
Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?

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Abstract

Articles 1 and 2 of the European Convention on Human Rights, when read together, require a proper and adequate official investigation into deaths resulting from the actions of state agents, both from the use of lethal force, and also in situations arising from the negligence of agents that leads to a death. The article considers the extent of the obligation to carry out an effective investigation since its explicit recognition by the European Court of Human Rights in the case of McCann and Others v. United Kingdom. The article assesses the jurisprudence of the duty to investigate in order to determine whether the obligation is now placing too onerous a burden on member states in order to comply with their duties under the Convention, or whether the duty does indeed secure the right to life, as is intended. To assess the original proposition, the article considers the jurisprudence of the duty to investigate in relation to the following applications: early forays into the application of the duty; fatalities arising from non-lethal force; the influential quartet of cases arising out of the Northern Ireland troubles; recent judgments concerning cases arising out of the conflict in Chechnya; and finally through to a critical review of the effectiveness of the European Court.

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1 Introduction

The text of Article 2 of the Convention states:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The obligation therefore is on the High Contracting Party to establish legal rules which prevent the taking of a human life by any state agent or individual, and where a life is taken, then it must fall into the categories outlined in paragraph 2. The Court in *McKerr v. United Kingdom*¹ summed up its approach in many of the cases coming before it under Article 2:

The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also situations where it is permitted to 'use force' which may result, as an unintended outcome, in the deprivation of life. The deliberate or

intended use of lethal force is, however, only one factor to be taken into account in assessing its necessity. Any use of force must be no more than 'absolutely necessary' for the achievement of one or more of the purposes set out in subparagraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is 'necessary in a democratic society' under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims . . .

Therefore the Court has inferred that where there has been a loss of life due to unintentional or intentional use of force, the actions that brought about that loss of life may be subject to scrutiny under Article 2.² Janis *et al.* suggest that the Court's jurisprudence under Article 2 can be categorized as recognizing three types of state duties:

1. Reviewing the use of excessive force by state agents;
2. Ensuring the adequate planning and control of operations in connection with those duties; and
3. Ensuring the adequate effective investigation of deaths.³

This article focuses on the last of the three duties, that of a High Contracting Party to carry out an effective investigation into deaths.

The seminal case of *McCann* was the turning point in the Court's authority

¹ App. No. 28883/95, judgment of 4 May 2001, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

² M. Janis, R. Kay, and A. Bradley, *European Human Rights Law Texts and Materials* (3rd edn, 2008), at 130.

³ *Ibid.*, at 130–131.

to scrutinize such state actions, and the principles established in that case have been applied and extended in numerous subsequent cases heard in Strasbourg. *McCann* arose out of the shooting dead of three IRA suspects by Special Forces operatives in Gibraltar as a result of a conjoined anti-terrorist operation involving British, Gibraltarian, and Spanish authorities. This was the first lethal force case to be heard by the Court as, prior to *McCann*, all other cases being brought under Article 2 had either been screened out for failing to comply with procedural obligations, or been decided by the Commission. The Court provided a lengthy and detailed judgment which examined, *inter alia*, the planning and control of the operation,⁴ and additionally created an obligation to carry out an effective investigation:

The Court confines itself to noting . . . that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art 2) read in conjunction with the State's general duty under Article 1 (art.2+1) of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in the [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as result of the use of force by, *inter alios*, agents of the State.⁵

This reflects the Court's practical and effective method of interpreting the Convention in order to secure the right to life as a 'State cannot fulfil their duties under the Convention by simply remaining passive'.⁶ Therefore the effect of the Court's interpretation of the Convention in *McCann* was to secure a realistic guarantee of rights and freedoms under the Convention,⁷ because, as the Court noted, a general prohibition on arbitrary killing by state agents would be ineffective if there were no method of scrutinizing the lawfulness of such actions.⁸

From this seminal case, the Court's jurisprudence has evolved and extended the circumstances in which such investigations may be undertaken, as this article will explore, but, prior to this assessment, it is worthwhile considering the Court's first foray into the duty to investigate in *McCann*.

2 Early Jurisprudence Regarding the Scrutinizing of an Investigation

Strasbourg's first foray into setting out the obligation on states to carry out an effective investigate interestingly had only a limited impact on *McCann* itself, as the Court stated:

it is not necessary in the present case for the Court to decide what form such an investigation should take and under what conditions it should be conducted.⁹

⁴ *McCann*, judgment of 27 Sept. 1995, 17/1994/464/545, at 202–214, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

⁵ *Ibid.*, at 161.

⁶ Mowbray, 'The Creativity of the European Court of Human Rights', 5 *Human Rights Law Review* (2005) 57, at 78.

⁷ *Ibid.*

⁸ *McCann*, *supra* note 4, at 161.

⁹ *Ibid.*, at 162.

The Court made such a pronouncement as a public inquest had already taken place, with 79 witnesses, where the applicants, the deceased's relatives, had been provided with legal representation, and the killings were the subject of detailed scrutiny, including examination and cross-examination of key witnesses, including police and military personnel.¹⁰ *Prima facie*, this public inquest appeared reasonable and detailed; thus the Court may have been unwilling to impose further obligations on the High Contracting Party when it had already undertaken such a reasonable procedure.

However, the inquest was subject to criticism from the applicants who complained, *inter alia*, that:

- No independent police investigation had taken place on any part of the operation leading up to the shootings;
- Usual scene of crime procedures were not followed;
- Not all eye-witnesses were traced or interviewed;
- The jury had potentially close links to the military;
- There were potentially Crown Servants serving as part of the jury; and
- The certificates issued by the government effectively curtailed any further examination of the operation.¹¹

Such allegations challenged the independence and integrity of the investigation, suggesting then a level of ineffectiveness and effectively contradicting the implied requirement of Article 2, that a High Contracting Party must carry out an effective investigation into any lethal

force death. However, the Court concurred with the Commission's opinion on this matter, stating that 'any alleged various shortcomings in the inquest proceedings¹² did not actually substantially hamper the 'carrying out of thorough, impartial and careful examination of the circumstances surrounding the killings'.¹³

The result was that on the one hand, the Court acknowledged that the inquest might have been flawed, and on the other, the Court stated that the High Contracting Party had complied with the requirements of Article 2. How then can a flawed investigation be an effective investigation? The author suggests that the Court took a pragmatic approach in enforcing the requirement of carrying out an effective investigation. Although an effective investigation is certainly, *prima facie*, an effective method of establishing responsibility, the Court must be cautious not to undermine a state's sovereign powers, and to respect its entitlement to enforce its national laws, in line with Article 2 requirements. Indeed, this is substantiated by the Court's analysis of the Gibraltar Constitution and whether it contravened Article 2, as alleged by the applicants.

