

THE OBLIGATION TO INVESTIGATE AFTER A POTENTIAL BREACH OF ARTICLE 2 ECHR IN AN EXTRA-TERRITORIAL CONTEXT: MISSION IMPOSSIBLE FOR THE ARMED FORCES?

NOËLLE QUÉNIVET*

1. INTRODUCTION

In the past few years, the growing number of military operations¹ conducted by States party to the European Convention on Human Rights (ECHR) abroad, combined with a broad definition of the notion of jurisdiction under Article 1 ECHR,² has led to a concomitant surge in cases brought before the European Court of Human Rights. One of the contentious issues has been the challenges brought about by the application of the procedural aspect of Article 2 ECHR that guarantees the right to life. In spite of this, little attention is paid in academic literature to the procedural aspect of Article 2 ECHR which requires States conducting military operations to carry out an appropriate investigation into the lawfulness of the use of force.³ Even fewer scholars examine this duty in an extra-

* Associate Professor in International Law, Head of the International Law and Human Rights Unit, Bristol Law School, University of the West of England (UK). I would like to thank Brig (ret) Anthony Paphiti, Professor and Col (ret) Charles Garraway, Dr Jane Rooney and the four reviewers and the Editorial Board of the NQHR for their invaluable comments, and Christian Dadomo for proof-reading the article. This article is one of the outcomes of a British Academy and Leverhulme Trust-funded project ‘Clearing the Fog of Law: The Impact of International Human Rights Law on the British Armed Forces’.

¹ In this article, the term ‘military operations’ covers operations in situations of armed conflict (whether international or non-international), occupation, as well as multinational military operations undertaken under the mandate of international organisations.

² For a discussion on the concept and the extra-territorial applicability of the ECHR, see, e.g., Marko Milanović, *Extraterritorial Application of Human Rights Treaties. Law, Principles and Policy* (OUP 2013); Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff 2013)

³ Juliet Chevalier-Watts, ‘Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?’ (2010) 21 EJIL 701; Hannah Russell,

territorial context,⁴ none offering a comprehensive overview of the application of all the legal requirements concerning this duty. This article seeks to remedy this gap by examining the application of the procedural aspects relating to Article 2 in armed conflicts abroad.

States must comply with the duty to investigate an attack resulting in the death of an individual.⁵ The procedural requirement is implicit in Article 2 ECHR,⁶ as ‘a general legal prohibition of arbitrary killing by the agent 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’.⁷ Consequently, States are required to provide a system of ‘adequate and effective safeguards against arbitrariness and abuse of force and even against avoidable accident’.⁸

The Use of Force and Article 2 of the ECHR in Light of European Conflicts (Hart 2017) ch 7 (Duty to Investigate Suspicious Deaths) 121; Silvia Borelli, ‘Domestic Investigation and Prosecution of Atrocities Committed during Military Operations: The Impact of Judgments of the European Court of Human Rights’ (2013) 46 *Israel L Rev* 369; Eva Biotti and Julie De Cillia, ‘L’obligation conventionnelle d’enquête sur les atteintes à la vie dans le contexte de conflits armés’ (2014) *Revue des Droits de l’Homme*, <<https://revdh.revues.org/1029>> accessed 10 July 2018; and the more recent Ian Park, *The Right to Life in Armed Conflict* (OUP 2018) ch 2 48

⁴ Silvia Borelli, ‘*Jaloud v Netherlands and Hassan v United Kingdom*: Time for a Principled Approach in the Application of the ECHR to Military Action Abroad’ (2015) 26 *QIL*, Zoom-in 25; Section 4.10 in Park (n 3) 142 (in relation to the UK only)

⁵ *McCann and Others v UK* App no 18984/91 (ECtHR, 27 September 1995) para 161; *McKerr v UK* App no 28883/95 (ECtHR, 4 May 2001) para 111. On the general obligation to investigate, see also European Parliament, Resolution 2014/2567(RSP), 25 February 2014, para C; Parliamentary Assembly of the Council of Europe, Resolution 2021(2015), 23 April 2015, paras 6.4 and 8.4

