (1979c), *Maria Fanny Suarez de Guerrero v. Colombia*, Comm. No. 11/45 of 5 February 1979, §§ 13.1-13.3; (1995f), *McCann and Others v. United Kingdom*, App. No. 18984/91, Judgment of 5 September 1995, §§ 132, 149, 196 ff, 212; (1997d), *Andronicou and Constantinou v. Cyprus*, App. No. 25052/94, Judgment of 9 October 1997, § 171; (2001i), *McKerr v. the United Kingdom*, App. No. 28883/95, Judgment of 4 May 2001 § 110; (2000g), *Gül v. Turkey*, App. No. 22676/93, Judgment of 14 December 2000, § 77; (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, §§ 94, 108; (1976d), *Handyside v. the United Kingdom*, App. No. 5493/72, Judgment of 7 December 1976, § 48; (1999b), *Armando Alejandro Jr. and Others v. Cuba* ('Brothers to the Rescue'), Case No. 11.589, Decision of 29 September 1999, §§ 37, 42; (2001j), *Report on the Situation of Human Rights in Guatemala* (6 April 2001), § 50; (2002h), *Report on Terrorism and Human Rights* (22 October 2002), §§ 87-88, 90-92; (1996c), *Chumbivilcas v. Peru*, Case No. 10.559, Decision of 1 March 1996; (1995g), *Neira Alegria et al. v. Peru*, Judgment of 19 January 1995. See also Commentary to Article 3, United Nations (1979).

al description, absolute necessity can be verified by assessing three aspects: the *qualitative*, *quantitative*, and *temporal* aspect.<sup>1142</sup> These will be discussed below.

### 2.2.1. Qualitative Aspect of Necessity

The qualitative aspect of necessity implies that there must be a *causal relation* between the attainable legitimate objective of the operation, and the *necessity* to use *lethal* force, instead of less harmful means, or no force at all.<sup>1143</sup> Put otherwise,

the use of potentially lethal force must be ‘strictly unavoidable’ in the sense that less harmful means remain ineffective or without any promise of achieving the purpose of the operation (qualitative necessity).<sup>1144</sup>

Thus, any use of potentially lethal force renders the resulting deprivation of life, whether so intended or accidentally caused,<sup>1145</sup> unlawful when applied in lieu of instruments of less harmful nature available and feasible to attain a legitimate aim. In that sense, this aspect of the qualitative element of the concept of necessity applies “[...] to the *hierarchy* of coercive measures in which lethal or potentially lethal force is reserved as a *last resort*.”<sup>1146</sup>

In the case of *Brothers to the Rescue (Armando Alejandro Jr. and Others v. Cuba)*, in respect of the shooting down by two Cuban MIG-29’s in international airspace of two unarmed civilian Cessna’s heading towards Cuba, the IACiHR held that Cuba had violated the right to life as

The Cuban Air Force never notified nor warned the civil small aircraft, did not attempt to make use of other methods of interception, and never gave them the opportunity to land. The first and only response of the MIGs was the intentional destruction of the civil aircraft and of their four occupants.<sup>1147</sup>

In the case of *Nachova v. Bulgaria*, concerning the shooting by a Bulgarian army officer of two unarmed soldiers who had escaped from short-term imprisonment for non-violent offences, and who at the time of the shooting posed no threat, the ECtHR held that

the conduct of Major G., the military police officer who shot the victims, calls for serious criticism in that he used grossly excessive force.

- (i) It appears that there were other means available to effect the arrest: the officers had a jeep, the operation took place in a small village in the middle of the day and the behaviour of Mr Angelov and Mr Petkov was apparently predictable, since, following a previous escape, Mr Angelov had been found at the same address (see paragraphs 17, 18, 23 and 24 above).<sup>1148</sup>

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<sup>1141</sup> Melzer (2010c), 283; Corn (2010), 80-81

<sup>1142</sup> Melzer (2010c), 227.

<sup>1143</sup> (1999b), *Armando Alejandro Jr. and Others v. Cuba ('Brothers to the Rescue')*, Case No. 11.589, Decision of 29 September 1999, §§ 37, 42; (2001j), *Report on the Situation of Human Rights in Guatemala (6 April 2001)*, § 50; (2002h), *Report on Terrorism and Human Rights (22 October 2002)*, § 87; (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, § 108. See also Principle 4, United Nations (1990b).

<sup>1144</sup> Melzer (2010c), 283.

<sup>1145</sup> (1995f), *McCann and Others v. United Kingdom*, App. No. 18984/91, Judgment of 5 September 1995, § 148.

<sup>1146</sup> Rodley (1999), 185. Also: Lubell (2010), 173; Corn (2010), 80-81; Kretzmer (2005), 178: “The absolute necessity tests involves examining two questions: 1. Is the use of *force* absolutely required, or could other measures be employed to protect the threatened persons? 2. Assuming that no other measures are available, is it absolutely necessary to use *lethal* force, or could some lesser degree of force be employed?” Also: (2011e), *Giuliani v. Italy*, App. No. 23458/02, Judgment of 24 March, 2011, § 214; (2006d), *Montero-Aranguren and Others (Detention Centre of Catia) v. Venezuela*, Judgment of 5 July 2006, § 67.

<sup>1147</sup> (1999c), *Armando Alejandro Jr. and Others v. Cuba ('Brothers to the Rescue')*, Case No. 11.589, IACommHR (29 September 1999), § 8.

<sup>1148</sup> (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, § 108.

