The Use of Force and Article 2 of the ECHR in Light of European Conflicts

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7

Duty to Investigate Suspicious Deaths

HUMAN RIGHTS TREATIES (including the ECHR) 'do not spell out a duty to investigate a loss of life'.[1] The aim of the ECHR is 'to secure to everyone within their jurisdiction the rights and freedoms defined in the ECHR'. The ECtHR reasoned that 'by implication … there should be some form of effective official investigation when individuals were killed as a result of the use of force by, *inter alios*, agents of the State'.[2] This scrutiny extends to all stages of an operation, not only immediately prior to the death of an individual.[3]

Over time, this obligation extended to include *any* suspicious death.[4] It is 'not confined to cases where it was established that the killing was caused by an agent of the State'.[5] A state may be held responsible for 'a failure of prevention where a risk of death materialises in connection with the activities of the public authorities or in the framework of public policy'.[6] Where the application was inadmissible, 'this obligation requires by implication that there should be some form of effective official investigation when there is reason to believe that an individual has died in suspicious circumstances'.[7] Therefore, where it is not clear who caused the death, or where there is an indication that the state failed in its duty to reasonably protect the victim from a known threat, the state is obliged to investigate such a death in the interests of 'due diligence'.[8] The ECtHR explained that:

> the essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.[9]

What is meant by accountability, and the special relationship between the right to life and the right to an effective remedy (Article 13 of the ECHR), are

[1] L Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP, 2011) 184.

[2] *McCann v UK* (1995) para 161; *Kaya v Turkey* (1998) para 91; *Isayeva v Russia* (2005) para 209.

[3] J Chevalier-Watts, 'Effective Investigations under Article 2 of the ECHR: Securing the Right to Life or an Onerous Burden on a State?' (2010) 21 (3) *European Journal of International Law* 701, 706.

[4] *Ergi v Turkey* (1998) para 82; *Shanaghan v UK* (2001); *Oneryildiz v Turkey* (2005) para 91.

[5] *Ergi v Turkey* (1998) para 82.

[6] JF Akandji-Kombe, *Positive Obligations Under the European Convention on Human Rights* (CoE, 2007) 24.

[7] *ROD v Croatia* (2008), s 1.

[8] Doswald-Beck (n 1) 188.

[9] *Anguelova v Bulgaria* (2002) para 137; *Jasinskis v Latvia* (2010) para 72.

discussed in Chapter 8. The present chapter considers the positive duty to investigate suspicious deaths in the context of European conflicts. This is the time when this duty is most vulnerable and subject to neglect; though the findings of this chapter can be applied to suspicious deaths outside of conflict scenarios. This chapter discusses the minimum requirements of this duty, as understood from the ECtHR's jurisprudence. These are that the investigation is: of the state's own motion; of an appropriate purpose; commenced promptly; reasonably expedited; thorough; independent and impartial; and subject to public scrutiny. This chapter also highlights certain aspects that are lacking adequate protection within the CoE. It identifies ways the CoE would benefit from incorporating other internationally recognised standards (eg the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions 1989 (1989 Principles),[10] the Model Autopsy Protocol in the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions 1999 (Minnesota Protocol), and the ICED). Each of these considerations should be included in the proposed guidelines as exemplified in the Appendix. As the requirement to investigate is not exclusive to Article 2, there is cross-over with other provisions of the ECHR. These are Articles 3 (prohibition of torture), 5 (right to liberty and security), 6 (right to a fair trial), 13 (right to an effective remedy) and 34 (individual applications—formerly Article 25(1)).

I. ESTABLISHING MINIMUM REQUIREMENTS FOR AN ARTICLE 2 INVESTIGATION

The ECtHR has broadly stated that state investigations, must be 'effective'[11] and 'official'.[12] It has also clarified that the investigation requirements of Article 2:

> go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law.[13]

McCann v UK (1995)[14] introduced the idea of a duty to effectively investigate suspicious deaths, but the ECtHR did not deem it necessary 'to decide what form such an investigation should take and under what conditions it should be conducted'.[15] In *McCann* a public inquest into the killing of three suspected terrorists in Gibraltar prima facie appeared reasonable and thorough, but the inquest

[10] E/1989/65 (1989), 'Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions', 24 May 1989.
[11] *Jelic v Croatia* (2014) para 63.
[12] *McCann v UK* (1995) para 161.
[13] *Ali and Ayse Duran v Turkey* (2008) para 61.
[14] *McCann v UK* (1995).
[15] ibid, para 162.

faced criticism from the applicants for its lack of independence and selective evidence.[16] The ECtHR ruled that it 'does not consider that the alleged various shortcomings in the inquest proceedings … substantially hampered the carrying out of a thorough, impartial and careful examination of the circumstances surrounding the killings'.[17] The ECtHR adopted a 'pragmatic approach' to the enforcement of the duty to investigate, by not enforcing too heavy a burden and being 'cautious not to undermine a State's sovereign powers'.[18] This was reflected in the subsequent *Hugh Jordan v UK* (2001).[19]

Hugh Jordan related to the killing of the applicant's son, Pearse Jordan, by an officer of the Royal Ulster Constabulary (RUC) on 25 November 1992. Jordan's car was pursued by the RUC and rammed to a halt. Pearse emerged from the car and was shot three times. No guns, ammunition, explosives, masks or gloves were found in the car and Jordan was unarmed. An RUC investigation, consisting of forensic examinations and witness interviews, was carried out and concluded in May 1993. The investigation was sent to the DPP, who directed no prosecution on 16 November 1993, due to a lack of evidence. The report was then sent to the Independent Commission for Police Complaints (ICPC), which informed the family on 31 August 1994 that it agreed with the DPP that the evidence was insufficient to warrant the preferment of criminal charges against the police officers concerned. The coroner was notified of this decision on 29 November 1994, but decided to hold an inquest into the killing. The applicant alleged that the investigations were not Article 2-compliant. The ECtHR agreed, and listed a number of elements which must be present to constitute an effective investigation. The Court also qualified that these elements did not equate to a list of what is required to satisfy the Article 2 duty to investigate across the board, but were related to what was required in that particular case. The Court stated that these elements were 'not an obligation of result, but of means'.[20]

It is observed that:

> an audit of the cases as a whole reveals a picture which does little to further the underlying rationale of the ECtHR's decision—the need for an investigation capable of determining whether there was a substantive violation of Article 2 or not. Rather the cases tend to continue a pattern of litigation, forum bouncing, and denial of investigation.[21]

Yet while the ECtHR may be hesitant to acknowledge it, cases such as *Hugh Jordan* created a set of principles that could be interpreted as the minimum requirements of the Article 2 duty to investigate. This does not mean that the ECtHR

[16] ibid, para 157.
[17] ibid, para 163.
[18] Chevalier-Watts (n 3) 704.
[19] *Hugh Jordan v UK* (2001).
[20] ibid, para 107.
[21] C Bell and J Keenan, 'Lost on the Way Home? The Right to Life in NI' (2005) 32(1) *Journal of Law and Society* 68, 85.

could not go further. For example, in the disappearance case *Bámaca-Velásquez v Guatemala* (2000), the IACommHR made it clear what was expected of a state and the purpose of an investigation. It recommended that Guatemala:

> conduct a prompt, impartial and effective investigation into the facts denounced in order to record in detail, in a duly authenticated official report, the specific circumstances in which the crimes against Mr Bámaca occurred and the responsibility for the violations committed, so as to inform the wife of Mr Bámaca, Jennifer Harbury, and the other members of his family about his fate and the whereabouts of his remains.[22]

This guidance can (and should) be used to determine what the minimum requirements are where the procedural obligation to conduct an effective investigation into suspicious deaths is concerned. The ECtHR's hesitancy in clarifying what constitutes an effective investigation is driven by the fear that it would lead to burdensome reinvestigations and contravene the principle of subsidiarity. This is easily countered. If states are aware of what this duty entails in the first place, a checklist can be created to provide guidance for what should and should not be done in conducting investigations. This assists with reducing the need for reinvestigations. Lack of codified guidance makes it easy for a state to ignore or to plead ignorance of its Article 2 obligations. Codified guidance informs the state of the minimum requirements for an Article 2-compliant investigation, something which it is required to conduct by virtue of being an HCP to the ECHR—a membership that it willingly signed up to. These set a yardstick by which to judge adherence; reflecting the principle of subsidiarity it is up to each individual state as to how these are implemented. As long as the implementation meets the minimum standards, the applicant has no case and the ECtHR will exonerate the state authorities. The subsequent sections consider what these minimum standards are.

II. STATE'S OWN MOTION

The ECtHR rules that where the relevant national authorities are aware of the death of a victim in suspicious circumstances, they are required to 'carry out an effective official investigation on their own motion'.[23] The state authorities 'cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures'.[24] The 'mere knowledge of the killing on the part of the authorities gave rise *ipso facto* to an obligation under Article 2 of the [ECHR] to carry out an effective investigation

[22] *Bámaca-Velásquez v Guatemala* (2000) 16.

[23] *McCann v UK* (1995) para 173; *McKerr v UK* (2001) para 111; *Hugh Jordan v UK* (2001) para 105; *Kelly and Others v UK* (2001) para 94; *Shanaghan v UK* (2001) para 88; *Avsar v Turkey* (2001) para 393; *Orhan v Turkey* (2002) para 334; *Akhmadova and Akhmadov v Russia* (2008) para 78; *Sultygov and Others v Russia* (2014) para 379.

[24] *Ilhan v Turkey* (2000) para 63; *Jelic v Croatia* (2014) para 66.

into the circumstances surrounding the death'.[25] In *Ergi v Turkey* (1998), a fact-finding mission by the ECommHR found that the applicant's claims of ineffective investigations into the death of his sister from live ammunition during a Turkish military operation in their village of Gisgis/Kesentas was well-founded; the ECtHR agreed.[26] The Court further ruled that while such an obligation can be burdensome, 'neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into the deaths arising out of clashes involving the security forces'.[27] In fact, there is particular need for the state to investigate cases where the 'circumstances are in many respects unclear'.[28] This is particularly true where the facts are disputed, or in the case of enforced disappearance. Within the four case studies there were complaints of the state not acting of its own motion to initiate and efficiently progress investigations.