The applicants submitted that Article 2 imposes a positive duty on a High Contracting Party to protect life and, in particular, that national law 'must strictly control and limit the circumstances in which a person may be deprived of his life by agents of the State'.¹⁴ In the applicants' view, the Gibraltar Constitution was vague, and did not encompass 'the Article 2 standard of absolute necessity',¹⁵

¹⁰ *Ibid.*

¹¹ *Ibid.*, at 157.

¹² *Ibid.*, at 163.

¹³ *Ibid.*

¹⁴ *Ibid.*, at 151.

¹⁵ *Ibid.*

and therefore 'this in itself constituted a violation of Article 2'.¹⁶ The Commission noted that Article 2 was not to be interpreted as 'requiring an identical formulation in domestic law',¹⁷ so long as the *substance* of the Convention right is protected by law. The Court concurred, noting that the Gibraltar Constitution is similar to Article 2, with the exception of the standard of justification for the use of force which results in the loss of life, which is 'reasonably justifiable' in the Gibraltar Constitution, as opposed to 'absolutely necessary', as required in Article 2(2). Therefore, the Convention appears to require a higher standard of states and their agents, but the Court accepted the government's submission that the difference between the two was not so great as to violate the provisions of Article 2.¹⁸ In addition, Strasbourg noted that it was not the role of the Court to examine *in abstracto* the compatibility of national legislation with the requirements of the Convention, nor does the Convention oblige states to incorporate provisions into its national law.¹⁹ The Court held that there had been no breach of Article 2 on this ground.²⁰

Therefore, in the light of such observations, it is not surprising that the Court took such a pragmatic approach with regard to the issue of the duty to investigate, as the Court may be constrained on a number of levels. First, the duty to carry out an effective investigation is only an implied provision, and is not an unambiguous requirement of the Con-

vention; therefore, it may be subject to a wider margin of appreciation than that which would be awarded to states in areas of common ground between High Contracting Parties. Secondly, the concept of an effective investigation is a novel one, as *McCann* was the first case to set out such a requirement; therefore, to expect dramatic or draconian measures would be unrealistic. Thirdly, the Court must have a mind to respect the rights and obligations of a member state, in this case its obligations to maintain law and order, and protect its public and servants. To maintain a flexible and pragmatic approach is more likely to achieve an effective balance of the differing interests, as well as taking into consideration the constraints, implied or otherwise, placed upon the Court.

McCann therefore created a sea change in Strasbourg's jurisprudence, and provided the groundwork from which the principles of the duty to carry out an effective investigation could be developed. The Court has relied on such principles when scrutinizing subsequent cases citing breaches of Article 2, and has widened the circumstances in which such a duty should arise. It is to this issue that this article now turns to consider whether the widening of such principles serves to burden states or whether it serves to secure the right to life.

3 Widening the Circumstances

*Ergi v. Turkey*²¹ stands as a milestone, alongside *McCann*, in developing Strasbourg's

¹⁶ *Ibid.*

¹⁷ *Ibid.*, at 152.

¹⁸ *Ibid.*, at 155.

¹⁹ *Ibid.*, at 153.

²⁰ *Ibid.*, at 164.

²¹ 66/1997/850/1057 judgment of 28 July 1998, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

jurisprudence.²² *Ergi* concerned the accidental shooting dead of Havva Ergi, the applicant's sister, by military security forces as a result of a planned armed ambush in order to capture members of the Kurdish Workers' Party (the PKK), a purportedly guerrilla organization. The Turkish government confirmed that it had carried out an ambush operation and had engaged in an armed clash with the PKK in the vicinity of the victim's village, and although the Court did not establish that the bullet which killed Havva Ergi was actually fired by the security forces, this did not preclude the Court from reviewing the planning and conduct of the operation and the adequacy of the investigation.²³

The Court was at pains to note that giving 'particular weight to the procedural requirement implicit in Article 2 of the Convention . . . requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State',²⁴ thus emphasizing the shift in jurisprudence towards stringent accountability at all stages of an operation, not just prior to the death of the individual. The government in the present case asserted that the Court's authority to scrutinize a lethal force death is only applicable in situations similar to that in *McCann*; in other words, where it has been established that the death was as a result of the actions of an agent of the state.²⁵ The

Court however firmly rebutted this presumption, noting that the obligation 'is not confined to cases where it has been established that the killing was caused by an agent of the State'.²⁶ What is interesting about this comment is that it leaves open the circumstances in which the obligation to investigate a death may actually arise, thus implicitly including untested situations, and, in fact, it is not clear which circumstances may NOT be included in this obligation. As this article will later discuss, the obligation to investigate a death has now been widened to apply in circumstances which may not necessarily have been considered in *McCann*, and raising the issue whether the burden on states flowing from the obligations of Article 2 of the Convention is now becoming increasingly onerous in order to satisfy the requirement to secure the right to life. Regardless of the possible implications of such obligations, the Court in *Ergi* further developed the principles first considered in *McCann* regarding the requirement to investigate a death by commenting that the 'mere knowledge of the killing on the part of the authorities' will trigger the obligation under Article 2, regardless of whether the victim's family, or others, have lodged a formal complaint about the killing with the relevant authorities.²⁷

Such requirements on a state which was suffering from serious and frequent challenges to its national security by the PKK may appear burdensome; however the Court noted that it was indeed mindful of such difficulties, thus implying that its decision was influenced by state needs,

²² Sperotto, 'Law in Times of War: the Case of Chechnya', 8 *Global Jurist* (2008), Topics, Article 5, 1.

²³ *Ergi*, *supra* note 21, at 79.

²⁴ *Ibid.*, at 82.

²⁵ *Ibid.*, at 75.

²⁶ *Ibid.*, at 82.