## 2.2.2. Quantitative Aspect of Necessity

Complementary to the qualitative aspect of necessity is the *quantitative* aspect of necessity. It requires that only that force may be used that, as a minimum, is strictly required to attain a legitimate objective. This means that in the event that the use of potentially lethal force is unavoidable, counterinsurgent forces remain under the obligation to ensure that, in light of the circumstances at hand and based on the information available to them, the potential lethal force is not more harmful to the life of the targets than the legitimate objective of the operation strictly necessitates, and aim to minimize damage and injury, and respect and preserve human life.<sup>1149</sup> In essence, the quantitative aspect of necessity demands a deliberation of strict proportionality (*stricto sensu*).<sup>1150</sup>

It follows that the extra-judicial use of potentially lethal force renders the deprivation of life *unlawful*, if it cannot be demonstrated that the intended killing of the individual under target was “objectively indispensable for the success of the operation” and it would not suffice to merely incapacitate the individual.<sup>1151</sup> Obviously, such is the case “where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost [...]”<sup>1152</sup> Thus, in the aforementioned case of *Brothers to the Rescue*, the IACiHR held that it

[...] cannot but comment, also, on the conclusions of the ICAO with respect to the fact that the agents of the Cuban State *did nothing to employ methods other than the use of lethal force to conduct the civil aircraft out of the restricted or danger zone*. The Commission considers that the indiscriminate use of force, and in particular the use of firearms, is an attack on the life and on the integrity of the person. In this case in particular, the military aircraft acted in an irregular fashion: Without prior warning, without proof that its action was necessary, without proportionality, and without the existence of due motivation.<sup>1153</sup>

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<sup>1149</sup> (1979c), *Maria Fanny Suarez de Guerrero v. Colombia*, *Comm. No. 11/45 of 5 February 1979*, §§ 13.1-13.3; (1995g), *Neira Alegria et al. v. Peru*, *Judgment of 19 January 1995*, §§ 43, 69 and 72; (2003h), *Myrna Mack Chang v. Guatemala*, *Judgment of 25 November 2003*, §§ 134.6 ff; (1999b), *Armando Alejandro Jr. and Others v. Cuba ('Brothers to the Rescue')*, *Case No. 11.589, Decision of 29 September 1999*, §§ 37, 42, 45; (2001j), *Report on the Situation of Human Rights in Guatemala (6 April 2001)*, § 50; (2002h), *Report on Terrorism and Human Rights (22 October 2002)*, § 169; (1995f), *McCann and Others v. United Kingdom*, *App. No. 18984/91, Judgment of 5 September 1995*, § 212; (1998g), *Gülec v. Turkey*, *Appl. No. 21593/93, Judgment of 27 July 1998*, §§ 71 and 73; (2005k), *Nachova v. Bulgaria*, *App. No. 43577/98, Judgment of 6 July 2005*, § 108. See also Principles 4 and 9, United Nations (1990b).

<sup>1150</sup> As explained by Melzer, the deliberation of strict proportionality must be strictly viewed as an element of the quantitative aspect of necessity and not be conflated with the requirement of proportionality *latu sensu*, discussed below, which has a different purpose and scope and requires an assessment independent from necessity. Melzer (2008), 228, footnote 33. To hold otherwise “deprives the law in force of the value judgement inherent in the principle of proportionality and, thereby, of one of the safeguards indispensable for its ability to provide adequate answers to contemporary challenges.”

<sup>1151</sup> Melzer (2010c), 283.

<sup>1152</sup> (2005k), *Nachova v. Bulgaria*, *App. No. 43577/98, Judgment of 6 July 2005*, § 95. Also: (1995f), *McCann and Others v. United Kingdom*, *App. No. 18984/91, Judgment of 5 September 1995*, §§ 146-150, 192-214; (2004m), *Makaratzis v. Greece*, *App. No. 50385/99, Judgment of 20 December 2004*, §§ 64-66; (2001l), *Streletz, Kessler and Krenz v. Germany*, *App. Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001*, §§ 87, 96-97.

<sup>1153</sup> (1999b), *Armando Alejandro Jr. and Others v. Cuba ('Brothers to the Rescue')*, *Case No. 11.589, Decision of 29 September 1999*, § 42.

### 2.2.3. Temporal Aspect of Necessity

The *temporal* aspect of necessity entails that “the use of lethal force is unlawful if, at the very moment of its application, it is not *yet or no longer* absolutely necessary to achieve the desired purpose.”<sup>1154</sup> Thus, potential lethal force may not be applied in the *anticipation* of a threat that is merely *presumed* to become manifest. IHRL requires the manifestation of a *concrete* and *specific* threat, only *in response* to which force may be applied. As formulated by the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, “there is no legal basis for shooting to kill for any reason other than near certainty that to do otherwise will lead to loss of life.”<sup>1155</sup> This arguably implies that the deprivation of life is unlawful in situation where an individual is killed in response to his previous use of lethal force against other individuals, whilst not presenting a threat at the moment of his killing by State agents.<sup>1156</sup> This is of particular relevance in view of the question of deprivations of life of insurgents, for it follows that the mere designation of an individual as insurgent – and the general perceived threat this ‘status’ brings along – is insufficient to permit the use of combat power when acting in the domain of law enforcement as long as his conduct does not amount to a concrete and specific threat that necessitates the use of lethal force to attain a legitimate aim.<sup>1157</sup> In response to the targeted killing-policies adopted by some States to fight terrorism, the UN Special Rapporteur on Extra-Judicial, Summary and Arbitrary Executions concluded that

[e]mpowering Governments to identify and kill ‘known terrorists’ places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative had been exhausted. While it is portrayed as a limited ‘exception’ in international norms, it actually creates the potential for an endless expansion of the relevant category to include any enemies of the State, social misfits, political opponents, or others.<sup>1158</sup>

As a result, ‘shoot to kill’-policies that authorize State agents to kill anyone falling under a certain category of persons – insurgents, guerrilla’s, terrorists, et cetera – on that basis alone are unlawful.

Similarly, potential lethal force may no longer be applied when the threat has subsided, partially or totally, for example because the suspect has been apprehended, has surrendered, or has been incapacitated, and further abstains from hostile acts.<sup>1159</sup> As held by the IACiHR:

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<sup>1154</sup> Melzer (2010c), 283. Evidence of this aspect can be found in (1999b), *Armando Alejandro Jr. and Others v. Cuba* (‘Brothers to the Rescue’), Case No. 11.589, Decision of 29 September 1999, § 42; (2002h), *Report on Terrorism and Human Rights* (22 October 2002), §§ 90 ff; (1995g), *Neira Alegria et al. v. Peru*, Judgment of 19 January 1995; (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, § 108; (1995f), *McCann and Others v. United Kingdom*, App. No. 18984/91, Judgment of 5 September 1995, §§ 70 ff, 132, 196 ff). See also Commentary (a) to Article 3 United Nations (1979).

<sup>1155</sup> United Nations (2006), §§ 50, 59.

<sup>1156</sup> As argued by Melzer (2008), 229, criticizing the Swiss court which deemed the deprivation of life of Ewald K lawful at a moment that he showed on the balcony of his apartment with the barrel of his rifle pointed to the floor hours after he had seriously injured a police man and killed a police dog in previous attempts to arrest him. (2000e), *Ewald K. Case*, § 13.