III. PURPOSE OF THE INVESTIGATION

Significant issues in the four case studies regarding lack of independence, ineffective investigations, existence of collusion, ineffective remedies and impunity, illustrate that investigations (when conducted) do not always adhere to their required purpose. On occasion the purpose is intentionally and systematically ignored by the respective states. Drawing from the Chechen example, Chechnya's own Deputy Prosecutor made a damning report about the general failings in investigations within the region. He warned:

> the investigative authorities fail to carry out urgent investigative actions and organise proper cooperation with the operational services in order to solve crimes. In fact, top-ranking officials of the Investigative Committee have no departmental control over criminal investigations. No concrete steps are taken to eliminate the violations identified by the agencies of the prosecutor's office. The perpetrators are not held accountable. There are instances where crimes of abductions have actually been concealed by the investigators of the [Investigative Committee] … As a result of delayed initiation of criminal proceedings and the inactive and passive nature of investigations, the perpetrators flee and the whereabouts of the affected [abducted] persons are not established.[29]

The purpose of an investigation is to secure 'the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination of whether the

[25] *Ergi v Turkey* (1998) para 82.
[26] ibid, paras 24–45 and 82–86.
[27] ibid, para 85.
[28] ibid, para 85.
[29] Extract from a letter dated March 2011 from the Deputy Prosecutor of the Chechen Republic to the head of the non-governmental organisation Committee Against Torture, Igor Kalyapin; *Aslakhanova and Others v Russia* (2012) para 84.

force used was or was not justified in a particular set of circumstances'.[30] It is the 'effective' element of Article 13, in conjunction with Article 2, that necessitates 'in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure'.[31] The Inter-American *Paniagua Morales et al* (1998) case indicates that the more long-term purpose of the duty to investigate is to assist with preventing future violations by combating impunity, which 'fosters chronic recidivism of human rights violations and total defencelessness of victims and their relatives'.[32] Supporting this, the ECtHR stated that Article 2 investigations should aim to ensure that 'any breaches of that right were repressed and punished'.[33]

To fulfil its purpose, an investigation must honour the rule of law, be transparent and provide effective accountability.[34] There are wide discussions on what the rule of law means. At its core it is understood 'that all persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts'.[35] The criminal law remedies available must also be capable of altering the course of an investigation.[36] It is insufficient to offer the possibility of lodging a disciplinary complaint against the state official involved. The nature and degree of scrutiny depends on the circumstances of each individual case. In cases where the facts are undisputed, such an investigation amounts to little more than a mere formality; whereas disputed or suspicious cases require additional scrutiny.[37] The 1989 Principles add that 'the purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death'.[38] The Minnesota Protocol elaborates that:

> the broad purpose of an inquiry is to discover the truth about events leading to the suspicious death of a victim. To fulfil this purpose, those conducting the inquiry shall, at minimum, seek:
>
> a) To identify the victim;
> b) To recover and preserve evidentiary material related to the death to aid in any potential prosecution of those responsible;
> c) To identify possible witnesses and obtain statements from them concerning the death;

[30] *Kaya v Turkey* (1998) para 87.
[31] ibid, paras 106–07; *Aksoy v Turkey* (1996) para 98; *Aydin v Turkey* (1997) para 103; *Orhan v Turkey* (2002) para 383; *Kukayev v Russia* (2007) para 117.
[32] *Paniagua Morales* et al (1998) para 173.
[33] *Armani da Silva v UK*, para 230.
[34] *Avsar v Turkey* (2001).
[35] T Bingham, *The Rule of Law* (Penguin Books, 2010) 37.
[36] *Sirin Yilmaz v Turkey* (2004) para 86.
[37] *Velikova v Bulgaria* (2000) para 80.
[38] E/1989/65 (n 10) principle 9.

d) To determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death;
e) To distinguish between natural death, accidental death, suicide and homicide;
f) To identify and apprehend the person(s) involved in the death;
g) To bring the suspected perpetrator(s) before a competent court established by law.[39]

IV. PROMPT COMMENCEMENT OF INVESTIGATIONS

ECtHR jurisprudence has established that investigations must commence promptly. What constitutes prompt commencement depends on the context of the case, but generally the ECtHR has clarified that it applies to the commencement of evidence-gathering. On occasion, prompt evidence-gathering was not adhered to in the four case studies. For example, the seven-year delay between the killing and on-site inspection of the crime scene in *Mentese v Turkey* (2005),[40] and the five-month delay between the reporting of a disappearance and the initiation of an investigation in *Aslakhanova v Russia* (2012)[41] were deemed incompatible with Article 2. Though not investigated by the ECtHR, it is likely that the initial lack of investigation into the BVE's and GAL's killings would also be contrary to Article 2. Regarding the NI Troubles, case delays played a significant role. However, they were predominantly at the inquest stage (initial investigation stage).

Much depends on the circumstances of each case. Investigations of enforced disappearances must be 'taken immediately after the crime was reported to the authorities',[42] and a delay of a matter of days can constitute a violation of Article 2.[43] In *Musayev v Russia* (2007) an investigation that was opened one month after the killings was found to be 'in itself … an unacceptable delay when dealing with dozens of civilians' deaths'.[44] This case concerned the killing of dozens of Grozny residents in February 2000 in a part of Grozny that was under full Russian control. This implies that the ECtHR demands a more expeditious investigation when it is involves a potential gross Article 2 violation perpetrated by state actors, though not necessarily as part of state policy.

The need for extra urgency in investigating disappearances is understandable, given that there is still the chance that the potential victim is alive. Yet, the different approach for group and individual killings is harder to justify. Consequently, the ECtHR is too lenient when it comes to the speed of investigation for individual

[39] E/ST/CSDHA/.12 'United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions' (1999) s III.B.
[40] *Mentese and Others v Turkey* (2005) para 54.
[41] *Aslakhanova and Others v Russia* (2012) paras 11–12.
[42] *Betayev and Betayeva v Russia* (2008) para 87; *Orhan v Turkey* (2002) para 336, where the ECtHR stated that the need for promptness was especially important when allegations of disappearances in detention are made.
[43] *Betayev and Betayeva v Russia* (2008) para 85.
[44] ibid, para 160.

claims. Taking NI as an example, many individual claims were made. When assessed as a whole these indicated a wider, unaddressed disregard for human life on the part of state actors.[45] Much debate exists around whether this was part of state policy. Irrespective, state actors were operating freely without repercussions, due to tolerance of delayed and ineffective investigations. This in turn risked further loss of life. A more restrictive approach should be taken in relation to repetitive cases concerning individual killings. When judged as a whole, these individual cases indicate a similar disregard for life, as that which is evident in cases of group killings.

The requirement for prompt commencement of investigations extends to prompt re-commencement of adjourned investigations. In *Hugh Jordan* the inquest proceedings were adjourned on 16 January 1995 to allow the DPP to reconsider the decision not to prosecute. The DPP's negative decision was communicated on 14 February 1995, but the inquest was not scheduled to resume until 12 June 1995.[46] The four-month delay in recommencement was found to have contributed to an unreasonable delay that was incompatible with Article 2. This is linked to the requirement that investigations should be conducted with reasonable expedition. The applicant did contribute significantly to the delays, by challenging the lack of legal aid and non-disclosure of witness statements. However, these judicial reviews were deemed reasonable, as the applicant should be able to make use of the legal remedies available to challenge the inquest procedures. It was unreasonable that the challenges leading to the adjournments resulted from difficulties facing relatives participating in inquest procedures. The ECtHR stated that:

> if long adjournments are regarded as justified in the interests of procedural fairness to the victim's family, it calls into question whether the inquest system was at the relevant time structurally capable of providing for both speed and effective access for the deceased's family.[47]

Thus, reasonable reasons for a delay in promptly commencing investigations must be given.

V. REASONABLE EXPEDITION OF INVESTIGATIONS

An investigation must be carried out with reasonable expedition.[48] This is regarded as 'essential in maintaining public confidence' in a state's 'adherence to

[45] *Hugh Jordan v UK* (2001); *Shanaghan v UK* (2001); *McKerr v UK* (2001).
[46] *Hugh Jordan v UK* (2001) 136.
[47] ibid, para 138.
[48] *Mahmut Kaya v Turkey* (2000) para 107; *McKerr v UK* (2001) para 114; *Kelly and Others v UK* (2001) para 97; *Hugh Jordan v UK* (2001) para 108; *Shanaghan v UK* (2001) para 91; *Avsar v Turkey* (2001) para 395; *McShane v UK* (2002) para 97; *Finucane v UK* (2003) para 70; *Ipek v Turkey* (2004) para 171; *Ahmet Ozkan and Others v Turkey* (2004) para 313.

the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts'.[49] It is also linked to the practical consideration that 'with the passing of time, it becomes more and more difficult to gather evidence from which to determine the cause of death'.[50] The ECtHR has given no indication of what constitutes reasonable expedition, implying that it is determined by the facts of each case. From a circumstantial (as opposed to numerical) perspective, the Court commented on a number of excuses that came before it in an attempt to justify delays. These provide some indication of when a delay is understood to be justified and when it is not.

A number of common complaints that impede the investigation process emerged through a study of the four case studies. These include:

1) undue delays in initiating investigations;
2) cover-ups including getting rid of evidence;[51]
3) ineffective investigations evidenced by the lack of records and failure to act on all evidence, such as interviewing key witnesses and verifying all information;[52] and
4) lack of coordination between investigators.[53]

There are certain aspects of the experiences of Chechnya, NI and Turkey that are worth in-depth discussion.

A. Excessive Delays

In the Chechen case, the ECtHR highlighted delays in the opening of proceedings and the taking of essential steps, lengthy periods of inactivity, and belated granting of victim status to the relatives.[54] The 'combination of these factors had rendered the criminal investigations ineffective';[55] thus a combination of factors must be present to satisfy the requirement to conduct an investigation with reasonable expedition. This is not overly troublesome, as a combination of factors is usually present. Such a stipulation may be contrary to the purposes of the duty to

[49] *McKerr v UK* (2001) para 114.
[50] *Slimani v Turkey* (2004) para 32.
[51] AF Ünsal, Mazlumder (Turkey) interviewed 9 September 2013; J Stevens, 'Stevens Enquiry 3: Overview and Recommendations', 17 April 2003, para 3.4; 'World; Europe Spain's state-sponsored death squads', *BBC News*, 29 July 1998.
[52] *Shanaghan v UK* (2001); *McKerr v UK* (2001); *Hugh Jordan v UK* (2001); *Meryem Celik and Others v Turkey* (2013) para 68; *Cakici v Turkey* (1998) para 105; *Ipek v Turkey* (2004) paras 172–77; *Tahsin Acar v Turkey* (2004) para 233; *Isayeva, Yusupova and Bazayeva v Russia* (2005) 224; Y Milashina, 'Bastrykin's Humiliation: Putin fires chief Chechnya Investigator for doing his job', *The Interpretor*, 18 December 2013; HRW, 'Russia: Joint Letter to President Medvedev regarding Human Rights Situation in the North Caucasus', 20 April 2011; M Elder, 'Chechen president takes charge of activist's murder inquiry', *The Telegraph*, 16 July 2009.
[53] *Buldan v Turkey* (2004) para 89.
[54] *Aslakhanova and Others v Russia* (2012).
[55] ibid para 123.

thoroughly investigate a suspicious death. It should be clear that extensive violations of a particular element of an investigation can constitute a violation, without the need for a violation of combining factors. Taking Article 6 of the ECHR (right to a fair trial) cases as an example, this right contains a number of components, such as the right to:

a) be informed promptly of the nature and cause of the accusation;
b) have adequate time and facilities to prepare a defence;
c) legal assistance;
d) examine witnesses; or
e) have an interpreter.[56]

Not all of these components must be violated for the ECtHR to find a violation of Article 6. If a defendant was given legal assistance, but was not informed promptly of the nature and causes of the accusation, this would constitute a violation of the defendant's fair trial rights. Consequently, the ECtHR should consider clarifying that not all components of the duty to investigate identified by this chapter need to be violated, for Article 2 to be contravened.

