

# APPLICATION OF ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN CONDITIONS OF ARMED CONFLICT: THE PRACTICE OF THE ECTHR

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DOI: <https://doi.org/10.61345/1339-7915.2025.5.9>

**Annotation.** The article provides a comprehensive analysis of the application of Article 2 of the European Convention on Human Rights in armed conflict based on the practice of the European Court of Human Rights. The content of the substantive and procedural obligations of the state to protect the right to life is examined, the criteria of “absolute necessity” and proportionality are determined as key standards for the lawful use of lethal force. The correlation of the norms of international humanitarian law and international human rights law in the context of regulating the right to life during armed conflicts is analyzed, in particular the principle of *lex specialis* and the concept of “military necessity”. Special attention is paid to the procedural aspect of Article 2 of the ECHR - the obligation of the state to conduct an effective official investigation into each case of deprivation of life, including in extraterritorial conditions and in situations of enforced disappearance. Based on the analysis of key decisions of the ECHR - in the cases of *McCann and Others v. the United Kingdom*, *Ergi v. Turkey*, *Isaeva v. Russia*, *Georgia v. Russia*, *Hanan v. Germany*, *Cyprus v. Turkey*, *Varnava and Others v. Turkey*, “*Ukraine and the Netherlands v. Russia*” — formulated conclusions regarding the obligations of the state in the field of protecting the right to life of the civilian population in conditions of armed conflict.

**Key words:** right to life; restriction of the right to life; absolute necessity; armed conflict; international humanitarian law; principle of proportionality; effective investigation; European Convention on Human Rights; European Court of Human Rights; civilian population.

## 1. Problem statement.

Humanity has gone through a thorny path on the path to establishing human rights and freedoms, step by step limiting the omnipotence of the state, extending the principle of equality to an ever-widening circle of persons and relations between them. The Second World War, with its terrible events, mass murders and devaluation of human life, clearly demonstrated how defenseless a person can be in the face of violence and arbitrariness. It was the scale of the tragedy that became the impetus for the formation of a new international system for the protection of human rights, designed to prevent the recurrence of such crimes. In order to consolidate these intentions not only at the level of ideas, work was begun on the draft Convention for the Protection of Human Rights and Fundamental Freedoms.

The catalog of human rights provided for by the Convention opens with the right to life - the highest value and fundamental prerequisite for the existence of all other rights. It was the provision of this right that became the key response of the world community to the experience of mass crimes of the 20th century and the starting point for the formation of modern human rights standards. Although, it is worth noting that during the preparation of the text of the Convention, perhaps the most discussions revolved around the right to life. Its formulation went through many configurations, in particular, from the “right to security of life and health” to the “right to life, liberty and security of the person”. However, none of these formulations sufficiently emphasized the importance of the right to life, its exceptional significance. Various legal acts

proclaiming the right to life were analyzed, among which the Universal Declaration of Human Rights certainly had the greatest influence, and even the constitutions of individual states were studied. All in order to establish the most important formula of the inviolability of human life.

The relevance of the study is primarily due to the exceptional significance of the right to life as a fundamental human right. In conditions of armed conflicts, the issue of protecting the right to life becomes particularly acute, since it is during military operations that the risk of its violation is the highest, and the limits of the permissible use of force are the most difficult for legal assessment. The chosen research topic becomes particularly relevant in connection with the ongoing international armed conflict on the territory of Ukraine, which, unfortunately, is accompanied by mass casualties among the civilian population, the destruction of civilian infrastructure, cases of enforced disappearances, as well as the difficulties of ensuring effective investigation of violations of the right to life. In these conditions, it is of practical importance to clarify how the norms of Article 2 of the European Convention on Human Rights are applied during an armed conflict, how they correlate with the norms of international humanitarian law, and what standards of protection of the right to life have been developed in the practice of the European Court of Human Rights. Of course, the right to life in the context of the content of the European Convention on Human Rights has been the subject of numerous legal studies, the features and specifics of its protection in conditions of armed conflicts require in-depth analysis. In addition, despite the fact that the right to life under Article 2 of the European Convention on Human Rights is non-derogable even in extraordinary circumstances, in practice, significant difficulties often arise in determining the limits of the use of force in military operations, the proportionality and commensurability of the operations carried out, and the adequacy of the preparation of military operations. The practice of the ECHR indicates the absence of a universal approach and the need to assess each situation taking into account the specific circumstances of the armed conflict, which necessitates a thorough doctrinal and practical analysis.