<sup>1157</sup> Corn (2010), 28-29.

<sup>1158</sup> United Nations (2004), § 41.

<sup>1159</sup> IACommHR (2002), § 91 (emphasis added); (1995f), *McCann and Others v. United Kingdom*, App. No. 18984/91, Judgment of 5 September 1995, §§ 70 ff, 132, 196 ff; (1995g), *Neira Alegria et al. v. Peru*, Judgment of 19 January 1995. In the context of armed conflict: (1997b), *Abella et al. v. Argentina* (La Tablada), Case No. 11.137, Decision of 18 November 1997, §§ 204, 218, 245 (considering that the killing of individuals who had been involved in attacks on military barracks but who later surrendered constituted a violation of Article



“states must not use force against individuals who no longer present a threat as described above, such as individuals who have been apprehended by authorities, have surrendered or who are wounded and abstain from hostile acts.”<sup>1160</sup> According to the ECtHR, the temporal aspect of necessity was arguably ignored in *Nachova*:

Mr Petkov was wounded in the chest, a fact for which no plausible explanation was provided (see paragraphs 41 and 50-54 above). In the absence of such an explanation, the possibility that Mr Petkov had turned to surrender at the last minute but had nevertheless been shot cannot be excluded.<sup>1161</sup>

Another example in case is *Neira Alegria et al. v. Peru*,<sup>1162</sup> in which the IACtHR took account of the conclusion in the Peruvian Congressional Commission investigative report that “[t]he final demolition, after the surrender which occurred at 14:30 hours on the nineteenth, *would not have a logical explanation* and would, consequently, be unjustified.”<sup>1163</sup>

The appraisal of an existence of ‘absolute necessity’ must be made in light of the circumstances and on the basis of the information available. For example, the case of *Finogenov and Others v. Russia* concerned the taking hostage of almost a thousand civilians by over forty heavily armed Chechen terrorists equipped with explosives in the Dubrovka theatre in Moscow. The Russian authorities decided to use an opiate gas to incapacitate the terrorists before storming the theatre. The gas caused the death of 125 hostages. Regarding the question of absolute necessity, the ECtHR held that

In sum, the situation appeared very alarming. Heavily armed separatists dedicated to their cause had taken hostages and put forward unrealistic demands. The first days of negotiations did not bring any visible success; in addition, the humanitarian situation (the hostages’ physical and psychological condition) had been worsening and made the hostages even more vulnerable. The Court concludes that there existed a real, serious and immediate risk of mass human losses and that the authorities had every reason to believe that a forced intervention was the “lesser evil” in the circumstances. Therefore, the authorities’ decision to end the negotiations and storm the building in the circumstances did not run counter to Article 2 of the Convention.<sup>1164</sup>

The, in retrospect, mistaken, but objectively honest belief that an individual posed a threat so severe and immediate to the lives of individuals that it absolutely necessitated the use of lethal force may exonerate State agents from an unlawful deprivation of life.<sup>1165</sup> An example in case is the tragic death of Jean Charles de Menezes, a Brazilian citizen killed by the London Metropolitan Police in a metro, who was falsely believed to be a suicide bomber. A connected issue is whether sufficient precautions were taken that may have prevented the use of lethal force; an issue that will be explored in more detail below.

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4). See also (1997e), *Arturo Ribón Avilán v. Colombia*, Case 11.142, Report No. 26/97, Judgment of 30 September 1997, §§ 134 ff. and 159 ff.

<sup>1160</sup> (2002h), *Report on Terrorism and Human Rights* (22 October 2002), § 91.

<sup>1161</sup> (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, § 108.

<sup>1162</sup> (1995g), *Neira Alegria et al. v. Peru*, Judgment of 19 January 1995. The case involved the quashing of a prison riot in the San Juan Bautista Prison by Peruvian security forces, including the Navy, killing more than 100 prisoners. The Navy used dynamite to completely destroy – rather than force a way into – the so-called ‘Blue Pavillon’.

<sup>1163</sup> (1995g), *Neira Alegria et al. v. Peru*, Judgment of 19 January 1995, § 62, 43 (emphasis added).

<sup>1164</sup> (2012b), *Finogenov and others v. Russia*, App Nos. 18299/03 and 27311/03, Judgment (Grand Chamber) of 20 December 2011, § 226. See also the preceding §§ 219-225.

<sup>1165</sup> (1995f), *McCann and Others v. United Kingdom*, App. No. 18984/91, Judgment of 5 September 1995, § 200.

In sum, from an operational viewpoint, the requirement of absolute necessity entails that the use of combat power by counterinsurgent forces (potentially) resulting in the deprivation of life of insurgents when acting under the concept of law enforcement is lawful only when, in light of the circumstances at hand and the information available to the operator actually applying the force, non-lethal measures remain ineffective or without any promise of intended result and the use of lethal force is unavoidable. In the application of unavoidable lethal force, counterinsurgent forces must aim to minimize the damage or injury to human life, including that of the insurgent, to the extent that this is proportionate to attain a legitimate aim. The mere fact that an individual is identified or labeled as ‘insurgent’ (or ‘guerrilla’, or ‘terrorist’) warrants no lethal force if it is not established that he poses a concrete and specific threat to human life. Also, once an insurgent has been incapacitated to the extent that the grounds for continued lethal force have subsided, the continued use of lethal force is no longer strictly necessary.

### 2.3. The Requirement of Proportionality

The determination that the deprivation of life is absolutely necessary to attain a legitimate objective does not remove the obligation to carry out an independent follow-up assessment of the proportionality of the harm or injury to life in relation to the seriousness of the offence and the legitimate aim pursued.<sup>1166</sup> In other words, a deprivation of life violates the right to life when the nature and scale of the threat does not outweigh the harm or injury to life resulting from the use of force applied in support of a legitimate aim.<sup>1167</sup>

It therefore logically follows that the use of force must also be proportionate to the legitimate aim, i.e. the deprivation of life is lawful *only* if the force applied serves to attain an exceptional *legitimate* objective. In other words, the deprivation of life may not be the primary aim, irrespective of the reason why.<sup>1168</sup> As noted previously, the range of legitimate objectives permitting the application of potentially lethal force is limited and exceptional to

self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest

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<sup>1166</sup> Melzer (2010c), 285.