⁶ *McCann and Others* (n 5) para 161. See also *Ergi v Turkey* App no 66/1997/850/1057 (ECtHR, 28 July 1998) para 82; *Kaya v Turkey* App no 22729/93 (ECtHR, 19 February 1998) paras 78 and 86; *Güleç v Turkey* App no 21593/93 (ECtHR, 27 July 1998) para 81

⁷ *McCann and Others* (n 5) para 161. See Eva Brems, ‘Procedural Protection. An Examination of Procedural Safeguards Read into the Substantive Convention Rights’ in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2014) 137, 142

⁸ *Suleymanova v Russia* App no 9191/06 (ECtHR, 12 May 2010) para 77

The Court leaves a certain amount of discretion as to how the investigation is run,⁹ provided it follows three principles¹⁰ or ‘essential parameters’ in the Court’s most recent vernacular.¹¹ First, the Court has developed the principle that the investigation must be effective and so able to determine whether the force used was justified or not in the circumstances,¹² and if not, to identify and punish those responsible.¹³ Second, the investigation must be prompt and independent,¹⁴ and third, there must be an element of public scrutiny of the investigation or its results.¹⁵ In jurisprudence that postdates cases on the extra-territorial application of the procedural limb of Article 2 ECHR, the Court has clearly stated that ‘[t]hese elements are inter-related and each of them, taken separately, does not amount to an end in itself’.¹⁶ As the Court explains, ‘[t]hey are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed’.¹⁷ In other words, not every failure to meet the principles and the individual elements thereof will automatically lead to a violation.

⁹ *Acar v Turkey* App no 26307/95 (ECtHR, 8 April 2004) para 221. See also Brems (n 7) 142 and 149

¹⁰ A summary of the principles can be found in *Tagayeva and Others v Russia* App no 26562/07 (ECtHR, 18 September 2017) para 496

¹¹ *Tunç and Tunç v Turkey* App no 24014/05 (ECtHR, 14 April 2015) para 225; *Lovyginy v Ukraine* App no 22323/08 (ECtHR, 23 June 2016) para 103; *Sını́m v Turkey* App no 9441/10 (ECtHR, 6 June 2017) para 65

¹² *Isayeva v Russia* App no 57950/00 (ECtHR, 24 February 2005) para 212; *Isayeva, Yusupova and Bazayeva v Russia* App nos 57947/00, 57948/00 and 57949/00 (ECtHR, 24 February 2005) para 211; *Khashiyev and Akayeva v Russia* App nos 57942/00 and 57945/00 (ECtHR, 24 February 2005) para 144; *Oğur v Turkey* App no 21594/93 (ECtHR 20 May 1999) para 88; *Khamzayev and Others v Russia* App no 1503/02 (ECtHR, 3 May 2011) para 193

¹³ *Al-Skeini and Others v UK* App no 55721/077 (ECtHR, 7 July 2011) para 166; *Jaloud v the Netherlands* App no 47708/08 (ECtHR, 20 November 2014) para 200. See *Isayeva* (n 12) para 212; *Isayeva et al* (n 12) para 211; *Khashiyev and Akayeva* (n 12) para 144; *Jordan v UK* App no 24746/94 (ECtHR, 4 May 2001) para 128; *Estamirov and Others v Russia* App no 60272/00 (ECtHR, 12 January 2007) para 86

¹⁴ See, for example, *Al-Skeini and Others* (n 13) para 167. In a range of cases starting in 2015 with *Tunç and Tunç* (n 11) para 225 the Court has split this principle into two separate ones: promptness and independence.

¹⁵ *Acar* (n 9) para 225; *Al-Skeini and Others* (n 13) para 167

¹⁶ *Sarbyanova-Pashaliyaska and Pashaliyska v Bulgaria* App no 3524/14 (ECtHR, 12 January 2017) para 37; *Mazepa and Others v Russia* App no 15086/07 (ECtHR, 17 July 2018) para 70

¹⁷ *Tunç and Tunç* (n 11) para 225. See also *Lovyginy* (n 11) para 103; *Sarbyanova-Pashaliyaska and Pashaliyska* (n 16) para 37; *Sını́m* (n 11) para 65; *Mazepa and Others* (n 16) para 70

