

Doctor thesis expose

**EXCESSIVE USE OF FORCE BY THE LAW  
ENFORCEMENT OFFICIALS IN THE LIGHT OF  
ARTICLES 2 AND 3 OF THE EUROPEAN  
CONVENTION ON HUMAN RIGHTS**

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**Field of law:** Fundamental and Human Rights

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## INTRODUCTION

In 1950, when the Council of Europe drafted the European Convention for the Protection of Human Rights and Fundamental Freedoms, it was the first regional treaty which guaranteed international protection of human rights and fundamental freedoms defined in it. In order to provide that all the Member states act according the obligation imposed by Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”<sup>1</sup>, the Council of Europe was “the first organization to establish a human rights court (...) and to introduce a judicial individual complaints procedure similar to the protection of fundamental rights before domestic courts”<sup>2</sup>.

The European Convention on Human Rights and legal remedies system established by this European legal treaty <sup>3</sup> have had decisive impact on the creation of similar regional systems worldwide. Nevertheless, most legal experts share the view of human rights expert Jane S. Jensen, when stating: “Under the aegis of the Council of Europe, the European system remains a model for the international protection of human rights and has inspired similar programs, albeit none so successful.”<sup>4</sup>

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<sup>1</sup> Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5

<sup>2</sup> M. Nowak, Introduction to the Human Rights Regime, Leiden, 2003, at 160

<sup>3</sup> Since there was a strong resistance to the fact that the newly established European Court on Human Rights was granted the authority to interfere with the relations between Member states and their citizens, i.e. the national sovereignty, the only mandatory procedure envisaged by the European Convention on Human Rights originally was the inter – state complaints procedure before the European Court of Human Rights and the Committee of Ministers. As a political compromise, the individual procedure was optional, as well as the jurisdiction of the Court. During the years, appropriate amendments to the European Convention have been made by adoption of Additional Protocols - Protocol 11 which entered into force on 1 November 1998 established a fundamental change in the machinery of the Convention by abolishing the Commission and allowing individuals to apply directly to the Court. By this Protocol, the Court was given compulsory jurisdiction and its structure has been altered. The protocol also abolished the judicial functions of the Committee of Ministers. The entrance into force of Protocol 14 - which was finally ratified by all member states on 1 June 2010 – brought about a number of procedural changes: first of all, a single judge can decide on a case's admissibility ( previously, three judges were required ). In situations where cases are broadly similar to ones brought previously before the Court, and are essentially due to a member state failing to comply with a previous judgment, the case can be decided by three judges rather than the seven-judge Chamber. In addition to that, a case may not be admissible if it is considered that the applicant has not suffered a 'significant disadvantage' - however, this is not a rigid rule. A member state can be brought before the Court by the Committee of Ministers if that state refuses to enforce a judgment. The Committee of Ministers can ask the Court for an 'interpretation' of a judgment to help determine the best way for a member state to comply.

<sup>4</sup> Jane S. Jensen - The Impact of the European Convention for the Protection of Human Rights on National Law, University of Cincinnati Law Review (1983), 52

As a consequence of the inevitable evolution of societies and gradual change of ethical standards, new situations not envisaged by the drafters of the European Convention on Human Rights emerged before the European Court of Human Rights. In order to respond to the new challenges time has set before this Court, it was not sufficient only to use the Vienna Convention on the Law of Treaties as a source of inspiration for the interpretation of the Convention. The European Court of Human Rights has also adopted new creative techniques of interpretation, the ‘living instrument doctrine’ and the ‘practical and effective’ doctrine, which has led to imposing new positive obligations, requiring the state to uphold the right concerned by positive action.<sup>5</sup> As explained by the authors Kremnitzer and Ghanayim: “In modern law (...) fundamental rights are not limited to negative rights (...) in the sense that a person can demand that the state guarantees his fundamental rights, and the state is obliged not only to respect those rights, but also to actively protect them. The more important a fundamental right, the more comprehensive the protection of that right.”<sup>6</sup>

Nevertheless, when imposing positive obligations, the Court always has regard to the fair balance that has to be struck between the general interest of the community and the competing public interest of the individual, or individuals. It is essential not to impose an excessive burden upon the state enforcing such obligations, which is why it is important to precisely limit their scope.