<sup>1167</sup> (1986d), *Wolffgram v. Germany*, App. No. 11257/84, Decision of 6 October 1986. See also (1979c), *Maria Fanny Suarez de Guerrero v. Colombia*, Comm. No. 11/45 of 5 February 1979, §§ 13.1-13.3; (1995g), *Neira Alegria et al. v. Peru*, Judgment of 19 January 1995, §§ 43, 69 and 72; (2003h), *Myrna Mack Chang v. Guatemala*, Judgment of 25 November 2003, §§ 134.6 f.; (1999b), *Armando Alejandro Jr. and Others v. Cuba ('Brothers to the Rescue')*, Case No. 11.589, Decision of 29 September 1999, §§ 37, 42, 45; (2001j), *Report on the Situation of Human Rights in Guatemala (6 April 2001)*, § 50; (2002h), *Report on Terrorism and Human Rights (22 October 2002)*, §§ 87 and 92; (1999), *Third Report on the Situation of Human Rights in Colombia*, LACiHR (26 February 1999), § 169; (1993c), *Kelly v. the United Kingdom*, App. No. 17579/90, Decision of 13 January 1993; (1997f), *Ayetkin v. Turkey*, App. No. 22880/93, Decision of 18 September 1997, § 95; (1995f), *McCann and Others v. United Kingdom*, App. No. 18984/91, Judgment of 5 September 1995, § 192 ff; (2000g), *Gül v. Turkey*, App. No. 22676/93, Judgment of 14 December 2000, § 82; (2001i), *Streletz, Kessler and Krenz v. Germany*, App. Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001, §§ 87, 96, 102; (2004m), *Makaratzis v. Greece*, App. No. 50385/99, Judgment of 20 December 2004, § 64-66; (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, § 95; See also Commentary (c) to Article 3, United Nations (1979); Principles 4 and 9, United Nations (1990b).

<sup>1168</sup> (1993c), *Kelly v. the United Kingdom*, App. No. 17579/90, Decision of 13 January 1993; (1995f), *McCann and Others v. United Kingdom*, App. No. 18984/91, Judgment of 5 September 1995, § 147; (1997d), *Andronicou and Constantinou v. Cyprus*, App. No. 25052/94, Judgment of 9 October 1997, § 171.

a person presenting such a danger and resisting their authority, or to prevent his or her escape.<sup>1169</sup>

As a consequence, any deprivation of life resulting from intentional lethal force applied for purposes lying *outside* the scope of exceptional legitimate objectives is, besides strictly unnecessary, *a priori* disproportionate.<sup>1170</sup> Thus, a deprivation of life cannot be lawful to attain a *political* purpose, or where the threat is merely *political* in nature. In addition, the use of lethal force is disproportionate when the threat concerns a *potential* and *unspecified* threat that may materialize in the future, the application of intentional lethal force is likely to be disproportionate; what is required is a *specific* and *concrete* threat.<sup>1171</sup> It therefore follows that the decision to use of lethal force in a law enforcement operation must take place on an individual basis, and not on mere suspicion of an individual's involvement in a crime or membership to a group. As held by the IACiHR in relation to Colombia:

The Commission recognizes that the National Police have the right and responsibility to act, and even to use force, to impede crime or to protect themselves or others. However, the police are never justified in depriving an individual of his life based on the fact that he belongs to a “marginal group” or has been suspected of involvement in criminal activity. Nor may the police automatically use lethal force to impede a crime or to act in self-defense. The use of lethal force in such cases would only be permissible if it were *proportionate* and *necessary*.<sup>1172</sup>

The proportionality assessment must be made on a case-by-case basis. Thus, while an operation to arrest an individual who is about to commit a serious crime involving grave threat to life – for example a terrorist attack on a crowded cinema – may render the use of lethal force indispensable in light of the circumstances and the information available, the use of lethal force renders the actual deprivation of life unlawful if the law enforcement officers at the scene could have reasonably established that the individual, *de facto*, did not pose a threat.<sup>1173</sup> Thus, while the use of force complies with the requirement of proportionality *stricto sensu* (as part of the quantitative aspect of necessity), the use of lethal force in the absence of a threat does not or no longer serves a legitimate aim. Instead, law enforcement officers are under an obligation to resort to non-lethal alternatives, or, ultimately, the escape of the individual. In that respect, the proportionality assessment must be made not only *in abstracto*, on the basis of the letter of the relevant and applicable law, but also *in concreto*,

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<sup>1169</sup> Principle 9, United Nations (1990b); Melzer (2008), 284. Similarly: Article 2(2) ECHR, which justifies the use of force that is no more than absolutely necessary to “(1) to remove a threat posed to human life materializing from unlawful violence, (2) to effect a lawful arrest or to prevent the escape of a person lawfully detained, and (3) to lawfully quell a riot or insurrection.”

<sup>1170</sup> (1986d), *Wolffgram v. Germany*, App. No. 11257/84, Decision of 6 October 1986; (1993c), *Kelly v. the United Kingdom*, App. No. 17579/90, Decision of 13 January 1993; (1997f), *Ayetkin v. Turkey*, App. No. 22880/93, Decision of 18 September 1997, § 91; (1997d), *Andronicou and Constantinou v. Cyprus*, App. No. 25052/94, Judgment of 9 October 1997, § 171; (2001i), *McKerr v. the United Kingdom*, App. No. 28883/95, Judgment of 4 May 2001, § 110; (2001h), *Kelly and Others v. the United Kingdom*, App. No. 30054/96, Judgment of May 4, 2001, § 93; (2001k), *Shanaghan v. the United Kingdom*, App. No. 37715/97, Judgment of 4 May 2001, § 87; (2001g), *Jordan v. United Kingdom*, App. No. 24726/94, Judgment of 4 May, 2001 § 104; (2000g), *Gül v. Turkey*, App. No. 22676/93, Judgment of 14 December 2000, § 77; (2001j), *Streletz, Kessler and Krenz v. Germany*, App. Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001, §§ 96; (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, § 94.

<sup>1171</sup> Principle 9, United Nations (1990b).

<sup>1172</sup> (1999), *Third Report on the Situation of Human Rights in Colombia*, LACiHR (26 February 1999), § 213 (emphasis added).