Such principles and elements were originally spelled out in cases relating to law-enforcement situations on the territory of a State party. They were then extended to armed conflict situations, the Court stressing and maintaining since *Ergi* and *Kaya* that the obligation also applies ‘despite the prevalence of violent armed clashes [and] the high incidence of fatalities’¹⁸ and ‘in difficult security conditions, including in a context of armed conflict’.¹⁹ A more tailored set of requirements and elements was then fashioned by the Court, acknowledging some of the inherent challenges in applying them to military operations. As the Court expanded the Convention’s application to extra-territorial situations,²⁰ the investigation of deaths occurring in armed conflicts fought by State parties abroad fell within the ambit of the Convention guarantees and thus had to comply with its provisions and related case-law.

This article argues that: 1) some principles and elements are sometimes difficult, if not impossible, to fulfil when military operations are conducted abroad, and 2) the Court has sometimes shown flexibility but, in others, failed to recognise the inherent challenges faced by States in complying with these principles in an extra-territorial setting. Thus, this article contends that the Court ought to recognise the distinct nature of extra-territorial armed conflicts when applying its jurisprudence.

With this view this article uses the jurisprudence of both the Court as well as the experience of the British armed forces as a case-study. First, whenever available, arguments are supported by cases concerning armed conflicts or situations of violence in an extra-territorial context. If there are no such cases then recourse must be had to cases relating to armed conflicts (for example Chechnya) or situations of violence (for example

¹⁸ *Ergi* (n 6) para 85; *Kaya* (n 6) para 91

¹⁹ *Al-Skeini and Others* (n 13) para 164 as reiterated in *Jaloud* (n 13) para 186. See also *Isayeva* (n 12) para 180

²⁰ See Marko Milanović, ‘Al-Skeini and Al-Jedda in Strasbourg’ (2012) 23 EJIL 131; Aurel Sari, ‘Untangling Extra-Territorial Jurisdiction from International Responsibility in *Jaloud v. Netherlands*: Old Problem, New Solutions?’ (2014) 53 Military Law and the Law of War Review 287

Northern Ireland and Turkey) on the territory of the State party as the jurisprudence is indicative of what the Court may require in an extra-territorial context. One would indeed expect the Court to assess similar situations of (armed) violence whether at home or abroad in a similar manner. Only exceptionally will cases concerning peacetime, law-enforcement operations be used. Second, the experience of the British armed forces illustrates the challenges faced by armed forces in conducting an appropriate and lawful investigation into a potential breach of Article 2 ECHR in an extra-territorial context. The reasons for choosing the UK as a case-study are manifold. First, the overwhelming majority of ECtHR cases relating to the application of the procedural limb of Article 2 in an armed conflict or situation of violence in an extra-territorial context were brought against the UK. Second, prior and after these judgments a vigorous, albeit not always rigorous, debate was held in the UK leading to a flurry of comments and reports useful to identify the challenges faced by the armed forces.²¹ Third, the UK is viewed as a State ‘that operate[s] at the highest end of investigative processes and procedures’.²² Also, the British armed forces have, following the case-law of the Court, made changes to the way they work,²³ thereby demonstrating good will in trying to comply with the Court’s requirements. If they struggle to abide by the Court’s requirements it is likely that forces of other States will do too.

This article starts by explaining when the duty to investigate arises in the specific situation of an armed conflict or violence. It then proceeds to applying the principles (and

²¹ For example, judgments in English courts, written evidence submitted to Parliament by either the government or individuals with relevant expertise, and official reports. Informal discussions with military legal advisers have also assisted the author in gaining a better understanding of the situation. The sources of professional expertise on the practicalities of investigations abroad must be handled with caution, as they reflect a certain perception of the law and its application

²² Michael Schmitt, ‘Investigating Violations of International Law in Armed Conflict’ (2011) 2 Harvard National Security Journal 31, 77

²³ See, for example, in *Al-Skeini and Others* (n 13) paras 25-27 for a description of the changes to the policy undertaken by the armed forces to comply with its obligations. See also the changes mentioned in Army, The Aitken Report: An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004, 25 January 2008, paras 31-32 and Annex A as well as discussion in *Borelli* (n 3) 390-391

elements) of the procedural aspects of Article 2 ECHR in an extra-territorial setting, that is, where armed forces are engaged on the territory of a State that is not a party to the ECHR, the aim being to highlight elements that might be difficult to comply with. It then suggests that the Court should infuse in its jurisprudence a contextual approach that would allow it to confirm its case-law relating to armed conflict on the territory of a member State whilst adapting it to the realities of conflicts abroad.