Deaths in NI that are unexpected or unexplained must be investigated by the Coroners Service for NI (CSNI). Such deaths may be the result of violence, accident, negligence, any cause other than natural illness or disease, or other circumstances that may require investigation.[57] Coroners are barristers or solicitors appointed by the Lord Chancellor. The CSNI is led by a High Court judge and its remit extends to all of NI. It is legislated for by the Coroners Act (NI) 1959 and the Coroners (Practice and Procedure) Rules (NI) 1963.[58] The purpose of a CSNI investigation is to determine:

1) who the deceased was;
2) how, when and where the deceased came to his or her death; and
3) the particulars required to register a death.[59]

To achieve this, the coroner has the power to order a post mortem examination and to obtain witness statements and medical records.[60] The coroner can also hold an inquest, with or without a jury.[61] In its investigations the standard of proof required is typically on the balance of probabilities.[62]

[56] Art 6(3), ECHR 1950.

[57] Coroners Act (NI) 1959; Public Record Office of NI, 'About the Coroners' Service', www.proni.gov.uk/index/search_the_archives/proninames/about_the_coroners__service.htm.

[58] This was moderately amended by the Coroners (Practice and Procedure) (Amendment) Rules (NI) 2002 and Coroners (Practice and Procedure) (Amendment) Rules (NI) 2008.

[59] r 15, Coroners (Practice and Procedure) Rules (NI) 1963.

[60] NICTS, 'The Coroners', www.courtsni.gov.uk/en-GB/Services/Coroners/the_Coroners/Pages/coroners_coroners.aspx.

[61] s 13, Coroners Act (NI) 1959.

[62] Medical Protection, 'Inquests', www.medicalprotection.org/uk/northern-ireland-factsheets/inquests.

Inquests during the Troubles were plagued by delays for reasons ranging from non-disclosure of evidence,[63] to delays in investigation,[64] to suspected collusion.[65] In *Hugh Jordan,* a delay of 25 months between Pearse's death and the commencement of the inquest was found incompatible with Article 2.[66] The four-and-half year delay concerning the inquest into Patrick Shanaghan's death,[67] and the 10-year delay of the inquest into Pat Finucane's death, were also deemed incompatible,[68] with the UK admitting that the delay in Finucane's inquiry was excessive.[69] Despite these experiences and the ECtHR's findings, the ECtHR gave no indication of what is an acceptable timescale for conducting an investigation. This is understandable, given that an assessment of whether a delay is ECHR compatible depends on whether the delay is justified. This was clarified in *Hugh Jordan*, where the ECtHR implied that things might be different if an explanation had 'been forthcoming for this delay'.[70]

The ECtHR does not clarify whether any explanation will suffice, or if the explanation must denote some form of reasonableness or absolute necessity. The precedent of the ECtHR indicates that all decisions which potentially lead to a violation are to be subject to some form of assessment. The question arises as to what test should be applied. Article 2(2) provides that the test for whether the use of force is justified is absolute necessity. Yet in relation to positive obligations (eg the duty to investigate suspicious deaths), the ECtHR indicated that the test is one of reasonableness. As such, states must take 'all *reasonable* steps to investigate' [emphasis added].[71]

The coroner has more than 70 pending inquests related to the Troubles, which were adjourned awaiting conclusion.[72] It was claimed that the hearings were being deliberately delayed to conceal the truth,[73] implying that state actors unlawfully

[63] *Hugh Jordan v UK* (2001) para 136; 'Sean Brown murder: Inquest postponed indefinitely', *BBC News*, 12 February 2015.

[64] *Shanaghan v UK* (2001) para 28.

[65] *Finucane v UK* (2003).

[66] *Hugh Jordan v UK* (2001) para 136.

[67] *Shanaghan v UK* (2001) para 119. Patrick Shanaghan, a suspected (but never charged) member of the IRA, was killed by a masked gunman on his way to work on 12 August 1991. The loyalist paramilitary group, the UFF, later claimed responsibility for the murder. The RUC had known of a threat to Shanaghan's life from loyalists. The ECtHR left determining who was responsible for Shanaghan's death up to the domestic authorities. The Court in focusing on the state's duty to investigate found a violation of Art 2 due to delays, lack of public scrutiny and non-disclosure of evidence during domestic investigations.

[68] *Finucane v UK* (2003). Pat Finucane, a solicitor involved in a number of high-profile cases concerning the NI conflict, was shot dead at his home by two masked men on 12 February 1989. It was not until 17 April 2003 that the Stevens Inquiry reported that Pat Finucane's murder could have been prevented, that the RUC's investigation could have resulted in an early arrest and detection of the killers, and that there was evidence of collusion.

[69] ibid, para 64.

[70] *Hugh Jordan v UK* (2001) para 136.

[71] *McCaughey and Others v UK* (2013), concurring opinion of Judge Kalaydjieva.

[72] I Cobain, '"Delay, delay, delay": NI Troubles inquests still outstanding', *The Guardian*, 13 April 2014.

[73] ibid.

carried out or were complicit in the killings. This raises questions as to whether the coroner is sufficiently independent to conduct such investigations. It could be more an issue of resources, than independence. However, the ECtHR found that this is not a sufficient defence for the purposes of Article 2. The Court stated that 'there are different avenues to ensure Convention rights, and even if the State failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means'.[74] Kalaydjieva J further added that irrespective of the 'deficiency or "complexity" of the existing domestic procedures', the respondent state must take 'all reasonable steps to investigate with a view to establishing the facts of their own motion'.[75] That the UK government was aware of the deficiencies that existed for many years and did not address these issues was an example of how it failed to take reasonable steps.[76]

B. Sheer Volume of Deaths

In Turkey, where there were a significant number of killings at one time, the Public Prosecutors (PP—who are in charge of investigations) attempted to use the sheer volume of cases awaiting investigation as justification for delays. In *Mahmut Kaya v Turkey* (2000) Dr Hasan Kaya (treated demonstrators injured in clashes with state forces) and lawyer Metin Can (represented suspected members of the PKK) disappeared on 21 February 1993 following death threats.[77] Their two bodies were found six days later. An investigation was launched on 27 February 1993 and by 28 April 1995 it came to a stalemate, after the state forces claimed that they were unable to locate the two main suspects. During this time there were significant delays in obtaining witness statements, and long periods of inactivity.[78] The Turkish authorities argued that they could not be expected to deal with in excess of 500 investigations at any one time.

The ECtHR has an obligation to challenge bad faith and a lack of political will, which poses an obstacle to adherence to Convention rights. The ECtHR expressed its appreciation of the difficulties, but continued that 'where there are serious allegations of misconduct and infliction of unlawful harm implicating State security officers, it is incumbent on the authorities to respond actively and with reasonable expedition'.[79] Thus, having to investigate a large number of cases simultaneously is not an excuse for investigations to be ineffective and subject to excessive delays.

[74] *Saso Gorgiev v the Former Yugoslav Republic of Macedonia* (2012) 44.
[75] *McCaughey and Others v UK* (2013), concurring opinion of Judge Kalaydjieva.
[76] ibid.
[77] *Mahmut Kaya v Turkey* (2000).
[78] ibid, para 106.
[79] ibid, para 107.

C. Violent Context

States have excused delays on the basis that investigations taking place in the context of violence face significant difficulties.[80] The ECtHR takes into account that ongoing violence can impede the search for conclusive evidence[81] and that there 'may be obstacles or difficulties which prevent progress in an investigation in a particular situation'.[82] It has also stated that 'circumstances of that nature cannot relieve the authorities of their obligations under Article 2 to carry out an investigation';[83] the reasoning being that to do otherwise 'would exacerbate still further the climate of impunity and insecurity in the region and thus create a vicious circle'.[84] This approach is supported by Philip Alston, the former UN Rapporteur on Extrajudicial, Summary or Arbitrary Executions, who stated that:

> it is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate—this would eviscerate the non-derogable character of the right to life—but they may affect the modalities or particulars of the investigation.[85]

In *Yasa v Turkey* (1998) the ECtHR clarified that it is not sufficient (for the purposes of Article 2) that an investigation is pending. The applicant in this case was the nephew of Hasim Yasa, who believed that his uncle was killed by state agents on 14 June 1993 for selling the pro-Kurdish paper *Özgür Gündem*. More than five years after Hasim's killing the government reasoned that the investigations were still pending, but it failed to provide evidence showing that the investigations were progressing. The last investigative step that the ECtHR was aware of was a ballistics report on 21 June 1993. The Court found this unacceptable, indicating that an investigation must actually be progressing to satisfy the requirement of reasonable expedition.[86]

VI. THOROUGH INVESTIGATION

The ECtHR stated that an 'investigation's conclusions must be based on thorough, objective and impartial analysis of *all* relevant elements'.[87] It continued that 'failing to follow an obvious line of inquiry undermines the investigations'

[80] *Yasa v Turkey* (1998); *McKerr v UK* (2001); *Ahmet Ozkan and Others v Turkey* (2004); *Isayeva, Yusupova and Bazayeva v Russia* (2005) para 212; *Khashiyev and Akayeva v Russia* (2005) para 155.
[81] *Yasa v Turkey* (1998) para 104; *Sirin Yilmaz v Turkey* (2004) para 85.
[82] *McKerr v UK* (2001) para 114.
[83] *Yasa v Turkey* (1998) para 104.
[84] ibid.
[85] E/CN.4/2006/53, 'Report of the Special Rapporteur, Philip Alston', 8 March 2006, para 36.
[86] *Yasa v Turkey* (1998) para 104; *Tanrikulu v Turkey* (1999) para 109; *Sirin Yilmaz v Turkey* (2004) para 79; *Mentese and Others v Turkey* (2005) para 55.
[87] *Kolevi v Bulgaria* (2009) para 201; *Armani da Silva v UK* (2016) para 234.

ability to establish the circumstances of the case and the person responsible', and an investigation with these failings is ineffective.[88] This includes attempts which are 'half-hearted and dilatory'.[89] State authorities must take:

> reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.[90]

This is also reflected in the Minnesota Protocol:

> one of the most important aspects of a thorough and impartial investigation … is the collection and analysis of evidence. It is essential to recover and preserve physical evidence, and to interview potential witnesses so that the circumstances surrounding a suspicious death can be clarified.[91]

The Protocol further suggests that avenues to investigate should include:

a) What evidence is there, if any, that the death was premeditated and intentional, rather than accidental? Is there any evidence of torture?
b) What weapon or means was used and in what manner?
c) How many persons were involved in the death?
d) What other crime, if any, and the exact details thereof, was committed during or associated with the death?
e) What was the relationship between the suspected perpetrator(s) and the victim prior to the death?
f) Was the victim a member of any political, religious, ethnic or social group(s), and could this have been a motive for the death?[92]

The mere existence of these actions is insufficient; they also must be effective. The ECtHR was reticent to clarify what equates to an effective autopsy, forensic examination or eye-witness testimony. It has cast a wide net, stating that 'any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of this standard'.[93] Yet certain traits become clear by considering the ineffective practices exposed within the ECtHR's jurisprudence, particularly regarding the Turkish-Kurdish conflict.