<sup>1173</sup> Melzer (2010c), 284; Lubell (2010), 173.

“with due regard to the pre-eminence of respect for human life as a fundamental value.”<sup>1174</sup> As an example may serve the case of *Kelly v. the United Kingdom*. In applying the law to the facts, the ECiHR held firstly that it

[...] is satisfied that the shooting in this case was for the purpose of apprehending the occupants of the stolen car, who were reasonably believed to be terrorists, in order to prevent them carrying out terrorist activities. Accordingly, the action of the soldiers in this case was taken for the purpose of effecting a lawful arrest within the meaning of Article 2 para. 2 (b) (Art. 2-2-b) of the Convention.

The Government has submitted, and the applicant has not disputed, that the only course of action open to the soldiers was either to open fire or to allow the car to escape. Neither before the domestic courts, nor before the Commission, was it contended that it would have been possible to immobilise the car by shooting at the tyres or the engine block. The Commission notes that the High Court judge commented that there was a high probability that shots fired at the driver would kill him or inflict serious injury. The situation facing the soldiers, however, had developed with little or no warning and involved conduct by the driver putting them and others at considerable risk of injury. Their conduct must also be assessed against the background of the events in Northern Ireland, which is facing a situation in which terrorist killings have become a feature of life. In this context the Commission recalls the judge's comments that, although the risk of harm to the occupants of the car was high, the kind of harm to be averted (as the soldiers reasonably thought) by preventing their escape was even greater, namely the freedom of terrorists to resume their dealing in death and destruction.<sup>1175</sup>

In sum, the requirement of proportionality implies that counterinsurgent forces, when operating in the domain of law enforcement, in the concrete circumstances and on the basis of the information available to them must ensure that any deprivation of life (potentially) resulting from their use of force vis-à-vis insurgents is not the ultimate purpose but serves as a means to attain legitimate aim, and, and that the deprivation of life is a proportionate outcome to attain such a legitimate aim, in view of the concrete and specific threat.

#### 2.4. The Requirement of Precaution

A final substantive requirement determinative of the lawful deprivation of life is the requirement of precaution. A necessary and proportionate deprivation of life is nonetheless unlawful when if it results from an operation that is not planned, organized and controlled with a view to minimize the use of lethal force, to the greatest extent feasible.<sup>1176</sup> The requirement of precaution will be addressed in more detail by examining its personal, temporal and qualitative scope.

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<sup>1174</sup> (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, § 97. See also (1995f), *McCann and Others v. United Kingdom*, App. No. 18984/91, Judgment of 5 September 1995, §§ 211-214.

<sup>1175</sup> (1993c), *Kelly v. the United Kingdom*, App. No. 17579/90, Decision of 13 January 1993.

<sup>1176</sup> (1986d), *Wolfgram v. Germany*, App. No. 11257/84, Decision of 6 October 1986; (1997f), *Ayetkin v. Turkey*, App. No. 22880/93, Decision of 18 September 1997, § 97; (1995f), *McCann and Others v. United Kingdom*, App. No. 18984/91, Judgment of 5 September 1995, §§ 150, 194, 205; (1997d), *Andronicou and Constantinou v. Cyprus*, App. No. 25052/94, Judgment of 9 October 1997, § 171; (1998g), *Gülec v. Turkey*, Appl. No. 21593/93, Judgment of 27 July 1998, § 71; (2000g), *Gül v. Turkey*, App. No. 22676/93, Judgment of 14 December 2000, § 84; (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, § 93. See also Commentary (c) to Article 3, United Nations (1979); Principles 2, 3, 5 and 10 United Nations (1990b).

#### 2.4.1. Personal Scope

In its *active* personal scope, the requirement of precaution is binding upon *every* individual that may be potentially involved in the use of force, *irrespective* of his or her position within the organization. Thus, from the commanding officer overseeing the operation from his headquarters to the operator on the ground, each must make an *individual assessment* of the circumstances, irrespective of superior orders. This obligation, however, is not absolute, and may be limited in view of the extent to which the circumstances reasonably permit a member of the law enforcement operation to make such an assessment (see below).

In terms of the *passive* personal scope, the requirement of precaution *firstly* implies an obligation to distinguish between those individuals that threaten the security of all, and innocent bystanders who do not pose a threat. Lethal force may only be applied against the individual posing the threat. A *second* aspect of the passive personal scope is that the requirement of precaution stretches not only to the protection of *innocent bystanders*, but also to the minimization of the potential death or injury of the *targeted individual*. This aspect of the requirement of precaution renders operations solely designed to kill an individual *a priori* unlawful.

#### 2.4.2. Temporal Scope

In terms of *temporal* scope, the duty to take appropriate care in the control and organization of an operation applies to every stage of the operation, from pre-deployment training and initial planning to the actual execution of the operation, and in some extent, to the aftermath of the operation, in light of the duty to provide medical assistance to individuals injured, or otherwise affected as a consequence of the operation.

#### 2.4.3. Qualitative Scope

In terms of *qualitative* scope, the requirement of precaution entails a duty to equip the law enforcement operators, including military forces, with all *appropriate equipment of self-defense*, such as shields, helmets, bullet-proof vests, bullet-proof means of transportation and non-lethal weapons, to enable them to execute their operation with a view to measures proportionate to the gravity of the circumstances at hand.<sup>1177</sup> In the case of *Güleç v. Turkey*, concerning the deployment of Turkish armed forces to control a demonstration, the ECtHR held that, besides the disproportionality of the force applied, the Turkish government failed to comply with the requirement of precaution. The armed forces were forced to use their firearms

[...] because they apparently did not have truncheons, riot shields, water cannon, rubber bullets or tear gas. The lack of such equipment is all the more incomprehensible and unacceptable because the province of Sirnak, as the Government pointed out, is in a region in which a state of emergency has been declared, where at the material time disorder could have been expected.<sup>1178</sup>

An additional qualitative aspect of the requirement of precaution is the duty for State agents to identify themselves and to issue a *warning* preceding the use of lethal force, unless circumstances may render the issuing of a warning pointless or inappropriate, or unduly place the law enforcement officers or other persons at risk of death or serious harm.<sup>1179</sup> Not only

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<sup>1177</sup> Articles 2 and 3, United Nations (1990b), confirmed in (1998g), *Güleç v. Turkey*, Appl. No. 21593/93, Judgment of 27 July 1998, § 71.