²⁷ *Ibid.*

as well as individual needs. Nonetheless, the Court was adamant that ‘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’,²⁸ and, indeed, the requirement takes on even further significance where, as in this case, many of the circumstances leading to the death are unclear. As a result of such findings, Turkey was found to have breached Article 2 in that respect.

The Court’s strict approach in the present case was confirmed in the recent case of *Rod v. Croatia*.²⁹ In this case, the applicant did not lay any blame on the authorities for the death of her husband, but she did allege that the investigation into his death was flawed, and thus in breach of the procedural requirements under Article 2.³⁰ As a result, the Court confirmed that this case should be distinguished from cases, such as *McCann*, involving the death of an individual as a result of lethal force used by state agents, nonetheless, ‘the absence of any direct State responsibility for the death of [the husband] does not exclude the applicability of Article 2’.³¹

The Court noted that the duty on a state to secure the right to life requires a state to put in place effective criminal law provisions to deter the commission of offences, as well as to ensure that efficient ‘law enforcement machinery’ is

introduced and maintained to prevent, suppress, and punish breaches of such provisions. Therefore, by implication, ‘there should be some form of effective official investigation when there is reason to believe that an individual has died in suspicious circumstances’.³²

Such stringent obligations raise the issue whether Article 2 rights are engaged in cases where the death has occurred following some kind of medical procedure, and, if so, whether extending the obligation to investigate under those circumstances is now imposing an unrealistic burden on the state and its agents in the execution of their duty.

4 Hospital Fatalities

The jurisprudence that has been developed by Strasbourg has emerged from cases arising initially from the use of lethal force by state agents,³³ and, as more cases emerged, so the obligations under Article 2 extended beyond those deaths caused by state agents to situations where the violence or force had been inflicted by a non-state actor.³⁴ In *Ulku Ekinci v. Turkey*,³⁵ the Court held:

the obligation to protect the right to life under Article 2, read in conjunction with the State’s general duty under Article 1 to ‘secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention’, requires by implication that there should be some form of effective official investigation when

²⁸ *Ibid.*

²⁹ App. No. 47024/06, judgment of 18 Sept. 2008, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ *McCann*, *supra* note 4.

³⁴ *Ergi*, *supra* note 21.

³⁵ App. No. 27602/95, judgment of 16 July 2002, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

individuals have been killed as a result of the use of force. This obligation is not confined to cases where it has been established that the killing was caused by an agent of the State.³⁶

This implies therefore that some force or violence must have been used and the death must have resulted from those action(s). The question therefore arises whether the procedural rights under Article 2 will be engaged where the death has ‘occurred following a surgical or medical procedure’,³⁷ with the implication that force or violence is unlikely to be an issue in such circumstances. The Court has examined this issue in recent years. In *Erikson v. Italy*,³⁸ the applicant complained that the Italian legal system had failed to comply with the requirement to carry out an effective investigation after the sudden death of his mother following some medical examinations. The Court noted that Article 2 obliges states not only to refrain from intentionally causing death, but also to take adequate measures to protect life. Such an obligation should therefore extend to such cases as *Erikson* where ‘the deprivation of life was not the result of the use of lethal force by agents of the State, but where agents of the State potentially bear responsibility for loss of life’.³⁹

The Court implied not only that the right to an effective investigation will be engaged even when the death is not as a result of lethal force, but, more specifically, that the requirement will absolutely apply to hospitals, as they must provide ‘regulations for the protection of their patients’ lives and also the obligation to establish an effective judicial system for establishing the cause of a death which occurs in hospital and any liability on the part of the medical practitioners concerned’.⁴⁰

McGleenan notes that while it is unlikely that substantive Article 2 rights will be infringed by hospitals or medical practitioners, case law reflects that hospital settings can trigger procedural rights under Article 2,⁴¹ as confirmed in *Powell v. United Kingdom*.⁴² That case arose as a result of the death of Robert Powell from an undiagnosed, but potentially fatal, illness which was initially suspected by one general practitioner, but during subsequent and numerous medical examinations by different practitioners remained unconfirmed.

The Court in *Powell* confirmed that the ‘first sentence of Article 2 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction’.⁴³ Although this comment takes the case law no further and merely restates the law as established, the Court accepted

³⁶ *Ibid.*, at 144.

³⁷ McGleenan, ‘Investigating Deaths in Hospital in Northern Ireland, Does the System Comply with European Convention on Human Rights’, *Northern Ireland Human Rights Commission*, September (2004) at 13.

³⁸ App. No. 37900/97, judgment of 26 Oct. 1999, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ McGleenan, *supra* note 37.

⁴² App. No. 45305/99, judgment of 4 May 2000, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

⁴³ *Ibid.*

that 'it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2',⁴⁴ and in particular relation to *Powell*, the Court noted that 'with reference to the facts of the instant case, the obligation at issue extends to the need for an effective independent system for establishing the cause of death of an individual under the care and responsibility of health professionals and any liability on the part of the latter'.⁴⁵

This is a disquieting notion: health care certainly has an obligation to save life; however, in the field of health care there will come inevitable deaths; therefore to impose the identical obligations, as required by Article 2, on health care professionals as are imposed on state agents when carrying out, *inter alia*, terrorist operations,⁴⁶ or preventing internal armed conflicts,⁴⁷ is surely to impose unreasonable burdens? The Court in *Powell* answered this concern by noting:

Where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life.

Therefore it is clear that neither errors of judgement on the part of health care workers nor negligent co-ordination of medical information will automatically trigger the procedural obligation to carry out an effective investigation under Article 2. This echoes the considerations of the Court in a number of cases where agents of the state have used lethal force and killed the victim because they genuinely, but mistakenly, believed that their lives and/or those of others were at risk if the force was not used.⁴⁸ In those circumstances the Court has acknowledged that where there is an honest belief that lethal force is required, which is perceived to be valid at the time but which turns out to be mistaken, then such action may be justified under Article 2, as to hold otherwise 'would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others'.⁴⁹

Nonetheless, such obligations on health authorities raise a number of concerns. The likelihood of an investigation following a surgical death is greater than where there is an alleged wrongful administration of medication that may have caused death. It is likely that an unexpected death resulting from medical intervention is likely to raise fewer suspicions of negligent practice than an unexpected death resulting from surgery, and where no family members complain, or

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *McCann*, *supra* note 4.