A. Autopsies and Forensic Examinations

An autopsy is the examination of a dead body for the purposes of establishing the cause of death.[94] Forensic examinations involve using scientific techniques

[88] ibid.
[89] *Acar and Others v Turkey* (2005) para 91.
[90] *Hugh Jordan v UK* (2001) para 107.
[91] E/ST/CSDHA/.12 (n 39), s III.C.
[92] ibid.
[93] *Ramsahai and Others v Netherlands* (2007) para 324.
[94] R Hanzlick, *Death Investigation: Systems and Procedures* (CRC Press, 2016) 8.

to clarify whether a crime was committed, to determine who is responsible, and to corroborate evidence.[95] Autopsies can expose the truth—for example, in the killing of Mikel Zabalza, a Basque youth who disappeared after being taken into custody by the Spanish Guardia Civil in December 1985. His body was retrieved from a river several days after he had gone missing. His hands were cuffed behind his back. The Spanish officials claimed that he escaped and jumped in the river, but the autopsy showed that he died before entering the river.[96] However, failings in relation to autopsies and forensic examinations are common where conflicts are concerned, as exemplified in the case studies. Thus, any potential violation of Article 2 remains unaddressed, risking replication as a result.

Between 1960 and 2013 at least nine people died (either during or after custody) from injuries received while being interrogated by Spanish authorities about Basque activities.[97] The Spanish authorities failed to conduct any investigations (including autopsies and forensic examinations) into these deaths. In Chechnya a forensic expert bureau has operated in the country since 2002 (three years after the start of the first Russian-Chechen conflict). The bureau was unable to carry out autopsies until March 2008 (after the worst of the conflict).[98] The Deputy Head of the Chechnya Investigative Committee reported that this was due to the weakness of the local forensic laboratories and the uncertain legal framework for differentiating between the competence of military and civil investigators.[99] This resulted in a failure to carry out appropriate autopsies, forensic reports or ballistics reports,[100] or a delay in doing so.[101]

In NI the appropriate forensic examinations were usually conducted in relation to killings during the Troubles,[102] meaning the issue during this period was not whether or how autopsy and forensic examinations were conducted. The problem was the cover-ups that followed for the purposes of protecting the state agents involved.[103] For example, the UK government refused to make autopsy reports public. Also, until recently, the coroner's duty to establish 'how' a victim died was

[95] B Caddy and P Cobb, 'Forensic Science' in PC White (ed), *Crime Scene to Court: The Essentials of Forensic Science* (Royal Society of Chemistry, 2004) 8–9.

[96] R Clark, *Negotiating with ETA: Obstacles to Peace in the Basque Country, 1975–1988* (University of Nevada Press, 1990) 66.

[97] M Carmena et al, 'Base Report on Human Rights Violations in the Basque Country Case (1960–2013)' (OSGPSH, 2013) 7–12; Basque Peace Process, 'It has been really hard again', www.basquepeaceprocess.info/?p=1875.

[98] *Aslakhanova and Others v Russia* (2012) para 200.

[99] S Pashayev, 'Problems of Investigating Cases Which Have Become the Subject of Review by the ECtHR' (2010) 2(8) *Vestnik Sledstvennogo Komiteta RF*; *Aslakhanova and Others v Russia* (2012) para 81.

[100] *Estamirov v Russia* (2006) para 91; *Khashiyev and Akayeva v Russia* (2005) para 163; *Musayeva and Others v Russia* (2007) para 91; *Tangiyeva v Russia* (2007) para 92; *Zubayrayev v Russia* (2008) para 99.

[101] *Akhmadova and Sadulayeva v Russia* (2007) para 101.

[102] *Hugh Jordan v UK* (2001) para 119.

[103] R Murray, *State Violence: NI 1969–1997* (Mercier Press, 1998), ch VI.

narrowly interpreted and limited to establishing the cause of death.[104] The coroner was not allowed to express any opinion on criminal or civil liability.[105] As a result, 'the [coroner's] inquest played no useful role in the identification or prosecution of any criminal offences and consequently fell short of the standard requirement required by Article 2'.[106] This is contrary to the system that exists in England and Wales,[107] which is usually mirrored in NI. This was recognised by the NI Court of Appeal in *Middleton* (2004)[108] and *Jordan* (2004).[109] Subsequently, the inquest system has to allow some process whereby the hearing contributes towards the identification and prosecution of offences. Part of this requirement is that:

> where the circumstances of any death which has been, or is being, investigated by a coroner appear to the coroner to disclose that an offence may have been committed against the law of NI or the law of any other country or territory, the coroner must as soon as practicable send to the Director a written report of the circumstances.[110]

However, it remains the case that the coroner in NI cannot declare who was responsible for a death.

Section 13 of the Coroners Act (NI) 1959 provides that a coroner '*may* hold an inquest' [emphasis added], making it a discretionary power. Yet, following the enactment of the HRA, this is no longer the case. As Lord Bingham ruled in *Middleton*,[111] 'in the absence of full criminal proceedings, and unless otherwise notified, a coroner should assume that his inquest is the means by which the State will discharge its procedural investigative obligation under Article 2'.[112] This does not require an inquest to occur in the case of every unexplained death.

The experience during the Turkish-Kurdish conflict provides the starkest examples of inadequate autopsies and forensic examinations. In *Kaya v Turkey* (1998)[113] the autopsy and forensic examinations in relation to the killing of Kurdish farmer, Mehmet Kaya, by state forces on 25 March 1993 were called into question. Autopsy and forensic examinations were conducted directly after the incident, at the scene of the death. The ECommHR and ECtHR found the autopsy report to be 'defective and incomplete' and the forensic examinations to be 'insufficient'.[114] This judgment was made on the basis of a number of omissions. For one, the autopsy was conducted on site, which hindered a thorough

[104] rr 15 and 16, Coroners (Practice and Procedure) Rules (NI) 1963.
[105] r 16, ibid.
[106] F Doherty and P Mageean, 'Investigating Lethal Force Deaths in NI: The Application of Article 2 of the ECHR' (NIHRC, February 2006) 21.
[107] Coroners Act 1988; Coroners Rules 1984.
[108] *R (Middleton) v West Somerset Coroner* (2004) para 16.
[109] *In the Matter of an Application by Hugh Jordan for Judicial Review* (2004) para 25; *Hugh Jordan v UK* (2001) paras 110–11.
[110] Art 35(3), Justice (NI) Act 2002.
[111] *R (Middleton) v West Somerset Coroner* (2004).
[112] ibid, para 47.
[113] *Kaya v Turkey* (1998).
[114] ibid, paras 41 and 89.

examination. The Turkish government attempted to commend the PP and Dr Dogru for 'courageously' conducting an on-the-spot autopsy.[115] The ECtHR acknowledged the difficulties in conducting such an examination in an area prone to violence,[116] but it continued that in such a case the official in charge should have requested that the body be flown to a safer location to allow more detailed analysis.[117] The autopsy report omitted important facts, such as the number of bullet wounds and the entrance/exit points of the bullets.[118] A further issue in *Kaya* was that the autopsy report was not made available to the next-of-kin, despite a request from the victim's brother.[119] The identity of the victim was unknown at the time of the autopsy. Photos were taken as part of the autopsy report in an attempt to identify the body, but these photos were irretrievable.[120]

The forensic examination was found to be insufficient, as no tests for fingerprints or gunpowder traces on the deceased's clothes or body were made at the scene. The body was also handed over to the villagers after the initial and only examinations were completed. This was despite the outlined gaps in the examinations and the fact that the body remained unidentified at that point. The Turkish authorities took for granted that the victim was a PKK militant and did not consider it 'necessary to examine seriously the possibility that he was killed in circumstances engaging the responsibility of the security forces'.[121] The ECtHR ruled that:

> it cannot be maintained that the perfunctory autopsy performed or the findings recorded in the report could lay the basis for an effective follow-up investigation or indeed satisfy even the minimum requirements of an investigation into a clear-cut case of lawful killing since they left too many critical questions unanswered.[122]

The accumulation of serious deficiencies was found to constitute a violation of the Article 2 procedural duty to thoroughly investigate a suspicious death.[123] Yet, the Court did not clarify what the minimum requirements of an investigation were. *Kaya* provides some indication of what constitutes a thorough investigation—an autopsy that is effective and complete, and a forensic examination that is sufficient. With details lacking, what this means in practice depends on each individual case. Drawing from *Kaya*, at minimum the autopsy report and forensic examination must provide a basis for an effective follow-up investigation and must answer all the critical questions. This includes accurate and thorough details of any wounds to the body and a fingerprint and ballistics test of the body.

[115] ibid, para 82.
[116] ibid, para 89.
[117] ibid, para 89.
[118] ibid, para 41.
[119] ibid, para 18.
[120] ibid, para 34.
[121] ibid, para 41.
[122] ibid, para 89.
[123] ibid, para 92.

In *Tanrikulu v Turkey* (1999), the ECtHR stated that it was 'regrettable that no forensic specialist was involved and that no full autopsy was performed'.[124] In *Salman v Turkey* (2000) it indicated that an autopsy should provide 'where appropriate … a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings, including the cause of death'.[125] The ECtHR refrained from stipulating that the involvement of a forensic specialist and full autopsy is a compulsory requirement to satisfy a thorough investigation. Yet, in the interests of ensuring a thorough investigation is conducted, this is required. Unless these minimum stipulations are clearly set out, the state has an opportunity to feign ignorance, as was proven to be an issue particularly in Turkey.