2. THE DUTY TO INVESTIGATE UNDER ARTICLE 2 ECHR

It is established that although international humanitarian law is the legal regime that regulates armed conflict human rights law applies too.²⁴ In some instances, these bodies of law are complementary and in others their rules collide, thereby calling for the application of the doctrine of *lex specialis*.²⁵ Which rule prevails depends on the specific situation as the *lex specialis* doctrine operates on the level of norms and not legal regimes. It is often assumed that IHL rules are more specific than those of human rights law. The reverse is however true and the rules relating to investigations into unlawful killings are a testimony to it. Whilst IHL sets out such a duty²⁶ its rules are not very developed²⁷ to the effect that one could argue that human rights law, by providing a more detailed set of principles, supports and reinforces the IHL duty to investigate.²⁸

²⁴ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 266, para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 101-106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, para 261

²⁵ Jann Kleffner, 'Human Rights and International Humanitarian Law: General Issues' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (OUP 2010) 51, 72

²⁶ For investigations under IHL, see Schmitt (n 22) and Sylvaine Wong, 'Investigating Civilian Casualties in Armed Conflict: Comparing US. Military Investigations with Alternatives under International Humanitarian Law and Human Rights Law' (2015) 64 *Naval Law Review* 111

²⁷ See discussion in Ryan Santicola and Hila Wesa, 'Extra-territorial Use of Force Civilian Casualties and the Duty to Investigate' (2018) 49 *Col Hum R L Rev* 183, 192-202

²⁸ UNCHR 'Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (2015) UN Doc A/70/304, para 28

This article however only focuses on the strict application of human rights law and does not cover investigations under IHL notably because States have (barring *Hassan* in relation to Article 5 ECHR²⁹) failed to invoke IHL in their pleadings before the Court. As a consequence, the Court has not been given the opportunity to address the interrelationship between IHL and human rights law regarding the procedural aspects of Article 2 ECHR.

The obligation to launch an investigation begins as soon as State authorities are informed or become aware of facts that potentially constitute a violation of Article 2 ECHR.³⁰ In *Akkum*, the Court added that, in circumstances where the State had exclusive control over an area, it was deemed that the State had knowledge of such events, as they ‘lie wholly, or in large part, within the exclusive knowledge of the authorities’.³¹ First, there must be an ‘arguable breach’ or ‘grounds for suspicion’ for Article 2 ECHR to be triggered,³² the emphasis being on ‘cases of suspected *unlawful* killing’. The Court considers that two categories of events trigger an investigation in the context of military operations: 1) the death of a civilian and 2) the death in unlawful circumstances.³³ The Court thus understands that arbitrary deprivation of life must be construed with reference to IHL rather than human rights law.³⁴ Indeed, in a string of Chechen cases,³⁵ it refers to civilian deaths and in *Varnava*, acknowledges that targeting combatants or civilians taking a direct part in the hostilities is permitted inasmuch as it specifies that the States ‘are under obligation to protect the lives of those not, or no longer, engaged in

²⁹ *Hassan v UK* App no 29750/09 (ECtHR 16 September 2014)

³⁰ See, for example, *Çakici v Turkey* App no 23657/94 (ECtHR, 8 July 1999) paras 80, 87 and 106; *Tanrikulu v Turkey* App no 23763/94 (ECtHR, 8 July 1999) para 109

³¹ *Akkum and Others v Turkey* App no 21894/93 (ECtHR, 24 March 2005) para 211

³² See Russell (n 3) 121; Park (n 3) 49

³³ *Isayeva* (n 12) para 176; *Damayev v Russia* App no 36150/04 (ECtHR, 29 May 2012) para 60; *Ergi* (n 6) para 79.