⁴⁷ App. No. 57950/00, *Isayeva v. Russia*, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

⁴⁸ *McCann*, *supra* note 4; App. No. 25052/94, *Andronicou and Constantinou v. Cyprus*, 25 EHRR (1997) 491, ECHR Rep 1997-V1; App. No. 55151/00, *Brady v. United Kingdom*, judgment of 3 Apr. 2001, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

⁴⁹ *McCann*, *supra* note 4, at 199.

where the medical practitioners are confident that medical practices will not be subject to scrutiny, McGleenan suggests that only minimal levels of investigation may occur.⁵⁰ If this is so, then this raises issues as to whether current provisions for investigation are Article 2 compliant, as one of the key requirements is that a state must act of its own accord to begin the investigative process, rather than wait for relatives to initiate the process.⁵¹

In the UK, the Department of Health confirmed that there was no standardized approach to investigating serious incidents at any level,⁵² and, further, the actual content of the investigative procedure may ‘the subject of debate’.⁵³ When a death occurs which is related to the provision of healthcare, or suspected of being so related, then there are a number of investigative procedures available which may be relevant, including:

- Internal clinical audit
- Hospital post mortem
- Coroner’s post mortem
- Coroner’s inquest
- Litigation⁵⁴

However, certain procedures may conflict with religious or cultural beliefs, including the carrying out of post mortems and the timing of a funeral; therefore certain investigative procedures which may fulfil the obligations under Article 2 may raise

ethical or cultural issues. Unfortunately, there is no clear resolution to such situations, and McGleenan comments that public authorities may not be aware of how they are to discharge their duties under the obligation of an effective investigation when the overall obligation to hold an Article 2 compliant investigation lies upon the state.⁵⁵

However, in four concurrent judgments emanating from Strasbourg in 2001, the Court attempted to consolidate this procedural aspect and to set out a blueprint for effective domestic investigations. This article now reviews the conjoined cases of *Hugh Jordan v. United Kingdom*,⁵⁶ *Kelly and Others v. United Kingdom*,⁵⁷ *McKerr v. United Kingdom*,⁵⁸ and *Shanaghan v. United Kingdom*⁵⁹ and considers their impact on Strasbourg’s subsequent jurisprudence in relation to effective investigations.

5 The Conjoined Cases – A Brief Overview

In the four judgments delivered on 4 May 2001, the Court held unanimously that in each case there had been a violation of Article 2 with regard to the failure to conduct an effective investigation into the circumstances of the deaths, all of which concerned the killing of individuals in

⁵⁰ McGleenan, *supra* note 37, at 17.

⁵¹ App. No. 37715/97, *Shanaghan v. United Kingdom*, judgment of 4 May 2001, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/, at para. 88.

⁵² Department of Health, *An Organisation with a Memory: Learning from Adverse Events in the NHS* (2000), available at: www.npsa.nhs.uk/admi/publications/docs/org.pdf, at 4.9.

⁵³ McGleenan, *supra* note 37, at 19.

⁵⁴ *Ibid.*, at 17.

⁵⁵ *Ibid.*, at 20.

⁵⁶ App. No. 24746/94, judgment of 4 May 2001, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

⁵⁷ App. No. 30055/96, judgment of 4 May 2001, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

⁵⁸ *McKerr*, *supra* note 1.

⁵⁹ *Shanaghan*, *supra* note 51.

Northern Ireland by paramilitary, Special Forces soldiers and/or police officers.

In each of the cases, the Court acknowledged that an investigation had to be capable of leading to a determination of whether the particular use of force was justifiable in the circumstances, and to the identification and punishment of those responsible. The Court could have taken into consideration the legitimate interests of national security or the protection of material relevant to other investigations in order to satisfy the requirements of Article 2, although in all four cases the available procedures had not satisfied the requirements of Article 2.⁶⁰

In each of the cases the Court held that the proceedings for investigating the use of lethal force disclosed the following shortcomings, *inter alia*:⁶¹

- A lack of independence of the police officers investigating the incident from the officers implicated in the incident;
- A lack of public scrutiny and information given to the victim's family of the reasons for the decision of the DPP not to prosecute any police officer;
- The inquest proceedings did not commence promptly and were not pursued with reasonable expedition.

It is clear from the four judgments that the Court emphasized four key components of an effective investigation: being given official sanction, independence, openness

and expediency. However, the Court in all four cases noted that it was not for the Court to specify in any detail the procedures which the authorities should adopt in order to scrutinize the circumstances of the individuals' deaths. Therefore, although Strasbourg has developed *prima facie* standardized requirements, they are, in reality, open to interpretation. This means that justification is important with regard to the question of an effective investigation and accountability, and each case is judged on a case by case basis.⁶² Such an approach has not been without criticism however. Bell *et al.* suggest that the Court's response to the conjoined cases was inadequate because, *inter alia*, the judgments adopted a 'piece-meal and minimalist approach to addressing discrete *Jordan* defects'⁶³ and, as a result, questions remain open as to how the requirements of 'effectiveness' should be interpreted. The article now critically reviews these issues in relation to the original proposition.

6 What is Meant by an Effective Investigation?

The case of *Hugh Jordan* reaffirmed that the essential purpose of an investigation is to secure the effective implementation of

⁶⁰ 12 Human Rights Case Digest (2001) 292.

⁶¹ *Hugh Jordan*, *supra* note 56, at 142; *Kelly*, *supra* note 57, at 136; *McKerr*, *supra* note 1, at 157; *Shanaghan*, *supra* note 51, at 122.

⁶² Zidar and Klemencic, 'Confronting a Phenomenon of Impunity and Denial: Contemporary European Trends in dealing with Allegations of Ill-Treatment by Law Enforcement Officials', available at: www.fpvv.uni-mb.si/conf2004/papers/zidor.pdf, (2004), at 5, accessed 5 Oct. 2008.

⁶³ Bell and Keenan, 'Lost on the Way Home? The Right to Life in Northern Ireland', 32 *Journal of Law and Society* (2005) 68, at 75.

domestic laws which protect the right to life, and to ensure state accountability for deaths occurring under the state's responsibility. This latter point however is not an obligation of result but of means.⁶⁴ Bell *et al.* criticized this approach because they suggest that the outcome of the *Jordan* case merely 'continue[s] a pattern of litigation, forum bouncing and denial of investigation'⁶⁵ because the Court refused to compel the authorities to renew the investigations, thus identifying wrongdoers. Indeed, the judgment in *Brecknell v. United Kingdom*⁶⁶ notes that there is no absolute right to obtain a prosecution or conviction, and if an investigation ends with limited results, then this is not indicative of any failings *per se*. However, the author would argue that for the Court to compel authorities to instigate fresh investigations willy nilly would be to impose too heavy a burden.