The insufficiencies analysed in *Gül v Turkey* (2000) provide further support that, at minimum, forensic evidence should include complete ballistic reports (including photographs and fingerprint tests). Turkey was reprimanded as:

> there was no attempt to find the bullet allegedly fired by Mehmet Gül at the police officers, which was their primary justification for shooting him. There was no proper recording of the alleged finding of two guns and a spent cartridge inside the flat, which was also relied on by the police in justifying their actions. The references in the police statements on this point were vague and inconsistent, rendering it impossible to identify which officer had found each weapon. No photograph was taken of the weapons at the alleged location. While a test was carried out on the Browning weapon to show that it had been recently fired, there was no testing of Mehmet Gül's hands for traces that would link him with the gun. Nor was the gun tested for prints.[126]

Further guidance on what constitutes a thorough autopsy and forensic examination can be drawn from the Minnesota Protocol, which lists in detail the different procedures that should be followed. The extent of detail provided by the Minnesota Protocol goes beyond that demanded of the ECHR, which is aimed at setting a minimum level of protection. The Minnesota Protocol does offer an example of the minimum protections alluded to, but not elaborated on, by the ECtHR. This is to the detriment of promoting protection of the duty to thoroughly investigate suspicious deaths. Thus, a more direct approach should be taken within a European context.

Using the protections highlighted in the Minnesota Protocol as an example, it states that 'the prosecutor(s) and medical investigators should have the right of access to the scene where the body is found',[127] and that a 'system for co-ordination between the medical and non-medical investigators (eg law enforcement agencies) should be established'.[128] This is followed by a number of detailed steps that investigators must take when dealing with a body. These include photographing

[124] *Tanrikulu v Turkey* (1999) para 106.
[125] *Salman v Turkey* (2000) para 105.
[126] *Gül v Turkey* (2000) 89.
[127] E/ST/CSDHA/.12 (n 39), s IV.B.1.
[128] ibid.

the body, recording details of the body's condition, conducting forensic examinations, recording the identities of witnesses, and ensuring evidence is adequately handled and stored.[129] Listing the steps is too much information for a generalised Convention which sets out minimum standards, as opposed to aspirational standards. Nevertheless, it is helpful and should be taken into account by other CoE bodies when providing advice to states on how to execute the ECtHR's judgments. This was allowed for as the PACE and the CoM confirmed their support for using the Minnesota Protocol to harmonise medico-legal autopsy rules.[130] The PACE and CoM should ensure that the Protocol is sufficiently referenced in their advice to states.

In terms of the actual autopsy the Minnesota Protocol includes important steps such as ensuring everything is recorded in full within an official report; that adequate photographs are taken; that extensive tests are carried out; and that body parts are appropriately dealt with.[131] It states that a thorough, prompt and impartial investigation 'shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide'.[132]

A further consideration is the independence and impartiality of those conducting the investigation. The ECtHR dealt with cases where lack of independence and partiality in conducting autopsies and forensic examinations is clear. The Court criticised these failings,[133] but it did not expressly demand that an independent commission of inquiry or similar procedure was pursued in such situations. The Minnesota Protocol provides clear guidance as to what is expected of an independent commission of inquiry:

> factors that support a belief that the government was involved in the execution, and that should trigger the creation of a special impartial investigation commission include:
>
> a) Where the political views, religious or ethnic affiliation, or social status of the victim give rise to a suspicion of government involvement or complicity in the death because of any one or combination of the following factors:
> i) Where the victim was last seen alive in police custody or detention;
> ii) Where the modus operandi is recognisably attributable to government-sponsored death squads;
> iii) Where persons in the government or associated with the government have attempted to obstruct or delay the investigation of the execution;
> iv) Where the physical or testimonial evidence essential to the investigation becomes unavailable.

[129] ibid.

[130] PACE, 'Recommendation 1159 (1991) of the PACE on the Harmonisation of Autopsy Rules', 29 June 1991; CoM, 'Recommendation No R (99) 3 of the CoM to Member States on the Harmonisation of Medico-Legal Autopsy Rules', 2 February 1999.

[131] E/ST/CSDHA/.12 (n 39), s IV.B.2.

[132] E/1989/65 (n 10) principles 9–13.

[133] *Tanrikulu v Turkey* (1999).

b) As set out in paragraph 11 of the Principles, an independent commission of inquiry or similar procedure should also be established where a routine investigation is inadequate for the following reasons:
   i) The lack of expertise; or
   ii) The lack of impartiality; or
   iii) The importance of the matter; or
   iv) The apparent existence of a pattern of abuse; or
   v) Complaints from the family of the victim about the above inadequacies or other substantial reasons.[134]

The use of the Minnesota Protocol as additional guidance is supported by PACE and the CoM.[135]

B. Public Inquiries

The independent commission of inquiry advocated by the Minnesota Protocol could be realised in the form of a public inquiry. Each of the jurisdictions regarding the four case studies has the ability to hold public inquiries,[136] but the exercise of this power is rare. The only public inquiries held involved the NI and Turkish-Kurdish conflicts. That is despite the UN calling for Russia to establish 'a national broad-based and independent commission of inquiry' into the Chechen conflict, with a view to bringing perpetrators to justice and preventing impunity.[137]

In the UK, there is the possibility of more in-depth inquiries, by virtue of the Tribunals of Inquiry (Evidence) Act 1921, the Inquiries Act 2005 (which repealled the 1921 Act) and (specific to NI) section 44 of the Police (NI) Act 1998. The establishment of these inquiries depends on the government's political will, but once set up, they are supposed to be independent of the Westminster Parliament.[138] In order to conduct its work, the Inquiry can compel the attendance of witnesses and the production of documents.[139] Since 2005 this requirement can be revoked, if that is seen to be in the public interest.[140] This development faced criticism;

[134] E E/ST/CSDHA/.12 (n 39), s IV.D.1.

[135] PACE (n 130); CoM (n 130).

[136] The Chechen, NI and Turkish-Kurdish conflicts and public inquiries are discussed in detail in this sub-section. For the Basque conflict, Art 76(1) of the Spanish Constitution 1978 established that the 'Congress and the Senate and, when appropriate, both Houses jointly, may appoint fact-finding committee on any matter of public interest'. There is the ability within the French system for public inquiries to be conducted by a specially created parliamentary Enquiry Commission (*Les Commissions d'Enquete*), which is given broad investigative powers.

[137] C/CN.4/RES/2000/58, 'The Situation in the Republic of Chechnya of the Russia Federation', 25 April 2000.

[138] O Gay, 'The Inquiries Act 2005', SN/PC/06410, 3 September 2012, 4.

[139] ss 1 and 2, Tribunals of Inquiry (Evidence) Act 1921; s 21, Inquiries Act 2005.

[140] s 21(5), Inquiries Act 2005.

it is viewed as a way for the state to escape scrutiny.[141] The task of a tribunal of inquiry is:

> to investigate certain allegations or events with a view to producing an authoritative account of the facts, attributing responsibility or blame where it is necessary to do so. Tribunals of inquiry do not make decisions as to what action should be taken in the light of their findings of fact, but they may make recommendations for such action. The chairman is normally a senior judge, assisted by one or two additional members or expert assessors.[142]

Inquiries relating to the Troubles include the Saville Inquiry,[143] the inquiry into the death of Rosemary Nelson,[144] and the De Silva Inquiry.[145] Each of these faced some form of criticism pertaining to a violation of Article 2's procedural obligation (eg the delays involved, the expense, or the non-involvement of the victims' next-of-kin).[146]

In Ireland, public inquiries are referred to as tribunals. They are provided for using the British law and the Tribunals of Inquiry (Evidence) Act 1921 (which remained in force post-independence). In 2004 the option of a Commission of Investigation was introduced. Compared to tribunals, this is a less expensive and faster method of investigation for matters of urgent public concern.[147] It is similar to the non-statutory ad hoc inquiries in NI as the Commission sets its

[141] O Bowcott, 'Pat Finucane's family denounce report as a "sham"', *The Guardian*, 12 December 2012.

[142] A Bradley and K Ewing, *Constitutional and Administrative Law* (Longman, 2002) 683.

[143] The Saville Inquiry was ordered under the Tribunals of Inquiry (Evidence) Act 1921. It was set up on 29 January 1998, concluded in June 2010 and cost £192 million. The Inquiry looked into the events surrounding a civil rights march in Derry/Londonderry on 30 January 1972, otherwise known as Bloody Sunday, when 13 people were killed and 13 injured, one fatally. It found that the deaths and injuries were the responsibility of the British Army and were unjustified: Lord Saville, *Report of the Bloody Sunday Inquiry* (SO, 2010).

[144] This inquiry was ordered under s 44 of the Police (NI) Act 1998 to investigate the killing of solicitor Rosemary Nelson on 15 March 1999. The inquiry, which cost £46.5 million, was appointed on 16 November 2004 and concluded on 23 May 2011. It found no evidence that state agencies (the RUC, British Army or MI5) directly facilitated her murder, but could not exclude the possibility that individual members had helped the perpetrators. It found that the actions of state agents helped legitimise her as a target in the eyes of Loyalist paramilitaries. This included the RUC leaking information about her, the RUC publicly abusing her and the failure of state agencies to protect her against threats: M Morland, *The Rosemary Nelson Inquiry Report* (SO, 2011).

[145] The de Silva Inquiry investigated the killing of solicitor Pat Finucane on 12 February 1989. It was to be set up in September 2004, but was delayed until 12 October 2011. The Inquiry concluded on 12 December 2012. The Inquiry found that the state agencies (RUC and British Army) had not done enough to protect Finucane against known threats. It also concluded that three members of Loyalist paramilitaries, two of whom were and one who was to become, agents of the state, were responsible for Finucane's murder. Furthermore, the state propaganda initiatives were found to legitimise Finucane as a potential target for Loyalist paramilitaries. However, Finucane's family criticised the report as a 'sham' and suppression of the truth in which they were given no opportunity to participate: D de Silva, *The Report of the Patrick Finucane Review* (SO, 2012); Bowcott (n 141).

[146] Gay (n 138) 5; Bowcott (n 141).

[147] Commissions of Investigation Act 2004.

own terms of reference and the cooperation regarding evidence is voluntary. The Irish Prime Minister (*Taoiseach*) also has the power to order an Independent Commission of Inquiry. Both of these latter mechanisms were utilised regarding the Dublin and Monaghan bombings in 1974, which killed 33 people and injured approximately 258.[148] The Commission of Inquiry is used as a pre-cursor to a Commission of Investigation or tribunal. The Hamilton/Barron Reports of the Independent Commission of Inquiry considered the facts and raised questions. These were then considered by the Commission of Investigation.[149] Independent Commissions have been used to investigate individual deaths and smaller bombings linked to the Troubles.[150] The conduct of these inquiries has not faced any significant criticism, but their limited jurisdiction poses a persistent problem when trying to obtain key documents from the UK government.[151] Any such Commission does not have the power to conduct investigations (including directly interviewing witnesses outside of Ireland), or to compel the disclosure of evidence in the hands of the UK government or its agents. In such instances the Commission has to rely on the cooperation of the authorities of the relevant jurisdiction.