<sup>1178</sup> (1998g), *Güleç v. Turkey*, Appl. No. 21593/93, Judgment of 27 July 1998, § 71.

<sup>1179</sup> Article 10, United Nations (1990b).

must such a warning be effective in terms of clarity and comprehensibility, it must also provide the addressee with sufficient time for the warning to be observed,<sup>1180</sup> so as to give the suspect time to surrender or to put down his arms, *et cetera*.<sup>1181</sup>

Furthermore, States are under an obligation to *train* law enforcement operators and to equip them with clear guidelines such as rules of engagement that contain rules governing the use of force that carefully reflect both the national standard as well as the substance of the IHRL standard. This follows from the ECtHR's judgment in the *McCann*-case, concerning the shooting by members of the Special Air Service (SAS, a UK Army special forces regiment) of suspected IRA-terrorists in Gibraltar. The ECtHR concludes that while

it is not clear whether they had been trained or instructed to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest [...] [t]heir reflex action in this vital respect lacks 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 stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to their attention and which emphasised the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement [...]. This failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation.<sup>1182</sup>

This must prevent that State agents act “not only on the basis of the letter of the relevant regulations, *but also with due regard to the pre-eminence of respect for human life as a fundamental value*.”<sup>1183</sup> This aspect is of particular relevance in light of *counterinsurgency operations*. Most States predominantly if not exclusively train their armed forces for combat in the domain of hostilities, where they are taught to apply force against individuals with a purpose to kill without a need to assess whether such is absolutely necessary in light of the circumstances at hand. Operational reality, however, makes clear that such operations not uncommonly take place in environments of mosaic warfare, where forces are forced to quickly shift from a hostilities-mode to a law enforcement mode in the application of the means available to them. In such a law enforcement situation, forces unaware and not trained in the use of force in a law enforcement manner will automatically take recourse to the skills and drills of combat in hostilities. An interesting example of State practice where forces are trained and equipped with ROE to apply force in both the hostilities and law enforcement mode is Colombia. There, armed forces apply force on the basis of two-colored ROE-card. The ‘red card’ (*tarjeta roja*) contains rules for operations during hostile scenarios directed against military objectives controlled by an organized armed group (*Operaciones en escenarios de hostilidades*); the blue card (*tarjeta azul*) provides rules for operations to maintain security (*Operaciones para el mantenimiento de la seguridad*),<sup>1184</sup> i.e.

all other operations that are performed not against a specific military objective, but against all sorts of violent criminals. In these situations, a framework of normal peacetime law enforcement including human rights law is generally applicable, the resort to force only being

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<sup>1180</sup> Article 10, United Nations (1990b).

<sup>1181</sup> (1979c), *Maria Fanny Suarez de Guerrero v. Colombia*, *Comm. No. 11/45 of 5 February 1979*, § 13.2; (1995g), *Neira Alegria et al. v. Peru*, *Judgment of 19 January 1995*, §§ 43, 62, 69; (1999b), *Armando Alejandro Jr. and Others v. Cuba* ('Brothers to the Rescue'), *Case No. 11.589, Decision of 29 September 1999*, § 42.

<sup>1182</sup> (1995f), *McCann and Others v. United Kingdom*, *App. No. 18984/91, Judgment of 5 September 1995*, § 212.

<sup>1183</sup> (2005k), *Nachova v. Bulgaria*, *App. No. 43577/98, Judgment of 6 July 2005*, § 97. See also (1995f), *McCann and Others v. United Kingdom*, *App. No. 18984/91, Judgment of 5 September 1995*, §§ 211-214.

<sup>1184</sup> Colombia (2009). See also Von der Groeben (2011), 150; Szesnat & Bird (2012), 228 ff.

allowed as *ultima ratio*.<sup>1185</sup> [...] [B]lue card operations are of a genuine law enforcement nature, with the particularity that they are addressed at soldiers, rather than the police forces. The blue card establishes a legal framework for robust law enforcement by the military and can be understood as an attempt to bridge the divide between police and military forces, reflecting the constitutional term of ‘public forces’. The blue card instructions are intended to regulate situations where the threat surpasses the capacities of ordinary police forces, especially when the intensity of the violence or its territorial extensions are of such a nature that the police is not equipped to fight it.<sup>1186</sup>

Also, in the planning and execution of operations involving a high probability of use of lethal force, such as counter-terrorist operations, States are under a duty *to continuously reassess* the necessity to such resort, particularly when the use of lethal force is predetermined. In practice, this implies a duty to evaluate the intelligence at their disposal before transmitting it to the operators, particularly if it concerns operators “whose use of firearms automatically involved shooting to kill,”<sup>1187</sup> such as special forces of the armed forces. As noted by the ECtHR in *Nachova and Others v. Bulgaria*:

[...] a crucial element in the planning of an arrest operation ... must be the analysis of all the available information about the surrounding circumstances, including, as an absolute minimum, the nature of the offence committed by the person to be arrested and the degree of danger – if any – posed by that person. The question whether and in what circumstances recourse to firearms should be envisaged if the person to be arrested tries to escape must be decided on the basis of clear legal rules, adequate training and in the light of that information.<sup>1188</sup>

Finally, and noted previously in relation to the temporal scope, the requirement of precaution includes a duty to ensure the *availability of medical assistance* in operations that are likely to involve the use of lethal force.<sup>1189</sup>

#### 2.4.4. Standard: ‘Reasonableness in the Circumstances’

The requirement of precaution is not absolute, but contingent on a standard of ‘reasonableness in the circumstances’.<sup>1190</sup> As the ECtHR held in *Andronicou and Constantinou v. Cyprus*,<sup>1191</sup>

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<sup>1185</sup> Von der Groeben (2011), 150.

<sup>1186</sup> Von der Groeben (2011), 154.

<sup>1187</sup> (1995f), *McCann and Others v. United Kingdom*, App. No. 18984/91, Judgment of 5 September 1995, § 211.

<sup>1188</sup> (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, § 104.