It is practically undisputed that among all the rights provided by the European Convention on Human Rights, the right to life and right not to be subjected to torture or to inhuman or degrading treatment<sup>7</sup> are most fundamental. On the other hand, these rights are very often violated – more than 11% of violations found by the Court concern these two rights<sup>8</sup>. More often than not, the ones violating them are state agents, despite their duty to recognize, respect and ensure the rights established by the Convention.

By doing a comprehensive analysis of the Court’s case law in this regard, this research aims to point out the way the European Court of Human Rights balanced the demand of showing judicial creativity in order to respond to the present – day demands and respect for the role of Member States in determining the scope of rights which the European Convention on Human Rights guarantees in cases of excessive use of force by the law enforcement officials in the light of Articles 2 and 3 of the European Convention on Human Rights.

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<sup>5</sup> Almost all positive obligations only require a state to take steps to ensure that a right is upheld, not to achieve a particular result. – C. de Than – Positive Obligations under the ECHR: Towards the Human Rights of Victims and Vulnerable Witnesses, *The Journal of Criminal Law*, at 168

<sup>6</sup> M. Kremnitzer and H. Ghanayim – Proportionality and the aggressor’s culpability in self defense, *Tulsa Law Review* 39 ( 2003 – 2004 ), at 898

<sup>7</sup> These rights are provided by Articles 2 and 3 of the European Convention on Human Rights.

<sup>8</sup> European Court of Human Rights Public Relations - The European Court of Human Rights, an Overview of statistics by states 1959-2011, Strasbourg, 2012

## SUPERVISOR

The student will be supervised by Univ. Prof. Dr. Manfred Nowak, LL.M.

## THE MAIN RESEARCH QUESTIONS

Over the years, the European Court of Human Rights had made some very important turns in its jurisprudence concerning cases in which there were allegations that officials of the member State had violated one's right to life under circumstances not complying with the allowed exceptions to the Article 2 of the European Convention on Human Rights, as well in the cases of state officials being accused of submitting someone to a behavior amounting to torture or inhuman or degrading treatment, which is prohibited by Article 3 of the same Convention.

When analysing this important area of the Court's jurisprudence, the key questions to be answered are:

In the cases of excessive use of force by the police officials, which standards are used in order to determine was this force 'absolutely necessary'? What is the difference between the standard 'beyond reasonable doubt' applied by the Court in cases of alleged violations of right to life and the same standard applied in cases of alleged violations of the prohibition of torture? What is the scope of application of the principle of proportionality, as one of the key principles of interpretation of European Convention on Human Rights, in such cases? How did the doctrine of positive obligations under Articles 2 and 3 in cases of excessive use of force by the law enforcement officials develop and upon what jurisprudential foundations has it been constructed? What methodology was used by the Court in order to determine their existence, scope and breach? How did they evolve and what are the reasons for it? What are their precise contents, express and implied? Where do boundaries lie? Has the contemporary Court been cautious in developing and applying these obligations? In which areas are they expected to expand in future?

## RESEARCH METHOD

In order to answer the above stated questions, it is necessary to establish how the European Court of Human Rights has interpreted terms 'unlawful violence', 'lawful arrest', 'lawfully detained', 'action lawfully taken for the purpose of quelling a riot or insurrection', as well as terms 'torture' and 'inhuman or degrading treatment or punishment'. Furthermore, it is to be examined what is understood by the 'proportionality principle' according to the Strasbourg case law and how did the Court apply this principle in cases of use of excessive violence. It is also of high importance to disclose the meaning behind the term 'beyond reasonable doubt standard of proof' and to point out the differences in the application of this standard in cases concerning Article 2 and in those referring to Article 3 of the European Convention on Human Rights.