Representatives of the UN called for public inquiries into the activities of Turkish forces in the south-east of Turkey.[152] The only public inquiry in relation to the Turkish-Kurdish conflict was the Commission of Inquiry into the Susurluk scandal. This examined the existence of collusion between state actors (including the Turkish death squad JITEM, Turkish extremists and PKK members) which resulted in an unknown number of unjustified killings. The conclusion of the inquiry was predictable and limited, as key witnesses were not obliged to testify, the Commission of Inquiry's intended fact-finding missions were halted and a number of pro-government Commissioners resigned. The Commission did find that excessive immunity was granted to public officials, but only four officials were implicated, two of whom were dead.[153]

The ECtHR intentionally avoids imposing explicit demands on how obligations are fulfilled in the interests of the principle of subsidiarity. If a public inquiry satisfied all of the elements required of a thorough investigation, it is possible that this form of inquiry could be used as the main investigation mechanism.

[148] JCJEDWR, 'Final Report on the Report of the Independent Commission of Inquiry into the Dublin and Monaghan Bombings' (March 2004); JCJEDWR, 'Final Report on the Report of the Independent Commission of Inquiry into the Dublin Bombings of 1972 and 1973' (February 2005); P MacEntee, 'Commission of Investigation into the Dublin and Monaghan Bombings of 1974' (March 2007).

[149] ibid.

[150] JCJEDWR, 'Final Report on the Report of the Independent Commission of Inquiry into the Murder of Seamus Ludlow' (March 2006); JCJEDWR, 'Final Report on the Report of the Independent Commission of Inquiry into the Bombing of Kay's Tavern, Dundalk' (November 2006).

[151] Oireachtas, *Sub-Committee Report on the Barron Report* (Oireachtas, 2004) 21.

[152] HRW, 'Turkey: No Justice for Airstrike Victims', 27 December 2012, www.hrw.org/news/2012/12/27/turkey-no-justice-airstrike-victims.

[153] B Maddy-Weitzman, *Middle East Contemporary Survey*, Vol 21 (Moshe Dayan Centre, 1999) 722.

C. Witness Statements

A further issue is a failure on behalf of the investigators to take witness statements. A witness statement is 'an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime'.[154] The lack of investigations into the BVE's and GAL's killings and deaths of alleged Basque sympathisers in Spanish custody implies that insufficient action was taken by the Spanish authorities to obtain witness statements. The same can be said of the French authorities regarding killings that took place on French soil. In the Chechen conflict the Russian authorities commonly failed to identify and question witnesses,[155] or delayed the process of doing so. In *Bayasayeva v Russia* (2007) it took three months to interview the applicant, four years to interview the local residents and over five years to interview the Russian servicemen.[156] The Russian authorities also failed to raise pertinent questions when taking witness statements. A trend developed where the legal teams for the relatives obtained witness statements that should be taken by the Russian authorities. These statements were presented to the Russian authorities, who then failed to act on the information.[157] In *Aslakhanova* Russia was found to have failed 'to take vital investigative steps, especially those aimed at the identification and questioning of the military and security officers who could have witnessed or participated in the abduction'.[158]

Generally witness statements were appropriately taken regarding killings related to the NI Troubles.[159] The issue was the selective way in which the statements were used during inquests and criminal proceedings. In essence:

> the duty to take reasonable steps to protect life has been wrongly interpreted in NI to include blanket anonymity of security personnel. A request for anonymity will be granted for security force personnel that have to appear at legacy inquests. This will be farcical anonymity as the person's name will already be in the public domain, but it means that steps cannot be taken to investigate further. It will not be possible to see if that particular person has been involved in similar killings or if there is evidence of this person's actions being part of a *modus operandi*.[160]

This contributed to cover-ups, particularly concerning cases that were the responsibility of the UK.

[154] *Prosecutor v Blaškić*, No IT-95-14-A, International Criminal Tribunal for the Former Yugoslavia, 26 September 2000, para 15.

[155] *Goncharuk v Russia* (2007); *Khamila Isayeva v Russia* (2008); *Makhauri v Russia* (2007).

[156] *Baysayeva v Russia* (2007); *Estamirov v Russia* (2006), where it took more than three years to gather the witness statements; *Tangiyeva v Russia* (2007), where it took more than four years to gather the witness statements; *Musayev and others v Russia* (2007), where it took up to nine months to gather the witness statements; *Akhmadova and Sadulayeva v Russia* (2007), where it took three years to gather the witness statements.

Akhmadova and Sadulayeva v Russia (2007) para 101.

[157] *Aslakhanova and Others v Russia* (2012) paras 36–37.

[158] ibid, para 123.

[159] *Hugh Jordan v UK* (2001) para 118.

[160] D Holder, CAJ (NI), interviewed 1 August 2014.

It is the Turkish-Kurdish cases (and the significant failings by the state in these cases) that provide the most assistance in developing the European guidance on witness statements. In *Ergi v Turkey* (1998),[161] Havva Ergi and her young daughter were killed during an ambush by the Turkish forces on the village of Gigis (Kesentas) on 29 September 1993. It transpired that (despite claims to the contrary) the PP did not conduct any interviews of family members, villagers or military personnel.[162] The PP alleged that he did not need to investigate further, as there were no elements contradicting the incident report of the Turkish gendarmerie that concluded that Havva Ergi was killed by fire from the PKK.[163] It transpired that the gendarmerie's report was drafted by a commander who was not present during the clash. The PP did not see it as his job to investigate the surrounding circumstances to inform the report's conclusion, as the deceased's relatives had not alerted him to any suspicion of wrongdoing by the Turkish security forces.[164] The ECtHR rejected this reasoning. It found the actions and inaction of the Turkish authorities did not constitute a thorough and effective investigation in line with Article 2. The implication from *Ergi* is that an effective investigation involves investigators following every available line of inquiry. This includes investigators acting of their own motion to interview witnesses and file their statements. Also investigators should consider the surrounding circumstances, to corroborate official reports of the incident.

Where the surrounding circumstances of the case indicate that state involvement is not beyond the realms of possibility—that the state forces might be implicated in a killing—the ECtHR found it unacceptable that a state would conduct an investigation in such a way that does not allow for that very possibility.[165] This was established in *Yasa*, which concerned the killing of a pro-Kurdish newspaper seller in Diyarbakir on 14 June 1993. The Turkish investigatory authorities excluded from the outset the possibility that state agents were implicated in the killing. The PP considered the killing a settling of scores between non-state armed organisations, and the Turkish government found the killing to be the result of 'terrorist' activity.[166] The failure of any state authority to investigate an alternative perpetrator (including state actors) was found to be a violation of Article 2. This implied that there must be some evidence to suggest that state involvement is a possibility.[167] Around the time of *Yasa*, the Susurluk report was in the public domain, which exposed collusion between the state and ex-PKK members. The ECtHR put the latter requirement into clearer language in *Ogur v Turkey* (1999).[168]

[161] *Ergi v Turkey* (1998).
[162] ibid, para 42.
[163] ibid, para 83.
[164] ibid.
[165] *Yasa v Turkey* (1998) paras 106 and 107.
[166] ibid, para 105.
[167] ibid, para 106.
[168] *Ogur v Turkey* (1999).

It stated that in order for an investigation to be thorough, a 'serious attempt to identify the person' responsible for the killing had to be made,[169] in this case the person who fired the fatal shot that killed Musa Ogur during a security operation at a mining company in south-east Turkey.

In the *Mahmut Kaya* disappearance case, the ECtHR found that significant delays in seeking statements from witnesses did not meet the requirements of a thorough investigation. In this case there was a delay of six months between obtaining a more detailed statement from a key witness and an order from the National Security Court Prosecutor to do so. This was then followed by inactivity.[170] The ECtHR acknowledged the difficulties that faced investigators in the south-east of Turkey, but ruled that 'where there are serious allegations of misconduct and infliction of unlawful harm implicating State security officers, it is incumbent on the authorities to respond actively and with reasonable expedition'.[171] The negative impact of the lapse of time on securing witnesses and confirmation that this constituted a key violation in relation to investigations were evidenced in *Varnava v Turkey* (2008).[172] This concerned the disappearance of nine Greek-Cypriots during Turkey's 1974 military operations in Cyprus. Thus investigators must act promptly and be active in obtaining witness statements.

Hugh Jordan confirmed that it is appropriate to take action to remove possible witnesses from situations where public safety needs to be considered (eg highway safety). It also established that the state's duty concerning civilian witnesses is fulfilled by making genuine attempts to look for, find and involve such witnesses. The state cannot be held responsible for a civilian witness's decision to not come forward.[173] Aside from these clarifications, the ECtHR does not elaborate as to what is expected of witness statements; for example, who and what should be recorded. The Minnesota Protocol elaborates that:

(a) Investigators should identify and interview all potential witnesses to the crime, including:
    (i) Suspects;
    (ii) Relatives and friends of the victim;
    (iii) Persons who knew the victim;
    (iv) Individuals residing or located in the area of the crime;
    (v) Persons who knew or had knowledge of the suspects;
    (vi) Persons who may have observed either the crime, the scene, the victim or the suspects in the week prior to the execution;
    (vii) Persons having knowledge of possible motives;
(b) Interviews should take place as soon as possible and should be written and/or taped. All tapes should be transcribed and maintained;

[169] ibid, para 90.
[170] *Mahumt Kaya v Turkey* (2000) para 106.
[171] ibid, para 107.
[172] *Varnava and Others v Turkey* (2008) para 96.
[173] *Hugh Jordan v UK* (2001) para 118.

(c) Witnesses should be interviewed individually, and assurance should be given that any possible means of protecting their safety before, during and after the proceedings will be used, if necessary.[174]

VII. INDEPENDENT AND IMPARTIAL INVESTIGATIONS

Investigations must be independent and impartial. This obligation can be divided into two categories—the investigation itself and, where appropriate, the trial. The latter comes from Article 6(1) of the ECHR, which requires that 'an independent and impartial tribunal [is] established by law' to carefully scrutinise whether a violation of the ECHR occurred.[175] Such a tribunal is also required to deter and prevent violations of the ECHR, including Article 2.[176] It is questioned whether the special courts and trials without jury used in the four case studies satisfy these requirements.[177] This book focuses on the independence of the investigation, a requirement that was introduced by the ECommHR.

The ECommHR stated that the obligation to protect the right to life under Article 2 'includes the minimum requirement of a mechanism whereby the circumstances of a deprivation of life by the agents of a State may receive public and independent scrutiny'.[178] This was confirmed by the ECtHR,[179] but it is the phrasing in the inadmissible *Kamalak v Turkey* (2013)[180] case that is of interest. The ECtHR recalled 'that an independent and impartial investigation capable of leading to the establishment of facts and the liability of those responsible has, in the Court's case-law, been considered as an obligation inherent in Article 2'.[181]

[174] E/ST/CSDHA/.12 (n 39), s C.4.

[175] *Armani da Silva v UK* (2016) para 239.

[176] ibid.