## 2. Status of scientific research.

The issue of protecting the right to life in conditions of armed conflict is at the intersection of international human rights law and international humanitarian law, which causes wide interest in it in both domestic and foreign legal science.

The issue of the content and limits of the right to life guaranteed by Article 2 of the European Convention on Human Rights was studied by such foreign scholars as F. Jacobs, R. White, K. Ovey, D. Harris, M. O'Boyle, K. Warrick, and others. Among domestic scholars, V.G. Butkevych, M.V. Buromensky, O.V. Zadorozhny, P.M. Rabinovich and other specialists in the field of international law and human rights.

Certain aspects of the interaction of international humanitarian law and human rights law during armed conflicts were covered in the works of T. Meron, M. Sassoli, L. Doswald-Beck, R. Arnold. The procedural obligations of states to investigate cases of violations of the right to life in armed conflicts became the subject of analysis in connection with key decisions of the ECHR - in particular, in the cases of *McCann and Others v. the United Kingdom*, *Ergi v. Turkey*, *Georgia v. Russia*, *Hanan v. Germany*, *Cyprus v. Turkey*, *Varnava and Others v. Turkey*, *Isaeva v. Russia* and others.

At the same time, despite a significant amount of scientific works, a comprehensive analysis of the application of Article 2 of the ECHR in armed conflict, taking into account the current practice of the ECHR, in particular in the case of *"Ukraine and the Netherlands v. Russia"*, remains insufficiently developed in domestic doctrine. This is particularly relevant in the context of the ongoing international armed conflict on the territory of Ukraine, which creates an urgent need for a thorough scientific understanding of the relevant standards for protecting the right to life.

**3. The purpose of the study** is a comprehensive analysis of the application of Article 2 of the European Convention on Human Rights in conditions of armed conflict based on the practice of the European Court of Human Rights, clarifying the content of the state's substantive and procedural obligations to protect the right to life, as well as determining the features of their implementation.]

#### 4. Presentation of the main material.

First of all, it is worth starting the study of the right to life in armed conflict by clarifying the general content of this right in the context of Article 2 of the European Convention on Human Rights (hereinafter referred to as the ECHR). Article 2 of the ECHR establishes that everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally except in execution of a sentence of death passed by a court after he has been found guilty of a crime for which such punishment is provided by law. However, deprivation of life shall not be considered as committed in violation of this Article if it is the result of the use of force that is strictly necessary: a) to protect any person from unlawful violence; b) to make a lawful arrest or to prevent the escape of a person lawfully detained; c) in the course of lawful action to suppress a riot or insurrection.

Thus, the second part of the article establishes a number of exceptions under which a party may derogate from its obligations to protect the right to life. However, it is worth dwelling on this in order to properly understand the nature of these exceptions. The second part of Article 2 rather describes the situations in which it is permissible to use force that may lead, as an unintended consequence, to the deprivation of life. However, the use of force must be no more than "absolutely necessary" to achieve one of the aims specified in the subparagraphs. The use of force that led to the deprivation of life must be "absolutely necessary to achieve the aim under each of the three subparagraphs and, therefore, justified taking into account the possible risks to human life" - the European Court of Human Rights noted in a number of its decisions.

Actually, the category of "absolute necessity" is perhaps the most defining in the context of the research issues. The only article 2 of the ECHR among the entire catalogue of rights of the Convention tells us about the criterion of "exceptional necessity", as opposed to the more widespread criterion of necessity as such in the content of the Convention. This indicates an exceptional approach to the restriction of the right to life, where the standard of guarantee and protection should be much higher. In addition, it is important to note that according to article 15 of the ECHR, in time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention only to the extent required by the urgency of the situation and provided that such measures do not contradict its other obligations under international law. However, these provisions cannot serve as a basis for derogation from the right to life, which again indicates an increased level of guarantees for the protection of the right to life.