<sup>1189</sup> Principle 5, United Nations (1990b). See also (2012b), *Finogenov and others v. Russia*, App. Nos. 18299/03 and 27311/03, Judgment (Grand Chamber) of 20 December 2011, §§ 266, where the ECtHR held that Russia had violated its obligation to take precautions since “the rescue operation of 26 October 2002 was not sufficiently prepared, in particular because of the inadequate information exchange between various services, belated beginning of the evacuation, limited on-the-field coordination of various services, lack of appropriate medical treatment and equipment on the spot, and inadequate logistics.”

<sup>1190</sup> (1995f), *McCann and Others v. United Kingdom*, App. No. 18984/91, Judgment of 5 September 1995, § 200; (1997d), *Andronicou and Constantinou v. Cyprus*, App. No. 25052/94, Judgment of 9 October 1997, § 192; (2001i), *McKerr v. the United Kingdom*, App. No. 28883/95, Judgment of 4 May 2001, § 116; (2001h), *Kelly and Others v. the United Kingdom*, App. No. 30054/96, Judgment of May 4, 2001, § 99; (2001g), *Jordan v. United Kingdom*, App. No. 24726/94, Judgment of 4 May, 2001 § 110; (2000g), *Gül v. Turkey*, App. No. 22676/93, Judgment of 14 December 2000, § 78; (2004m), *Makaratzis v. Greece*, App. No. 50385/99, Judgment of 20 December 2004, §§ 66, 69.

<sup>1191</sup> (1997d), *Andronicou and Constantinou v. Cyprus*, App. No. 25052/94, Judgment of 9 October 1997, § 171. The case concerned the killing by Cypriot special police forces of an individual who held hostage a young woman and whose life was believed to be in serious danger. After negotiations to end the hostage failed, the authorities sent in a team of special police forces who intentionally killed the hostage taker, and unintentionally killed the hostage.

“[i]n carrying out its assessment of the planning and control phase of the operation from the standpoint of Article 2 of the Convention, the Court must have particular regard to the *context* in which the incident occurred as well as to the *way in which the situation developed over the course of the day*.”<sup>1192</sup>

While it is unreasonable to resort to lethal force based on the mere suspicion that an individual may constitute a threat because of his or her perceived involvement in a crime or his belonging to a criminal group, as was the case in *Guerrero*,<sup>1193</sup> the applied standard of reasonableness leaves room for the lawfulness of lethal force “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,” as was accepted by the ECtHR in *McCann*. As applied to the facts in that case,

[t]he Court accepts that the soldiers honestly believed, *in the light of the information that they had been given*, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life. The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives. [...] To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.<sup>1194</sup>

As explained by Melzer,

The distinctive criterion between ‘mere suspicion’ and ‘honest but mistaken belief’ is not only the degree of subjective conviction or doubt actually held by the operating personnel, but also the *objective reasonableness* of that subjective conviction in view of the circumstances prevailing at the time.<sup>1195</sup>

In the recent case of *Finogenov and Others v. Russia*, mentioned previously, the ECtHR applied a similar reasoning when assessing the lawfulness of the actions of the Russian authorities. It demonstrates that the normative framework governing the right to life is sufficiently flexible to take account of the severity of the circumstances at hand, as illustrated by the ECtHR’s sensitivity for contemporary threats to the public safety and national security of States posed by terrorism, also in Russia:

Although hostage taking was, sadly, a widespread phenomenon in recent years, the magnitude of the crisis of 23-26 October 2002 exceeded everything known before and made that situation truly exceptional. The lives of several hundred hostages were at stake, the terrorists were heavily armed, well-trained and devoted to their cause and, with regard to the military aspect of the storming, no specific preliminary measures could have been taken. The hostage-taking came as a surprise for the authorities (see, in contrast, the case of *Isayeva v. Russia*, no. 57950/00, §§ 180 et seq., 24 February 2005), so the military preparations for the storming had to be made very quickly and in full secrecy. It should be noted that the authorities were not in control of the situation inside the building. In such a situation the Court accepts that difficult and agonising decisions had to be made by the domestic authorities. It is prepared to grant them a margin of appreciation, at least in so far as the military and technical aspects of the situation are concerned, even if now, with hindsight, some of the decisions taken by the authorities may appear open to doubt.<sup>1196</sup>

In sum, it follows that counterinsurgent forces, when operating in the domain of law en-

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<sup>1192</sup> (1997d), *Andronicou and Constantinou v. Cyprus*, App. No. 25052/94, Judgment of 9 October 1997, § 182.

<sup>1193</sup> (1979c), *Maria Fanny Suarez de Guerrero v. Colombia*, Comm. No. 11/45 of 5 February 1979.

<sup>1194</sup> (1995f), *McCann and Others v. United Kingdom*, App. No. 18984/91, Judgment of 5 September 1995, § 200. See also

<sup>1195</sup> Melzer (2010c), 286 (emphasis added).

<sup>1196</sup> (2012b), *Finogenov and others v. Russia*, App Nos. 18299/03 and 27311/03, Judgment (Grand Chamber) of 20 December 2011, § 213.



forcement, are obliged to plan, organized and execute their operations with a view to the minimization of the use of lethal force to the extent feasible in light of the circumstances and information available to them. This implies, *inter alia*, a duty to train and educate forces in the standards of the use of force in law enforcement operations; to provide the forces with equipment that allows them to respond to threats in a non-lethal manner to the maximum extent possible; to identify themselves and to issue a warning that lethal force will be resorted to, thereby allowing the suspect adequate time to respond. Finally, the application of lethal force must take place in the honest belief that all requirements to do so are fulfilled. The mere suspicion or assumption that these requirements are fulfilled is not sufficient.

## 2.5. The Requirement of Investigation

A fundamental requirement embedded in the right to life imposed on the State is the duty to investigate *each* deprivation of life attributable to the State. This requirement is generally accepted in conventional and non-conventional IHRL, as well as jurisprudence of the principal human rights bodies.<sup>1197</sup> The requirement of investigation follows by implication from the obligation to protect the right to life and the general obligation to secure to everyone within its jurisdiction the rights and duties laid down in the relevant conventions.<sup>1198</sup> As expressed by the ECtHR in *Nachova v. Bulgaria*,

The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.<sup>1199</sup>

In its General Comment 31 the UNHRC noted that “a failure by a State Party to investigate violations could in and of itself give rise to a separate breach of the Covenant.”<sup>1200</sup> Once a matter has come to their attention, the authorities having used the lethal force must initiate an investigation.<sup>1201</sup> A central aspect in the requirement of investigation is that it must be *effective*. This implies, *firstly*, that the persons responsible for carrying out the investigation must be independent and impartial.<sup>1202</sup> *Secondly*, the investigation must be sufficiently proficient to result in the determination of lawfulness of the use of force, as well as to the identi-

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<sup>1197</sup> For non-conventional IHRL, see, *inter alia*, ECOSOC (1989), 9; United Nations (1990b), § 22. For jurisprudence, see, *inter alia*, (2003h), *Myrna Mack Chang v. Guatemala*, Judgment of 25 November 2003; (2005f), *Isayeva, Yusupova and Bazayeva v. Russia*, App. No. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005, §§ 208-213; (2011b), *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Judgment of 7 July 2011, §§ 151 ff; (2001i), *McKerr v. the United Kingdom*, App. No. 28883/95, Judgment of 4 May 2001, § 111.