[177] On the courts used in the Basque country: J Sunderland, 'Setting an Example? Counter-Terrorism Measures in Spain' (HRW, January 2005), 17; P Hamilos, 'Judge Baltasar Garzón', *The Guardian*, 6 March 2008. For the courts used in regarding the Chechen conflict: The Committee Against Torture, 'Chechen Supreme Court Judge disqualifies self because of pressure from "a person identifying himself as the Minister of the Interior for the Chechen Republic"', 11 November 2013, www.pytkam.net/mass-media.news/1036/pg7. On the courts in NI: D Walsh, *Use and Abuse of Emergency Legislation in NI* (Civil Liberties Trust, 1993) 94; Lord Diplock, *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in NI* (SO, 1972) paras 61–92; B Dickson, *The ECHR and the Conflict in NI* (OUP, 2010), 208; *Joseph Kavanagh v Ireland* (2001) para 10.2. On the courts used in the Turkish-Kurdish conflict: *Ergin v Turkey (No 6)* (2006) paras 43–44; *Kilic v Turkey* (2000) paras 70–76; Türkiye Cumhuriyeti Avrupa Birligi Bakanligi, 'Dgm'lerin Yerine 18 Agir Ceza Mahkemesi (Instead of DGM 18 Heavy Penal Court)', 2 July 2004, www.abgs.gov.tr/index.php?p=36335&l=1.

Art 145(1), Constitution of the Republic of Turkey 1982; Law No 1632, Military Criminal Code, 22 May 1930; Sections 9–14, Law No 353 on the Foundation of Criminal Procedures at Military Courts of October 1963 (revised in October 2006).

[178] *McCann and Others v UK* (1994) 79.193.

[179] *Baysultanova and Others v Russia* (2013) para 92; *Hugh Jordan v UK* (2001) paras 105–09; *Esmukhambetov and Others v Russia* (2011) paras 115–18; *Umarova and Others v Russia* (2012) paras 84–88.

[180] *Kamalak v Turkey* (2013).

[181] ibid, para 31.

The inclusion of the requirement for states to conduct an independent and impartial investigation within Article 2's duty to investigate a suspicious death is intended to ensure that the investigation conducted is effective, not 'theoretical and illusory'.[182] Article 2 claims focus on there being a fault (either an act or omission) on behalf of the state that led to a threat to life or death, or prevented accountability. This safeguard assists with reducing the risk of cover-ups, impunity and future violations. An independent and impartial investigator should have no interest in conducting a botched investigation. For cases where the impartiality and independence of an investigator is called into question:

> the nature and degree of scrutiny which satisfies this minimum threshold must, in the Commission's view, depend on the circumstances of the particular case. There may be cases where the facts surrounding a deprivation of life are clear and undisputed and the subsequent inquisitorial examination may legitimately be reduced to a minimum formality. But equally there may be other cases where a victim dies in circumstances which are unclear, in which event the lack of any effective procedure to investigate the cause of the deprivation of life could by itself raise an issue under Article 2 of the Convention.[183]

The higher threshold of scrutiny for contested cases is welcomed. Such cases are prevalent during times of unrest and conflict and there are occasions when the lack of clarity is intentionally created by state actors to enable impunity. An exploration of the ECtHR's jurisprudence offers a number of principles that are required for an investigation to be ECHR compatible, but it does not provide a succinct list of what is needed to satisfy an independent and impartial investigation. This is to create an obligation that is not so restrictive that it is useless in practice, and to honour the principle of subsidiarity.

There is evidence of lack of independence in the four case studies. In the Basque conflict, the state authorities failed to thoroughly investigate all state killings.[184] These include those during covert operations by the BVE and GAL, and the individual actions of Spanish police officers.[185] Those killings that were investigated were subject to undue delays.[186] When combined with the state-sponsored origins of the BVE and GAL, this suggests a lack of independence. In Chechnya, the Russian authorities ignore the requirement for investigations to be independent and impartial by generally failing to take critical investigative steps, despite evidence of foul play being submitted by the applicants. For example, in *Baysultanova v Russia* (2013), which concerned the disappearance of Beslan Baysultanov, the ECtHR 'observed that there is no indication that a number of crucial investigative steps were ever taken'.[187] The Russian investigators failed to

[182] *Khashiyev and Akayeva v Russia* (2005) para 177.
[183] *McCann and Others v UK* (1994) 79.193.
[184] I Urizar, Behatokia interviewed 8 January 2015; D Albin, 'El Gobierno criminaliza a las víctimas del terrorismo de Estado', *Público*, 18 September 2014.
[185] ibid.
[186] ibid.
[187] *Baysultanova and Others v Russia* (2013) para 97.

act on information brought by the applicant that could lead to the identification and interviewing of a suspect. The investigators also failed to make 'any genuine attempt' to verify information of the victim's detention.[188]

The NI and Turkish-Kurdish cases offer the most insight into what is required of an independent investigation. *Ogur* shows that it is unacceptable for the investigating officer to be subordinate to the chain of command being investigated, for the institution in charge of the investigation to be linked to the individuals being investigated, or for statements to be tampered with. In this case, members of the tribunal who opposed the favoured decision were simply replaced.[189] Therefore, for an investigation to be deemed independent it is 'necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events'.[190] There must not only be a 'lack of hierarchical or institutional connection, but also a practical independence'.[191]

In *McKerr v UK* (2001)[192] and *Hugh Jordan* the ECtHR found that the investigation into RUC officers' behaviour was conducted by RUC officers and overseen by the RUC Chief Constable. The Court acknowledged that there were independent elements, such as the ICPC could require the RUC Chief Constable to refer the investigating report to the DPP for a decision on prosecution or for the DPP to initiate disciplinary proceedings. Yet this did not sufficiently negate that the investigation was conducted by police officers connected with those under investigation.[193]

The independence of the DPP was also called into question. The DPP's office faced criticism for its reluctance to launch criminal proceedings against state actors.[194] This was exposed by the Bennett Committee in 1979. This Committee considered more than 1,600 formal complaints of assault and battery that was lodged against the RUC. Many of the complaints were corroborated by independent medical evidence, but not a single RUC officer was charged or convicted. The DPP's response was that there was not enough evidence to prosecute.

> [it] is strange, therefore, that [the DPP] has been willing to prefer charges against 'terrorist' suspects in cases where the only evidence against them is the word of an RUC officer but has consistently refused to prefer charges against an RUC officer where the evidence consists of the word of a suspect and independent medical testimony.[195]

[188] ibid.

[189] *Ogur v Turkey* (1999) para 91.

[190] *Gülec v Turkey* (1998) para 82; *Ogur v Turkey* (1999) para 91; *Isayeva, Yusupova and Bazayeva v Russia* (2005) para 210.

[191] *Ergi v Turkey* (1998) paras 83–84; *Hugh Jordan v UK* (2001) para 120; *McKerr v UK* (2001) para 128; *Isayeva, Yusupova and Bazayeva v Russia* (2005) para 210; *Armani da Silva v UK* (2016) para 232.

[192] *McKerr v UK* (2001).

[193] ibid, para 128; *Hugh Jordan v UK* (2001) para 120.

[194] The DPP for NI is tasked with reviewing any case where the circumstances of a death appear to involve a criminal offence: Justice (NI) Act 2002.

[195] D Walsh, 'Arrest and Interrogation' in A Jenkins (ed), *Justice Under Fire: The Abuse of Civil Liberties in NI* (Pluto Press, 1988) 43.

It was a case of the DPP 'bending, consciously or unconsciously, to the wishes of the government in allowing the RUC a free hand'.[196] The current problem of the PSNI investigating allegations against the RUC is that there is 'institutional continuity' between the two police forces.[197] This shows the need for investigations to be independent and impartial at all levels, from initial investigations through to the tribunal stage.

A. Independent Complaints Mechanism

The experience in NI supports the argument for some form of truly independent mechanism to hold the various investigation bodies to account. One suggestion is to have independent complaints mechanisms for the judiciary, police and military. This requires that the persons responsible for and carrying out the investigation are independent from those implicated in the events.[198] This means that they should be practically independent, with no hierarchical or institutional connection.[199] Looking at the complaints mechanisms that are applicable in the four case studies, this requirement is not being adequately delivered across the board.

In the four case studies, keeping the national judiciaries in check usually falls to fellow members of the judiciary,[200] with the exception of NI that has the Criminal Cases Review Commission (CCRC).[201] The CCRC is an independent public body set up to review possible miscarriages of justice in the criminal courts of England, Wales and NI and to refer appropriate cases to the appeals courts.[202] It was not set up until March 1997, towards the end of the conflict.

There are no independent mechanisms within the Spanish or French justice systems to oversee police investigations[203] or the actions of the respective armies. In France's case, any complaints against the French police are often met with counter-claims against the original claimant: that the claimant insulted or assaulted a police officer.[204] The lack of effective complaint mechanisms extends

[196] ibid.

[197] Holder (n 160).

[198] *Gülec v Turkey* (1998) para 82; *Ogur v Turkey* (1999) para 91; *Isayeva, Yusupova and Bazayeva v Russia* (2005) para 210.

[199] *Ergi v Turkey* (1998) paras 83–84; *Hugh Jordan v UK* (2001) para 120; *McKerr v UK* (2001) para 128; *Isayeva, Yusupova and Bazayeva v Russia* (2005) para 210.

[200] The GCPJ is a judicial body tasked with overseeing and inspecting the activities of Spanish judges and courts since 1978. It is made up of 20 members, consisting of a mix of judges and lawyers. Since 1964, the IGJS has supervised the French civil and criminal courts (excluding the Court of Cassation) and all of the departments and bodies under the responsibility of the French Ministry for Justice and Freedoms. It is headed by the General Inspector, a high-ranking judge. There are no separate bodies in Chechnya, Ireland, Russia or Turkey that oversee the work of the courts. Miscarriages of justice in these jurisdictions are usually dealt with by the appellate courts.

[201] Part II, Criminal Appeal Act 1995.

[202] CCRC, 'About the CCRC', www.justice.gov.uk/about/criminal-cases-review-commission.

[203] Sunderland (n 177).