The criterion of "absolute necessity" was first properly substantiated in the judgment of the European Court of Human Rights (hereinafter referred to as the ECtHR) in the context of the case of "McCann and Others v. the United Kingdom". The case concerned an operation against terrorists which resulted in the deaths of three unarmed people. Both the applicants and the respondent State in the case referred to "absolute necessity", but each party understood the meaning of this category in its own way. As a result, the Court emphasised that Article 2 of the ECHR indicates the need to apply a stricter and more weighty criterion of necessity than is usually applied in determining whether a particular State action is [8, § 149]. In particular, the Court noted that the force used must be strictly proportionate to the attainment of the aims set out in Article 2(2) of the ECHR [8, 194].

At the same time, gradually moving on to the issue of protecting the right to life in armed conflict, we note that the ECHR in its practice, repeatedly recognizing the existence of an armed conflict, indicates that during hostilities the criterion of "absolute necessity" in Article 2 of the ECHR should be interpreted more freely than during law enforcement operations. Moreover, as of today, at the doctrinal level and based on the practice of the ECHR, the concept of "military necessity" is being formed, which is applied exclusively during armed conflicts and means the obligation to use only those measures, methods and means that are not prohibited by international humanitarian law and that are necessary to achieve a legitimate military goal, that is, to weaken the military power of the other party to the armed conflict and victory [6, p. 116]. At this stage of the work, it is important to note the specifics of the legal regulation of armed conflicts. First of all, it would be appropriate to provide a definition of armed conflict, however, as of today there is no comprehensive and precise definition of what an armed conflict is. The interpretation and clarification of this concept largely depends on the practice of states, international courts and legal scholars. The key features, classification and regulation are provided by the sources of international humanitarian law, the lion's share of which is occupied by the Geneva Conventions and their protocols, the so-called Geneva law.

In addition, in the previous paragraph we have already mentioned international humanitarian law, which is also called the law of war. As soon as an armed conflict arises, any actions committed for reasons related to this conflict must comply with the norms of international humanitarian law.

It is also important to note the relationship between international humanitarian law in the context of regulating human rights in general and the right to life in particular in armed conflicts with international human rights law in general and the norms of the Convention in particular, as part of it. In its decisions, the ECtHR recognizes that international humanitarian law is a special law regarding the conduct of hostilities, and therefore, when assessing compliance with Article 2 of the ECHR in the context of military operations, the Court takes into account the standards of international humanitarian law. To date, international practice recognizes the mandatory simultaneous application of the norms of these two legal regimes, but with the primacy of the law of war. The Court has repeatedly concluded that during armed conflicts, the right to life is protected by both of these branches of international law, and the relationship between their norms should be such as to protect human life as much as possible. In fact, despite the fundamental differences between the law of war and the norms of the Convention, both legal regimes have a common direction and a single goal - the protection of human life and dignity. Usually, when IHL and the Convention or other international human rights norms are applied simultaneously to the same situation, their respective provisions are not in conflict but rather complement each other [3, p.33].

However, in some areas the relationship between IHL and human rights under the ECHR, especially the right to life, can be somewhat more complex. For example, with regard to persons not taking a direct part or no longer involved in hostilities, IHL prohibits any violence directed against their life and physical integrity in any circumstances, including murder. However, for obvious reasons, it does not provide such protection to combatants and civilians who take a direct part in hostilities. On the other hand, the universal norms of the ECHR protect all persons from "arbitrary" deprivation of life, thus assuming that the same standards apply to all persons, regardless of their status under IHL. In such cases, the relevant provisions are usually agreed upon according to the principle of *lex specialis*, which provides that special rules, more specifically designed to address the specific situation that has arisen, take precedence over competing rules of a more general nature [3, p. 33].

Taking into account all of the above, I propose to focus on the issue of protecting the right to life of the civilian population in armed conflict and the ECHR's approaches to its resolution.