*Szula v. United Kingdom*⁶⁷ illustrates this concern. In this case the review process was close to conclusion, and the police had insufficient corroborating evidence and it would be unlikely that they would be able to bring a successful prosecution. Therefore, to impose a mandatory requirement on a state to renew investigations in such circumstances would be unrealistic and unreasonable. This article recognizes that the Court's requirement that 'authorities must have taken

the reasonable steps available to them to secure the evidence concerning the incident'⁶⁸ already imposes stringent requirements which can be adjusted on a case by case basis, taking into consideration facts and circumstances specific to the death. This then would help to resolve the concerns raised with respect to health authority cases highlighted earlier in the article. Nevertheless, the Court has not totally dispelled the idea that an authority may be obliged to revive an investigation.

The *Brecknell* case addressed such a situation. This case concerned the shooting dead of Trevor Brecknell and others in a bar in Northern Ireland by loyalist gunmen. The Court confirmed that there is no absolute right to obtain a conviction or prosecution following an investigation, and that where such an investigation fails to obtain such a result, or has limited results, then this will not be an automatic indication of a breach of obligation under Article 2 because the obligation is of means only, not results. However, where new information comes into the public domain which sheds new light on the circumstances of the death, then the issue arises whether, and in what form, the procedural obligation to investigate is revived.⁶⁹

The government in this case provided a compelling argument that no obligation arose to reinvestigate over 20 years after the event because there had been police investigations into the murders immediately after they occurred, with an inquest, and that secondary police

⁶⁴ *Hugh Jordan*, *supra* note 56, at 105–107.

⁶⁵ Bell and Keenan, *supra* note 63, at 85.

⁶⁶ App. No. 32457/04, judgment of 27 Feb. 2008, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

⁶⁷ App. No. 18727/06, judgment 4 Jan. 2007, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

⁶⁸ *Hugh Jordan*, *supra* note 57, at 107.

⁶⁹ *Brecknell*, *supra* note 66, at 66.

investigations had taken place in light of further information being made available. The government submitted that it was not for an applicant to claim that the procedural obligations could be revived each time potentially relevant information came to light, as this would be contrary the requirement of Article 35 of the Convention.⁷⁰ The government further submitted that after such a long period of time there was a strong possibility that incomplete files would be found, and with no real prospect of further viable investigations therefore there was a compelling argument for relying on the six-month limitation rule prescribed under Article 35.⁷¹ The government took the opportunity to remind the Court of its requirement that:

no impossible or disproportionate burden should be placed on the State; when with the passage of time the objective of identifying and punishing those responsible for killing became less capable of being achieved, the point would eventually be reached where it became disproportionate to expect the State to devote scarce resources to undertaking investigations unlikely to yield any significant gains.⁷²

The government relied on the decision in *Hackett v. United Kingdom*⁷³ to support its submissions. In the *Hackett* case, Dermott Hackett was ambushed and shot

dead allegedly by loyalist paramilitary Michael Stone, who initially admitted carrying out the murder, but who then later pleaded not guilty to the shooting. He was convicted and sentenced to life imprisonment for the murder. During his sentence, Stone published a book in which he claimed, *inter alia*, that he had not killed Hackett, although he admitted that he was involved in the conspiracy to kill him because Hackett was suspected of working for the IRA. Stone claimed that he had initially confessed to the murder to protect another individual. The Court acknowledged that the authorities had taken steps to investigate Stone's credibility and that the investigation, although only preliminary, might lead to further action being taken. Therefore the Court could find, *inter alia*, no violation of Article 2 on the grounds of a breach of procedural obligations.

The government in the *Brecknell* case submitted that the Court in *Hackett* had adopted its decision without the benefit of the powerful arguments put forward in *Brecknell* and, thus, given a lapse of 24 years from the death in issue in *Brecknell*, there was 'no realistic prospect that new material would be brought to light that would be likely to allow the perpetrators to be prosecuted and punished'.⁷⁴

The Court in this case rejected the government's argument that no new obligation arose and that the strict six-month time limit was not applicable, as the Court noted that it had already examined cases, including *McKerr* and *Hackett*, where new evidence had come to light after the conclusion of the original proceedings. Nevertheless, the Court noted

⁷⁰ Art. 35(1) – 'admissibility criteria: the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.'

⁷¹ *Brecknell*, *supra* note 66, at 61.

⁷² *Ibid.*, at 62.

⁷³ App. No. 34698/04, judgment of 10 May 2005, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

⁷⁴ *Brecknell*, *supra* note 66, at 62.

that the nature and extent of subsequent investigations would depend entirely on the nature of the circumstances of the case, and may well be different from those expected after a suspicious or violent death.⁷⁵

The Court took pains, however, to reiterate that, although there may be an element of discretion available to a state concerning the nature of subsequent investigations, it thought it best not 'to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity'.⁷⁶ This suggests that where such crimes are implicated, then the burden on the state to reopen investigations may be more onerous because of the demands of the public interest. The element of public interest appeared to figure strongly throughout the *Jordan* cases and may have been strongly influential in the judgments. In *McKerr*, the Court noted:

the shortcomings in transparency and effectiveness . . . run counter to the purpose identified by the domestic courts of allaying suspicions and rumour. Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force.⁷⁷

This is hardly a surprising approach when one bears in mind the history

behind the *Jordan* cases: that of the bloodshed in Northern Ireland over many years, not only of terrorists, but also of civilians, military, and police, as well as circulating rumours of a shoot to kill policy being enforced by state agents. Indeed, the Court in *McKerr* noted that a lack of suitable investigatory procedures will simply add 'fuel to fears of sinister motives, as is illustrated . . . by the submissions . . . concerning the alleged shoot-to-kill policy'.⁷⁸

The enforcement of such procedural obligations to ensure publicly transparent investigations will help to quell public consternation, but, although the sentiment may be persuasive, the actual impact may be nominal. Bell and Keenan suggest that there is a paradoxical effect of such judgments: Article 2 provides one of the few pressures on states which are subject to conflicts where human rights may be under scrutiny from a number of forums, including non-governmental organizations and the judiciary.⁷⁹ However, the Court is constrained in its ability to enforce or demand regime change in a liberal democracy.