<sup>1198</sup> (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, § 111; (1999d), *Çakiki v. Turkey*, App. No. 23657/94, ECtHR, § 86.

<sup>1199</sup> (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, § 110, in reference to (2002a), *Anguelova v. Bulgaria*, App. No. 38361/97, Judgment of 13 June 2002, § 137.

<sup>1200</sup> UNHRC (2004), § 15.

<sup>1201</sup> (2000h), *İlhan v. Turkey*, App. No. 22277/93, Judgment (Grand Chamber) of 27 June 2000, § 63.

<sup>1202</sup> (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, § 112; (1998g), *Güleç v. Turkey*, Appl. No. 21593/93, Judgment of 27 July 1998, §§ 81-82; (1999i), *Ogur v. Turkey*, App. No. 21594/93, Judgment of 20 May 1999, §§ 91-92; (1998f), *Ergi v. Turkey*, App. No. 66/1997/850/1057, Judgment of 28 July 1998, §§ 83-84; (2001i), *McKerr v. the United Kingdom*, App. No. 28883/95, Judgment of 4 May 2001, § 113; (2005e), *Isayeva v. Russia*, App. No. 57950/00, Judgment of 14 October 2005, § 210-211. See also ECOSOC (1989), 9; United Nations (1990b), § 22.

fication and punishment of the responsible State agents.<sup>1203</sup> In view of the ECHR, this means, in practice, that

[t]he authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eye-witness testimony and forensic evidence. The investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements and must apply a standard comparable to the "no more than absolute necessary" standard required by Article 2 § 2 of the Convention. Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person is liable to fall foul of the required measure of effectiveness [...].<sup>1204</sup>

In addition, there must be a sufficient element of public scrutiny of the investigation. As a minimum, this entails that the victim's relatives must be involved in the procedure to the extent necessary to safeguard their legitimate interests.<sup>1205</sup> They must remain free from any form of discrimination. Finally, the investigation must be made public.

In sum, the requirement of investigation implies that a counterinsurgent State is bound to carry out an independent and impartial investigation into the use of lethal force by its forces. It must thereby ensure that counterinsurgent forces, as well as those conducting the investigation, are not only equipped with the financial and technical means to collect forensic evidence, to conduct autopsies, to call witnesses, to adequately dispose of the body, but are also trained in the use of such means.

### 3. Observations

The purpose of this chapter was to conclude upon the permissible scope for targeting insurgents resulting from an examination of the substantive content of the requirements underlying the prohibition on arbitrary deprivation of life, and which are imposed on a counterinsurgent State when its forces resort to the use of lethal force.

Generally, as follows from the relevant soft-law documents and the practice of the UNHRC, IACiHR and ECtHR, the question of whether a deprivation of life is arbitrary or not is subject to the compliance by a State with a body of strict substantive and procedural requirements. While the (procedural) requirement of investigation typically is a *post-facto* requirement, all other (substantive) requirements – absolute necessity, proportionality and precautionary measures – must be complied with both before and during the actual application of lethal force. In nature, these requirements are all designed to respect the right to life to the maximum extent possible as an exercise of *law enforcement* (in a peacetime context). In that respect, the framework is reflective of a presumption that the government exercises control over territory, objects or persons – as the very concept of law enforcement already suggests.

In view of the permissible scope for targeting insurgents on the basis of IHRL, two principal, connected observations in respect of can be made.

*Firstly*, as may be concluded from their very object and purpose, the requirements of IHRL sit quite uncomfortably with the notion of targeting as understood in this study. The *intentional* deprivation of life in the concept of targeting is difficult to reconcile with the idea underlying the use of force used as a measure of law enforcement, where the law mandates

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<sup>1203</sup> (2005k), *Nachova v. Bulgaria*, App. No. 43577/98, Judgment of 6 July 2005, § 113; (1999i), *Ogur v. Turkey*, App. No. 21594/93, Judgment of 20 May 1999, § 88;

<sup>1204</sup> (2001h), *Kelly and Others v. the United Kingdom*, App. No. 30054/96, Judgment of May 4, 2001, §§ 96-97; (2002a), *Anguelova v. Bulgaria*, App. No. 38361/97, Judgment of 13 June 2002, § 139, 144.

<sup>1205</sup> (2001i), *McKerr v. the United Kingdom*, App. No. 28883/95, Judgment of 4 May 2001, § 113.

that operations are planned and executed with the primary aim to minimize, to the greatest extent possible, the recourse to lethal force. As the principles of absolute necessity and proportionality indicate, targeting may only be resorted to as a measure of last resort, and when it serves a legitimate aim as recognized under IHRL. In sum, IHRL offers only a very limited permissible scope for the targeting, which, as a rule, is prohibited, and may only be resorted to in exceptional circumstances. In operational terms, these exceptional circumstances are limited to situations where insurgents pose a concrete and direct threat to the lives of counterinsurgent forces and the civilian population. In other words, where a commander aims to achieve other effects with the targeting of insurgents – for example, to disrupt the command chain within the insurgency movement – IHRL offers little permissible room for maneuver.

This brings us to the *second* observation, which is that if (hypothetically speaking) IHRL were the sole regime applicable to govern a State's conduct in the situational contexts of counterinsurgency, its strict requirements would not only severely impact the counterinsurgent State's operational ability to target insurgents present in territory under its control, but mostly so in territory *not under the control of the counterinsurgent State*. It is for precisely this reason that LOAC provides a more tailored regime. It is to this regime that we will now turn in the next chapter.