First of all, returning to the concept of "military necessity" and a comprehensive analysis of the norms of international humanitarian law, we conclude that the principle of proportionality plays a fundamental role. In situations where it is impossible to avoid causing incidental harm to civilians or civilian objects, it is necessary, first of all, to be guided by the principle of proportionality. Accordingly, those who plan or decide on an attack must not launch or stop any "attack which, as may be expected, will cause incidental loss of civilian life, injury to civilians and damage to civilian objects, or both, which would be excessive in relation to the concrete and direct military advantage intended to be achieved in this way." The principle of proportionality within IHL allows the use of lethal force against a legitimate military objective (combatants, military objectives, etc.) if such an attack is likely to result in incidental loss of life or damage to civilian objects, provided that the attack is not excessive in relation to the concrete and direct military advantage sought [6, p. 18].

In the ECHR case *Ergi v Turkey*, the applicant complained on behalf of her sister Havva Ergi, who died as a result of shelling by Turkish forces on her village in the province of Diyarbakir (Turkey) in the context of hostilities between state forces and suspected terrorists. The Turkish armed forces surrounded the village and, during the exchange of fire, opened fire on houses in which civilians were trying to take refuge, with little regard for the safety of civilians. The applicant's sister, who had gone out onto the veranda of her house, was killed. The family reported the incident to the local authorities, but the investigation was superficial and ineffective, and the subsequent actions of the prosecutor did not clearly establish the circumstances of the death or the persons responsible. The Court, despite the existence of an armed conflict, concluded that insufficient precautions had been taken to protect the lives of the civilian population, and that the Turkish forces had failed to verify whether the use of force was absolutely necessary in the first place. In addition, the Court stressed that in choosing the means and methods of conducting armed operations, the State must exercise due planning and coordination of the actions of the military or security forces [12, §.86].

Thus, the concept of military necessity in international humanitarian law and the practice of the ECHR is not an independent justification for the use of lethal force. It is subject to the principle of proportionality, which requires that any attack should not cause excessive incidental harm to the civilian population in relation to the concrete and direct military advantage. The ECtHR's case law confirms that even in conditions of armed conflict, the State is obliged to carefully plan and control operations, to verify the exceptional (absolute) necessity of the use of force and to take all possible precautions to minimize the risk to the lives of civilians. Failure to comply with these requirements leads to a violation of Article 2 of the Convention.

Regarding the protection of civilian life, in the case of *Tagayeva and Others v. Russia* the Court emphasized that the positive obligation to protect life "may apply not only to situations involving the need for the personal protection of one or more persons identified in advance as potential targets of a lethal act, but also to cases giving rise to the obligation to ensure the general protection of society" [14, § 482].

Where, in the course of an armed conflict, events have occurred which have resulted in fatalities, including among civilians, the Court has held that the State has a positive obligation to conduct an effective official investigation into the circumstances of the death. This procedural obligation is a cornerstone of the protection afforded by Article 2 of the ECHR and is intended to ensure that those responsible are held accountable, which in fact always applies – both in normal peacetime conditions and in the difficult circumstances of armed conflict. In the case of *Georgia v. Russia*, the Court emphasised that the obligation under Article 2 requires that, even in difficult security circumstances, all reasonable steps must be taken to ensure an effective, independent investigation into alleged violations of the right to life [11, § 164]. However, in the same case, the court noted that "the procedural obligation under Article 2 must be applied realistically", which at first glance sounds quite controversial, but is quite understandable from the point of view of the likely difficulties of investigations in armed conflict [11, § 168].