Therefore although the Court may impose apparently stringent procedural obligations, such obligations are subject to a certain amount of discretion, which make it possible for states to 'win, substantively or by default . . . [by providing] declaratory relief only' or withstanding substantive legal challenges.⁸⁰ The author, however, would concur with Bell and Keenan that this opinion is perhaps a cynical view as, although the judgments

⁷⁵ *Ibid.*, at 68.

⁷⁶ *Ibid.*, at 69.

⁷⁷ *McKerr*, *supra* note 1, at 160.

⁷⁸ *Ibid.*, at 160.

⁷⁹ Bell and Keenan, *supra* note 63, at 88.

⁸⁰ *Ibid.*, at 85.

have not delivered anything new in relation to the requirement to investigate, the effective investigation obligation has provided victims and their families with some leverage over state actors.⁸¹ Perhaps therefore it would be pertinent to suggest that the procedural obligations balance the requirements on a state and recognize its position in a liberal democracy whilst recognizing the rights of victims' families and acknowledging the need to restore public confidence. The concept of maintaining equilibrium is reflected in the Court's dicta in *Brecknell* where it noted:

It cannot be the case than any assertion or allegation can trigger a fresh investigative obligation . . . [n]onetheless, the State authorities must be sensitive to any information or material which has the potential either to undermine . . . an earlier investigation or to allow an earlier inconclusive investigation to be pursued further.⁸²

The Court is clearly keen to emphasize the obligations of both parties without imposing too heavy a burden on one while respecting the right to life of another, but it then goes on to affirm its own limitations in this respect:

The Court has doubts as to whether it is possible to formulate any detailed test which could usefully apply to the myriad of widely-differing situations that might arise. It is also salutary to remember that the Convention provides for minimum standards, not for the best possible practice, it being open to the Contracting parties to provide further protection or guarantees⁸³

The Court is mindful of determining tests which may be unreasonable or inappropriate, and therefore 'positive obligations must be interpreted in a way that does not impose impossible or disproportionate burden[s] on the authorities'.⁸⁴ However, such emphasis by the Court on reducing the burden on the state does suggest that the balance may be shifting imperceptibly in favour of the state, as opposed to protecting the right to life, although the author acknowledges that trying to provide an adequate balance between the two requirements when taking into consideration the 'difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resource' will inevitably be a challenging undertaking.

Nevertheless, subsequent judgments arising out of the conflict in Chechnya suggest that the obligation to carry out an effective investigation may be emphasizing the rights of the victim more explicitly than previously.

7 From Northern Ireland to Chechnya

The influence of the *Jordan et al.* judgments is particularly significant with regard to a number of cases arising out of the conflict between Russia and Chechnya, with applicants citing breaches, *inter alia*, of Article 2 in relation to deaths and disappearances as a result of state agents' activities. In February 2005, the Court delivered its first judgments concerning such violations, and many of the principles established in *Jordan et al.* are

⁸¹ *Ibid.*

⁸² *Brecknell*, *supra* note 66, at 70.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

clearly reflected in the Court's considerations with regard to the procedural obligation of carrying out an effective investigation, with much emphasis being placed on restoring public confidence.

In *Isayeva, Yusupova and Bazayeva v. Russia*,⁸⁵ (hereafter referred to as *Isayeva I*) the complainants alleged that they had been indiscriminately attacked by Russian military planes whilst escaping from suburbs surrounding the city of Grozny in Chechnya after hearing media reports that Russia was opening up a humanitarian corridor to provide safe passage for civilians to leave the city. The government submitted that the air strikes were carried out as part of counter-terrorist measures. In *Isayeva v. Russia*⁸⁶ (hereafter referred to as *Isayeva II*), the Russian military ordered sustained aerial bombing near the village of Katyr-Yurt in Chechnya after rebel fighters unexpectedly entered the village. This resulted in heavy civilian casualties, with many left dead and wounded. When villagers attempted to escape the village later that day, planes reappeared and bombed the escaping civilians on a road outside the village, resulting in further injured and dead civilians. In both cases, the Court held that the government had breached Article 2.

The Court noted in each of the cases that the situation which existed in Chechnya at the time called for exceptional measures on the part of the State in order to regain control and to suppress illegal

armed insurgency. Such measures could take the form of military aerial attacks and might have justified the use of lethal force.⁸⁷ However, for such measures to be justified, there must be a balance between 'the aim pursued and the means employed to achieve it'.⁸⁸ In assessing Russia's measures, the Court referred repeatedly to the *Jordan et al.* cases with respect to the obligation to carry out an effective investigation, and echoed the key principles of those cases whereby, in order to maintain public confidence in adherence to the rule of law and to prevent any appearance of collusion or tolerance of unlawful acts, it is essential to carry out a prompt investigation.⁸⁹

In *Isayeva I*, the Court noted that there was considerable delay before a criminal investigation was opened and no explanation was put forward to explain such delay. In addition, the Court commented that there was a strong suggestion in the documents submitted that there were serious and unexplained failures to act once the investigation had commenced. Although the Court considered that these elements warranted concern, it took the unusual step of highlighting real concern about one specific aspect: that no effort had been made to collect information about the declaration of a safe passage for civilians, nor to identify anyone who would be responsible for ensuring the safety of the exit.⁹⁰ In the light of these issues, the Court scathingly noted that 'it is difficult to imagine how the investigation

⁸⁵ App. Nos 57947/00, 57948/00 and 57949/00, judgment of 24 Feb. 2005, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

⁸⁶ *Isayeva, Yusupova and Bazayeva v. Russia (Isayeva II)*, *supra* note 85.

⁸⁷ *Isayeva I*, *supra* note 47, at 178; *Isayeva II*, *supra* note 85, at 180.

⁸⁸ *Ibid.*, at 181.

⁸⁹ *Ibid.*, at 213; *Isayeva I*, *supra* note 47, at 212.