[204] AI, 'Police Abuse Goes Unchecked in France', 2 April 2009, www.amnesty.org/en/press-releases/2009/04/france-police-above-law-20090402/.

to Chechnya, but in select cases the Russian criminal courts have played a role in questioning the actions of the Russian military in Chechnya. This is not common practice.[205] There are no independent mechanisms within the Turkish justice or military system to deal with complaints. Legislation was passed in 2013 by the Turkish Parliament to create an Ombudsman's Office and a separate national human rights institution. Amnesty International voiced concern that these mechanisms will lack independence.[206] Also the Turkish government has yet to fulfil its promise of a police complaints procedure.[207]

There is no, nor was there, any independent oversight for complaints against army personnel in the UK (including NI).[208] This was the same for police complaints in the whole of the UK until 1977.[209] The Police Act 1970 established procedures for recording and investigating complaints in NI, but RUC officers continued to investigate their colleagues.[210] It was not until the publication of the Black Committee's recommendations that an independent mechanism was introduced to NI. Since September 1977 independent mechanisms were in place to handle complaints against the RUC, and now, the PSNI. The Police Complaints Board (PCB) operated from 1977 to 1988. During that time the PCB's remit was limited to reviewing completed investigations and recommending that officers be charged with a criminal offence to the RUC Deputy Chief Constable. During the PCB's tenure, the Deputy Chief Constable did not impose any of the recommended charges[211] and the PCB overturned 'less than one per cent of the cases it reviewed'.[212]

The PCB was replaced by the ICPC in 1988.[213] This was an independent body that dealt with referrals related to a complaint against the police under investigation by a police officer, or where the Chief Constable or Secretary of State suspected that a criminal offence may have been committed by a police officer. Where the conduct of an RUC officer resulted in a death or serious injury, the ICPC was required to supervise the investigation into the complaint.[214] It had to approve the appointment of any police officer to the investigation and it could require any police officer to be replaced.[215] Any reports concerning the investigation had to be submitted to the ICPC and Chief Constable. In turn the ICPC issued a statement determining whether the investigation was satisfactorily conducted and specifying

[205] N Kovalev, 'Trial by Jury in Russian Military Courts' (2008) 8 *JPIPSS*, para 31.
[206] AI, 'Turkey' in AI, *Annual Report 2013: The State of the World's Human Rights* (AI, 2013).
[207] ibid.
[208] Doherty (n 106) 19.
[209] D Glass, *Towards Greater Public Confidence: A Personal Review of the Current Police Complaints System for England and Wales* (IPCC, March 2014) 4.
[210] A Mulcahy, *Policing NI: Conflict, Legitimacy and Reform* (Routledge, 2013) 36.
[211] ibid.
[212] R Weitzer, *Policing Under Fire: Ethnic Conflict and Police-Community Relations in NI* (SUNY Press, 1995) 188.
[213] Police (NI) Order 1987.
[214] Art 9(1)(a) Police (NI) Order 1987.
[215] Art 9(5)(b), ibid.

any defects.[216] The ICPC was to be notified of any disciplinary proceedings[217] and could make disciplinary recommendations.[218] If the ICPC felt that a police officer should be charged with a criminal offence, it could direct the Chief Constable to send the DPP a copy of the investigation report.[219] The strong relationship between the ICPC and the Chief Constable was criticised by the ECtHR and found to be an insufficient safeguard.[220] The ICPC was replaced by the Police Ombudsman for NI (PONI) on 1 October 2000.[221] This is a fully independent office, which is a move away from police officers being investigated by police officers. Investigations of the police saw a significant overhaul since the end of the Troubles, but questions continue around the independence of the individuals who fulfilled these roles at different stages.[222]

VIII. PUBLIC SCRUTINY

Public confidence is one of the main criteria for judging whether an investigation is effective.[223] To achieve this there must be sufficient public scrutiny of the investigation and its results.[224] The reasoning is that public scrutiny provides a procedural safeguard.[225] In order for it to be effective, it must be offered in theory *and* practice.[226]

McKerr established that the degree of public scrutiny required may vary from case to case.[227] Yet in all cases the next-of-kin of the victim must be involved in the procedure 'to the extent necessary to safeguard his or her legitimate interests'.[228] This does not equate to an automatic requirement that families should have access to police files or any information that they demand, or that they are kept informed throughout the investigation.[229] The disclosure of such information may involve sensitive issues with possible prejudicial effects to private individuals or other investigations.[230] This requirement is satisfied as long as the public or the victim's relatives are provided with access at 'other stages of the available procedures'.[231]

[216] Art 9(8), ibid.
[217] Arts 10(5), 11(6) and 11(7), ibid.
[218] Arts 13(1) and 13(3), ibid.
[219] Art 12(2), ibid.
[220] *Hugh Jordan v UK* (2001) para 120.
[221] Pt VII, Police (NI) Act 1998.
[222] L Clarke, 'Police Ombudsman won't step down despite severe criticism in leaked report', *Belfast Telegraph*, 16 August 2011.
[223] *McKerr v UK* (2001) para 114.
[224] *McCann v UK* (1995) para 159.
[225] ibid.
[226] *Shanaghan v UK* (2001) para 92; *Ogur v Turkey* (1999) para 92; *Isayeva v Russia* (2005) para 214.
[227] *McKerr v UK* (2001) para 115.
[228] ibid.
[229] *Hugh Jordan v UK* (2001) para 122–24.
[230] ibid, para 121.
[231] ibid, para 121.

It does not have to involve the scrutiny of the wider public, unlike the right to a public hearing provided for by Article 6(1) of the ECHR.

ECtHR jurisprudence confirms that at the very least, the next-of-kin:

1) must be informed of a decision regarding prosecution;[232]
2) cannot be prohibited outright from access to the investigation and court documents;[233] and
3) must be given the opportunity to tell the court of their version of events.[234]

This reflects Principle 16 of the 1989 Principles:

> families of the deceased and their legal representatives shall be informed of, and have access to any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence. The family of the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy. When the identity of a deceased person has been determined, a notification of the death shall be posted, and the family or relatives of the deceased shall be informed immediately. The body of the deceased shall be returned to them upon completion of the investigation.[235]

These Principles provide the additional stipulation that:

> a written report shall be made within a reasonable period of time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on the findings of fact and on applicable law. The report shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based, and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection. The government shall, within a reasonable time, either reply to the report of the investigation, or indicate the steps to be taken in response to it.[236]

Specific examples of how the principle of public scrutiny is disregarded by state actors can be drawn from three of the case studies.

Concerning access to information in the Chechen conflict, Article 161 of the Code of Criminal Procedure of the Russian Federation 2002 prohibits the disclosure of information from the preliminary investigation file. Information may only be divulged with the permission of the prosecutor or the investigator, in so far as it does not prejudice the investigation. Information about the private lives of parties to criminal proceedings can be divulged only with the parties' permission. This enabled the Russian authorities to refuse to disclose documents without explanation, leaving the relatives of the victims in the dark.[237]

[232] *Gülec v Turkey* (1998) para 82.
[233] *Ogur v Turkey* (1999) para 92.
[234] *Gül v Turkey* (2000) para 93.
[235] E/1989/65 (n 10) Principle 16.
[236] ibid, Principle 17.
[237] *Imakayeva v Russia* (2006) para 202; *Akhmadova and Sadulayeva v Russia* (2007) para 93.

In NI, initially the DPP was viewed as not being under an obligation to furnish reasons for his decision on whether or not to prosecute.[238] This was on the basis that some reasons can lead to an assumption of guilt, a threat to personal security or a threat to national security.[239] This is contrary to the practice in England and Wales. The ECtHR criticised the DPP for not providing reasons and called for an obligation to give reasons to be imposed in relation to a controversial incident involving the use of lethal force. This is to promote public confidence and to permit the family of a victim to have access to information that may be crucial in any legal challenge.[240] The enactment of the HRA also caused a rethinking of how section 8 of the Coroners Act (NI) 1959 is interpreted. This requires the police to inform the coroner when a body is found or a death occurs, together with information that the police are 'able to obtain concerning the finding of the body or concerning the death'.[241] Pre-HRA, this provision was given a limited interpretation, with the RUC being able to determine what was relevant and irrelevant. However, post-2000:

> as a matter of sensible public administration it seems essential that the Coroner should have the material obtained by the police so that he [or she], the Coroner, can decide what witnesses to call and to investigate the matter generally.[242]

While the coroner has the power to summon witnesses,[243] rule 9(2) of the Coroners (Practice and Procedure) Rules (NI) 1963 did not say that a person suspected of causing a death was compelled to appear as a witness at an inquest. The incompatibility of this with Article 2 of the ECHR was exposed in *Hugh Jordan*.[244] It is also contrary to Principle 10 of the 1989 Principles, which states that, the investigative authorities:

> have the authority to oblige officials allegedly involved in any such executions to appear and testify. The same shall apply to any witness. To this end, they shall be entitled to issue summonses to witnesses, including the officials allegedly involved and to demand the production of evidence.[245]

Consequently, a person suspected or charged with causing a death is now a compellable witness at the inquest into the death. This is with the condition that the compellable witness may decline to answer any question tending to incriminate him or herself, and his or her spouse.[246] This does not reflect the compellability of *any* witness as provided for in the 1989 Principles, but it is a step in the right direction.

[238] *R v DPP ex p Patricia Manning and Elizabeth Manning* (2000); *Re an Application by David Adams for Judicial Review* (2001).
[239] *Hugh Jordan v UK* (2001) para 82.
[240] ibid, para 123.
[241] s 8, Coroners Act (NI) 1959.
[242] *Peach v Commissioner of Police of the Metropolis* (1986), 138.
[243] s 17, Coroners Act (NI) 1959.
[244] *Hugh Jordan v UK* (2001) para 127.
[245] E/1989/65 (n 10) Principle 10.
[246] Coroners (Practice and Procedure) (Amendment) Rules (NI) 2002, Explanatory Note.

Turkey was criticised for the lack and inaccessibility of information for next-of-kin.[247] The state authorities also turned to dishonest tactics in an attempt to detract from these shortcomings. This includes focusing on the character of the victim (as opposed to the killing)[248] and charging suspects for murder without any evidential link.[249]

IX. CONCLUSION

Suspicious deaths do occur, particularly during times of conflict. They may be the result of a violation of Article 2, or they may not. In both scenarios it is important to establish why and how the death occurred, and if possible by whom. This is to enable steps to be taken to prevent or reduce the risk of similar deaths in the future. The ECtHR acknowledges the benefits of having the full picture and as such interpreted that Article 2 contained a procedural obligation to investigate suspicious deaths. This chapter shows that the ECtHR jurisprudence concerning investigations and Article 2 is fairly well developed, but that consideration should be given to additional elements found in the 1989 Principles, Minnesota Protocol and ICED. Bringing these different sources together this chapter confirmed that from a conflict standpoint, Article 2's duty to investigate suspicious deaths requires that:

— the state must act of its own motion;
— the purpose of the investigation must be to secure the accountability of agents of the state;
— the investigations must be commenced promptly;
— the investigations must be conducted with reasonable expediency; the investigations must be thorough;
— the investigations must be independent and impartial; and
— the investigations must be subject to public scrutiny (including that of the next-of-kin).

In the interests of clarity, these different requirements should be included in the proposed guidelines. How these should be enumerated is set out in the Appendix. In the interests of robust protection, this chapter also concludes that the PACE and the CoM should adequately reference the Minnesota Protocol in their advice on how to ensure and deliver an adequate Article 2 investigation.

[247] *Adali v Turkey* (2005).
[248] *Koku v Turkey* (2005) para 155.
[249] *Kilic v Turkey* (2000) para 48.