Noteworthy in the context of the issue is the case of "*Hanan v. Germany*", following which the court drew an important position on the investigation of cases of civilian deaths in armed conflict. The case concerned an airstrike on two fuel tankers that had been seized by Taliban insurgents in Afghanistan, the order for which was given by a German colonel acting as part of the International Security Assistance Force. As a result of the airstrike, both insurgents and civilians were injured. The applicant was the father of the deceased civilian, who complained that Germany had failed to conduct an effective investigation into his son's death, and that the procedural aspect of Article 2 of the ECHR had been violated. The German prosecutor opened and then closed the investigation due to the lack of grounds for criminal prosecution of the colonel, liability under the Criminal Code was excluded, since the legality of the airstrike under international law was an act of justified self-defense. The key issue in the case was whether the State's obligation under Article 2 of the Convention to conduct an effective investigation extended to the actions of its military abroad in the context of an armed conflict. In formulating the answer to the question raised, the Grand Chamber interpreted the concept of "jurisdictional connection" in relation to the obligation to conduct an investigation under Article 2 of the Convention in the case of deaths caused by active hostilities in an extraterritorial armed conflict. The actual decision was that even in conditions of international armed conflict and in the absence of full territorial control, a State is obliged to ensure an effective investigation of cases of deprivation of life if there is a sufficient jurisdictional connection between the State and the relevant events. The ECtHR therefore recognised that, although Germany did not exercise effective control over the territory of Afghanistan, there was a special jurisdictional link because: 1) the lethal strike was directly authorised by a German officer; 2) the investigation was entirely under the control of the German authorities. The procedural obligation under Article 2 of the Convention is therefore applicable [9, §131].

Thus, the case of *Hanan v. Germany* confirms the ECtHR's approach that the procedural obligation of a State to investigate the deprivation of life persists even during an armed conflict, even outside its territory. At the same time, the Court recognises that the standards of effectiveness of investigation must be applied taking into account the realities of war and the rules of international humanitarian law, but cannot be nullified.

Another interesting case in the context of the study arose in connection with the military intervention of Turkey in northern Cyprus in 1974 and the subsequent de facto occupation of the northern part of the island (*Cyprus v. Turkey*). The complaints in the case, among other things, concerned violations of the right

to life due to the lack of an effective investigation into the fate of missing persons. Importantly, in this case, the court very clearly formulated the concept of “effective control”, indicating that Turkey exercised effective control over the northern part of Cyprus and, therefore, was responsible for violations of the Convention, in particular for failing to carry out an effective investigation into the disappearances and possible deaths of persons. Moreover, in this case, the court held a violation of the procedural aspect of Article 2 due to the failure to conduct an effective investigation into the whereabouts and fate of missing persons who disappeared in life-threatening circumstances [7, §123].

Based on the latter, a violation of Article 2 of the European Convention on Human Rights, which guarantees the right to life, is not limited to cases of confirmed death of a person, in particular in conditions of armed conflict. The case-law of the European Court of Human Rights has consistently confirmed that disappearance in circumstances that pose a real threat to life may also constitute a violation of this article. The ECtHR proceeds from the fact that when a person disappears in conditions of armed conflict (which naturally involves violent, life-threatening actions) and the State does not provide a convincing explanation for his fate, the Court may conclude that there is a reasonable presumption of death. In such a case, there is a violation of the substantive aspect of Article 2, even in the absence of direct evidence of death. This approach was clearly formulated, in particular, in the already mentioned case of *Cyprus v. Turkey* and the rather notable *Varnava and Others v. Turkey*, where the Court recognized that the mere uncertainty about the fate of missing persons in the context of hostilities does not exempt the State from responsibility for violations of the right to life.

In the course of studying the case of *Cyprus v. Turkey*, my attention was additionally drawn to the separate opinion of the judge in the case, who took a rather broad approach to interpreting the right to life in conditions of armed conflict, however, in my opinion, in this context it was more than appropriate. In particular, the judge considers that “where freedom of movement is considered essential, especially when it comes to obtaining optimal medical care, the denial of such freedom by the State constitutes a serious breach of its obligations towards persons within its jurisdiction. The judge adds that this may constitute a breach of the State’s obligation under Article 2 of the Convention to protect everyone’s right to life in accordance with the law. The right to life, of course, can be interpreted differently, he notes, but it undoubtedly includes the freedom of choice to find the best available medical care [7, partly dissenting opinion of judge Marcus-Helmons].