This is to be done by making a case by case analysis of the leading judgments by the European Court of Human Rights, which will include a short description of the case facts, citations of key

passages from the judgments concerned and dissenting or separate opinions, opinions given by the renowned human rights specialists and finally general comments on the judgment by the author. At the end of every chapter, conclusions will be made about the role of Strasbourg court in imposing a certain positive obligation, its structure, limits and their place within the wider theoretical setting of international human rights law. The methods used, therefore, will be the classical methods of qualitative science inquiry.

## PROPOSED OUTLINE

INTRODUCTION – Overview of the development, importance and impact of the European Convention on Human Rights and legal remedies system established by this legal treaty

CHAPTER 1 - Stating the objectives of thesis research: focusing on the historical evolution on positive obligations upon state parties under Articles 2 and 3 of the European Convention on Human Rights by the European Court of Human Rights in cases regarding excessive use of force by the law enforcement officials, as well as analysis of the justification has been articulated by the Court to explain the recognition of such obligations. Concise outline of the previous commentary in the existing literature on this topic, followed by the short summary of the main research questions which are to be answered in this thesis. Explanation of research methods which will be used and reasons why were these methods chosen as the most suitable for achieving the objectives set

CHAPTER 2 – Excessive use of force by the state officials in the light of Article 2 of the European Convention: Positive obligation on Member States to exercise appropriate care in the planning and control over their security forces' operation which might involve the use of lethal force with a special reference to the terms of proportionality of the official response to the perceived threat; analysis of the correspondent jurisprudence

CHAPTER 3 – Excessive use of force by the state officials in the light of Article 2 of the European Convention: Positive obligation on Member States to carry out an effective official investigation when individuals have been killed as a result of use force by agents of state with a special reference to the fundamental institutional and procedural requirements of such investigation; analysis of the correspondent Strasbourg case - law

CHAPTER 4 - Excessive use of force by the state officials in the light of Article 3 of the European Convention: Duty to investigate allegations of serious ill – treatment by the State agents with a special reference to the requirements of thoroughness and effectiveness of the investigation, as well as its capability of leading to the identification and punishment of those responsible; analysis of the Courts leading judgments

CHAPTER 5 - Concluding chapter – provides an overview of the main trends in the case law regarding positive obligations of Member States in cases of excessive and disproportionate use of force by the law enforcement agents of state, as well of the difference in standards applied in

Articles 2 and 3 of the Convention. The academic commentary on this cutting edge Court's activity will be followed by the author's conclusion of certain similarities between positive obligations analysed, main differences among them and possible further development by of the Court. This chapter will conclude with short review of Member States' strategies for implementing above mentioned positive obligations as efficiently as possible in their national legal framework.

## PROPOSED TIME FRAME

From January 2013 – March 2013: Writing up the Introduction chapter of the thesis and submitting it to the supervisor for additional remarks and suggestions

From April 2013 – June 2013 - Writing up the First chapter of the thesis and submitting it to the supervisor for additional remarks and suggestions

From July 2013 – September 2013 - Writing up the Second chapter of the thesis and submitting it to the supervisor for additional remarks and suggestions

From October 2013 – December 2013 - Writing up the Third chapter of the thesis and submitting it to the supervisor for additional remarks and suggestions

From January 2014 – March 2014 - Writing up the Fourth chapter of the thesis and submitting it to the supervisor for additional remarks and suggestions

From April 2014 – June 2014 - Writing up the Fifth, concluding chapter of the thesis and submitting it to the supervisor for additional remarks and suggestions

From July 2014 – September 2014 – final revision of the thesis in accordance with supervisor's suggestions

October 2014 – Defensio of the thesis

## CASES DEALT BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS –

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*Absar v. Turkey*, application no. 25657 / 94, judgment of 10 July 2001

*Ahmet Özkan and others v. Turkey*, application no. 21689/93, judgment of 6 April 2004

*Akkoc v. Turkey*, application no. 22947 / 93 and 22948 / 93, judgment of 10 October 2000

*Aksoy v. Turkey*, application no. 21987 / 93, judgment of 12 December 1995

*Anguelova v. Bulgaria*, application no. 38361 / 97, judgment of 13 June 2002

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