⁹⁰ *Ibid.*, at 218–222.

could be described as effective'.⁹¹ Interestingly, Strasbourg went further in its condemnation of the investigation and took the uncharacteristic approach of commenting on the applicants' mental state as being relevant to the considerations of the Court in response to the government's criticism that the investigation was undermined by the applicants' failure to present themselves to the authorities or to leave an address. The Court noted that the applicants had fled Grozny in order to escape serious attacks on the city, therefore they had no permanent addresses, and also they would have been subject to feelings of vulnerability and insecurity, thus their suffering would have outweighed their failure to make their addresses known to the authorities.⁹²

The Court in *Isayeva II* noted similar failings in Russia's investigative procedures, and again it submitted equally derisive comments and felt compelled to comment on very specific aspects of the investigation, including the method by which the state had attempted to communicate with the applicants and the victims.⁹³

The approach of the Court in the two *Chechnyan* cases could be construed as distancing itself from its earlier judgments in the Northern Ireland cases, where the Court noted that 'it is not for the Court to specify in any detail which procedures should adopt in providing for the proper examination of the circumstances of a killing by State agents'.⁹⁴ It is clear that the Court in the *Chechnyan*

cases did not feel constrained by such an obligation. However, the author submits that the evolution of such an approach is a natural response to such a serious situation, as the Court has already confirmed that investigations will vary depending on the circumstances, and where there is any deficiency in the investigation which undermines its ability to establish a cause of death or the person responsible for the death, then there is a strong likelihood that the investigation will fall below the minimum standard imposed by the Court.⁹⁵ The Court in the *Chechnyan* cases determined that Russia's investigations clearly fell below the minimum standard; therefore the author submits that the Court was justified in its depth of scrutiny and also its level of reprimand, and therefore there was no imbalance between the right to life and the burden on the state.

8 The Issue of the Effectiveness of the European Court of Human Rights

The recent case of *Leonidis v. Greece*⁹⁶ illustrates the limitations of the investigation procedures.

In this case, Leonidis attempted to run away from a plain clothes armed police officer after the officer sought to identify him. When Leonidis tripped and fell during the subsequent chase, the officer captured him. During the subsequent attempt to handcuff the suspect, the

⁹¹ *Ibid.*, at 223.

⁹² *Ibid.*, at 224.

⁹³ *Isayeva II*, *supra* note 85, at 217–222.

⁹⁴ *McKerr*, *supra* note 1, at 159.

⁹⁵ *Ibid.*, at 111–113.

⁹⁶ App. No. 43326/05, judgment of 8 Jan. 2009, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

officer accidentally shot him just below the ear, killing him immediately. The gun was cocked ready to fire and fully loaded; the officer had failed to place his gun in the holster while attempting to subdue Leonidis.

The Court confirmed that the obligation to protect life as required under Article 2 of the Convention requires by implication that there should be some form of effective investigation when individuals are killed as a result of the use of force.⁹⁷ Unusually however the Court acknowledged that:

the true circumstances of the death in such cases are often, in practice, largely confined within the knowledge of State officials or authorities, the bringing of appropriate domestic proceedings, such as a criminal prosecution, disciplinary proceedings and proceedings for the exercise of remedies available to victims and their families, will be conditioned by an adequate official investigation.

Such an explicit acknowledgement of the fact that it is the authorities which may have the advantage in such situations is testimony to the inherent weakness of imposing such an obligation on states.

Therefore in order for investigations to be effective, Strasbourg notes that the procedure ‘must be independent and impartial’.⁹⁸ The Court reiterated the principle that any deficiency in the investigation which undermines the ability to establish the circumstances of the case, or to determine the person responsible, will be likely to fall foul of the required standard.⁹⁹ However, this statement is

limited in its substantive authority in two ways. First, an investigation only has to be capable of establishing the circumstances of the case. There is no strict requirement to establish fully the circumstances of the case. Therefore, if a High Contracting Party provides the minimum, then it is likely to fulfil this criterion, and theoretically significantly disadvantage the applicant.

Secondly, the Court refers to the fact that an investigation is an obligation of result, not means.¹⁰⁰ This limited requirement undermines the actual authority of this obligation and adds credence to the criticism voiced by Bell *et al.*, referred to earlier in this article.¹⁰¹ It is logical that Europe should impose only a minimum standard on High Contracting Parties, as this then reaffirms the voluntary nature of the Convention and the principle of sovereignty. However, in reality, the author submits that such standards undermine the effectiveness of the Court in its ability to scrutinize the fundamental rights as set out in the Convention.

*Akman v. Turkey*¹⁰² reflects the author’s concerns regarding the effectiveness of the Court. In this case, the applicant’s son was shot dead by Turkish security forces during a raid on the applicant’s house. The case was struck out by the Court when Turkey accepted its violation, *inter alia*, of Article 2 of the Convention with regard to the death of the applicant’s son.

By letter dated 21 March 2001, the Deputy Permanent Representative of Turkey to the Council of Europe informed

⁹⁷ *Ibid.*, at 67.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, at 68.

¹⁰⁰ *Ibid.*

¹⁰¹ Bell and Keenan, *supra* note 63.

¹⁰² App. No. 37453/97, judgment of 26 June 2001, available at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/.

the registrar of the First Section of the Court that:

1. The Government regrets the occurrence of individual cases of death resulting from the use of excessive force as in the circumstances of Murat Akman's death notwithstanding existing Turkish legislation and the resolve of the Government to prevent such actions.
2. It is accepted that the use of excessive or disproportionate force resulting in death constitutes a violation of Article 2 of the Convention and the Government undertakes to issue appropriate instructions and adopt all necessary measures to ensure that the right to life – including the obligation to carry out effective investigations – is respected in the future. It is noted in this connection that new legal and administrative measures have been adopted which have resulted in a reduction in the occurrence of deaths in circumstances similar to those of the instant application as well as more effective investigations.
3. I declare that the Government of the Republic of Turkey offers to pay *ex gratia* to the applicant the amount of GBP 85,000. This sum, which also covers legal expenses connected with the case, shall be paid in pounds sterling to a bank account named by the applicant. The sum shall be payable, free of any taxes that may be applicable, within three months from the date of the striking-out decision of the Court pursuant to Article 37 of the European Convention on Human Rights. This payment will constitute the final settlement of the case.¹⁰³

In response, the applicant requested that the Court reject the government's initiative as, *inter alia*, there was no determination as regards the unlawfulness of the killing, merely an acceptance that Article 2 had been breached, and, further, that

the initiative did not seek to address any of the human rights issues raised by the applicant.¹⁰⁴

However, the Court unanimously struck out the application on the grounds of Article 37(1)(c) of the Convention whereby 'for any other reason established by the Court, it is no longer justifiable to continue the examination of the application'.