Returning to the relevance of the chosen research topic, as well as taking into account the above-described approaches to a broader interpretation of the violation of the right to life in armed conflict, it is impossible to leave without analyzing the decision of the ECHR in the case of *Ukraine and the Netherlands v. Russia*. This case is, without exaggeration, of historical and exceptional importance in the practice of the ECHR, as it concerns a large period of time and unprecedentedly large-scale violations of human rights, including under Article 2 of the ECHR. In fact, the analysis of this decision requires separate attention in the context of another study, since the court’s positions are really worthy of attention, for now we consider it appropriate to focus exclusively on the theses regarding the violation of the right to life. Therefore, on the basis of the extrajudicial killings of civilians, the “attacks (often fatal) on civilian evacuees (including children) who were travelling in vehicles clearly marked as civilians and those carrying children, by rail and bus or on foot”, as well as the “violation of humanitarian corridors by ... attempting to kill fleeing civilians”, the Court found that there had been a violation of the right to life under Article 2 of the ECHR. The Court held that the killings of civilians could not be justified by reference to the exceptions provided for in Article 2 § 2 of the Convention and therefore constituted a violation of Article 2 of the Convention [15, § 1044].

In the context of the study, it is appropriate to take into account the decision of the ECtHR in the case of “*Isaeva v. Russia*”, which concerned an airstrike by the Russian armed forces on the village of Katyr-Yurt in Chechnya during the armed conflict in the Chechen Republic. As a result of this strike, many civilians died, including civilians, including women and children. The applicant in the case was a relative of the dead civilians, who complained that the actions of the Russian military violated the right to life guaranteed by Article 2 of the ECHR. Additionally, she argued that a proper investigation into the circumstances of the death of her relatives had not been conducted. The ECtHR ruled that the right to life protects civilians even during armed conflicts, and that the use of military force must be carried out in such a way as to minimize the risk to the lives of civilians [13, §175]. The court also noted that the military operation was

not prepared and conducted in compliance with all the precautions necessary to preserve the lives of the civilian population [13, § 98].

## 5. Conclusions.

The study conducted allows us to conclude that Article 2 of the European Convention on Human Rights remains fully applicable in conditions of armed conflict, although its interpretation is carried out taking into account the norms of international humanitarian law and the realities of hostilities. The right to life, as a fundamental value and a prerequisite for the realization of all other rights, remains highly protected even in extraordinary circumstances. The ECHR consistently emphasizes that the use of lethal force must be strictly conditioned by the principles of “absolute necessity”, proportionality, provide for a number of precautions, and any military operation must be properly planned and controlled in order to minimize the risk to the civilian population.

At the same time, the right to life under Article 2 of the ECHR covers not only cases of confirmed death, but also situations of enforced disappearance or disappearance in life-threatening circumstances. As demonstrated in the cases of *Cyprus v. Turkey* and *Varnava and Others v. Turkey*, prolonged uncertainty about the fate of missing persons in the context of an armed conflict may constitute both a substantive and a procedural violation of Article 2, and such a violation is of a continuing nature.

Of particular importance is the procedural aspect of Article 2 of the ECHR, which imposes on the State a positive obligation to conduct an effective official investigation in every case of deprivation of life. As confirmed in the cases of *Georgia v. Russia* and *Hanan v. Germany*, this obligation persists even in the difficult circumstances of an armed conflict and may extend to the actions of the State outside its territory if there is a sufficient jurisdictional connection. At the same time, the Court recognizes the need for a realistic approach to assessing the effectiveness of the investigation, without, however, allowing it to be reduced to a formality.

Thus, the practice of the ECHR has formed quite specific approaches to ensuring proper protection of the fundamental human right to life. For ourselves, we can summarize the existence of the following obligations of the state to protect the right to life: 1) prohibition of arbitrary and unlawful killing, which means the prohibition of killing persons in cases not provided for by international humanitarian law and in violation of the principles of “exceptional (absolute) necessity” and proportionality; 2) conducting an official effective investigation, i.e. the obligation of states, even during armed conflicts, to conduct an investigation into each case of restriction of the right to life, but taking into account the realities of external circumstances.

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