Happold suggests that Turkey's failure to quantify how it will meet its obligations under the Convention, for instance, by providing an effective investigation, sanctions a state to murder its populus, providing it offers money to the victim's family.¹⁰⁵ Such criticism is not without support, as reflected in a meeting of the Council of Europe, where Non-Governmental Organizations (NGO) noted that the use of the striking out procedure in the context of right to life cases actually fails to resolve the dispute in its entirety. This is because, *inter alia*, Turkey failed to refer to its obligation to provide an effective investigation into the incident, nor did the state give an undertaking to attempt to investigate the circumstances, or consider whether criminal or disciplinary proceedings should be brought. The NGO considered that such an approach failed to ensure the right to life and, further, risked damaging the credibility of the Court itself.¹⁰⁶

In spite of such criticism, the case should perhaps be considered in light of its context. It could be argued that the

¹⁰³ *Ibid.*, at 23–24.

¹⁰⁴ *Ibid.*, at 25.

¹⁰⁵ Happold, 'Letting States Get Away with Murder', 151 *NLJ* (2001), at 1323.

¹⁰⁶ Council of Europe, Meeting, 26 June 2002, available at: www.coe.int/t/E/NGO/Public/Groupings/Human_Rights/Documents/2002/20020, at 4, accessed on 14 Jan. 2009.

Court made a practical decision, designed to reduce the burden on it, as striking out the case avoided a long fact-finding hearing, and, given the Court's increasing workload, the Turkish proposal must have seemed a tempting proposition.

It is acknowledged that the Court's fact-finding hearings are time-consuming and expensive; therefore, when a state so readily openly admits to breaching Article 2, the option of the striking out procedure may not only be tempting, but also have benefits. Such willingness by a state to accept liability meant that Turkey avoided international criticism, thereby strengthening Convention relations.

However, the question still remains as to the actual motives of Turkey, as that a state may avoid scrutiny by making vague pronouncements and offering compensation could be construed as that a state merely has to submit a number of vaguely-worded pronouncements and offer reasonable compensation to the victim's family in order to avoid scrutiny by Europe for its questionable actions. Indeed, in a report by the Committee on Legal Affairs and Human Rights a year later, it was noted that Turkey had yet to provide information on how it would implement any of the measures that it mentioned in its declaration to the Court.¹⁰⁷ Professor Zwaak suggests that where a state such as Turkey fails in its duties to carry out an effective investiga-

tion, then the Court should do so.¹⁰⁸ This, however, misunderstands the authority of the Court. The Court is not at liberty to instruct a state on how it should undertake or implement investigative obligations; the responsibility is, after all, one of result, not means.

However, the *Akman* case still leaves many questions unanswered and, thus, begets a sense of unease about the motivations of the state and the methodology of the Court, and does little, unfortunately, to challenge the proposition that the Court may have limited authority.

9 Conclusion

Case law has clearly established that an effective investigation must be 'capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances',¹⁰⁹ as well as extending the application of effective investigations to deaths which occur not just as a result of lethal force, but also in circumstances involving negligence within public health authorities. Such investigations should make it possible to identify those who are responsible and make it possible to support their punishment,¹¹⁰ although, as this article has determined, where a perpetrator is

¹⁰⁷ Report of the Committee on Legal Affairs and Human Rights, Doc 9537, Implementation of Decisions of the European Court of Human Rights by Turkey, available at: <http://assembly.coe.int/Documents/WorkingDocs/doc02/EDOC9537.htm>, accessed on 14 Jan. 2009.

¹⁰⁸ Zwaak, 'Overview of the European Experience in Giving Effect to the Protection in European Human Rights Instruments', Working Session on the Implementation of International Human Rights Protections, Netherlands Institute of Human Rights, available at: www.internationaljusticeproject.org/pdfs/Zwaak-speech.pdf, at 8.

¹⁰⁹ *McKerr*, *supra* note 1, at 113.

¹¹⁰ Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict', 98 *AJIL* (2004) 1, at 20.

not identified, then this will not automatically establish an ineffective investigation. Such an approach reflects the adaptable quality of this procedural duty, which the author suggests is an essential element in balancing two differing rights and requirements, that of the state and that of the individual. The article has outlined its effectiveness in a wide variety of contexts, ranging from anti-terrorist operations to armed ambushes, to deaths in hospitals, through to violent armed conflicts. In each of those situations there must be a balancing of the rights of individuals under the Convention with the requisite understanding from the Court of the need not to place too onerous a burden on member states. Creating such a balance will not be without criticism due to its very nature, and although many states still appear to be lacking in domestic standards or legislation to reach the minimum standard required by Strasbourg, the procedural duty under Article 2 is one of the few measures that can put pressure on states to ensure future accountability whilst taking into consideration sovereign authority and individual rights under the Convention.

The question therefore perhaps remains: has the jurisprudence of the duty to investigate since *McCann* really evolved? In answer to this question, the author submits that contemporary times

have presented unique challenges to the Court, for instance, with the increase in terrorist activity and national conflicts. Thus, where the Court has found itself having to scrutinize politically and humanitarily challenging circumstances such as those discussed in this article, it has rigorously applied the requirements of the duty to investigate while considering the burden on the state, thus achieving in most circumstances a balance in the burden on the state and a practical and effective method of securing the right to life.

However, although the burdens on the Court may be great, the very purpose of the institution must not be forgotten. That is, *inter alia*, to provide effective remedies where there have been violations of the right to life. In doing so, the Court is able to bring about pressure on states to comply with the fundamental rights of the Convention without political bias. Nonetheless, any criticisms of the effectiveness of Strasbourg must be tempered by the acknowledgment that the Court will always be subject to constraints in its ability to enforce or demand regime change in a liberal democracy. Perhaps, then, the jurisprudence since *McCann* should be welcomed as progress certainly has been made, despite the not insignificant limitations binding the effectiveness of the Court.