³⁴ In relation to human rights law more generally, see Santicola and Wesa (n 27) 207-208

³⁵ See, for example, *Isayeva* (n 12) para 176; *Isayeva et al* (n 12) para 199

hostilities'.³⁶ The duty to investigate also arises when the circumstances in which the person has been killed are doubtful. In mounting a military operation, States must ensure that they 'take all feasible precautions in the choice of means and methods of a security operation [...] with a view to avoiding and, in any event, minimising, incidental loss of civilian life'.³⁷ Here, the deaths are suspicious because of the circumstances in which they happened, that is, the means and methods deployed are unlawful.³⁸ The use of these two categories to determine the lawfulness of a military operation chimes well with military operational requirements and IHL principles.³⁹

Such a duty is also applicable to situations where there is uncertainty about the lethality of the attack, as Article 2 ECHR applies to situations of attempted killing too.⁴⁰ At first sight it appears difficult for the armed forces to comply with this obligation since there are situations where, despite taking all necessary steps to verify that no civilian has been killed, the State is unaware of the death of a person.⁴¹ However, in this instance, the obligation starts from the moment the State has been made aware of the potential breach, that is, when plausible or credible allegations are made.⁴² After all, 'a duty to conduct an

³⁶ *Varnava and Others v Turkey* App Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009) para 185

³⁷ *Isayeva* (n 12) para 176

³⁸ *Khashiyev and Akayeva* (n 12) para 44. In military parlance, 'means' refer to weapons and 'methods' refer to the way an operation is designed and executed.

³⁹ Yet, the issue is that the lawfulness of the attack (especially its proportionality) is determined according to Article 2 ECHR rather than IHL. See Claire Landais and Léa Bass, 'Reconciling the Rules of International Humanitarian Law with the Rules of European Human Rights Law' (2015) 97 IRRC 1295, 1300; Jordan FR Boddens Hosang, 'The Effects of Paradigm Shifts on the Rules on the Use of Force in Military Operations' (2017) 64 NILR 353-373. See also *Amicus Curiae* Brief Submitted by Professor Françoise Hampson and Professor Noam Lubell of the Human Rights Centre, University of Essex, *Georgia v Russia (II)* App no 38263/08 (ECtHR, 13 December 2011) para 27

⁴⁰ *Yaşa v Turkey* App no 63/1997/847/1054 (ECtHR, 2 September 1998) para 100

⁴¹ A Dutch military legal adviser recounted an airstrike that had, according to the pilot's screen and recording, not led to any civilian casualties. Later, external sources revealed that a civilian had been killed in the strike. In *Al-Saadoon*, the British troops were unaware of the death of Husam Salih Owaid during a protest at the Al Tannumah police station until almost a year later when they received a letter of claim sent by Public Interest Lawyers. *Al-Saadoon & Others v Secretary of State for Defence*, High Court, [2016] EWHC 773 (Admin), 7 April 2016, para 63

⁴² See also *Brecknell v UK* App no 32457/04 (ECtHR, 27 November 2007) para 71

investigation does not arise until an allegation or information which discloses an arguable breach of article 2 [...] has “come to the attention” of the state authorities’.⁴³ The mere knowledge of the killing gives rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death.⁴⁴ Once aware, the authorities must act of their own motion and should not leave it to the next of kin or victim to lodge a formal complaint.⁴⁵ Indeed, by bringing the matter to the attention of the authorities, the relatives are simply notifying the authorities that an individual might have been killed in unlawful circumstances, and the State must then act promptly thereafter.⁴⁶ After all, the obligation to investigate only arises ‘in cases of *suspected* unlawful killing’.⁴⁷ If there is no known or suspected killing, there is no duty to investigate.

Once the obligation arises, the State must comply with the principles spelled out by the Court, the first being that the investigation be effective.

3. PRINCIPLE OF EFFECTIVE INVESTIGATION

Determining the legality of the use of force entails collecting and securing evidence that sheds light on the circumstances that have led to the loss of life. In this process, it is imperative that potential suspects be identified. Indeed, major shortcomings in the investigation might undermine the ability to identify the perpetrator and thus ‘the bringing of appropriate domestic proceedings, such as criminal prosecution, disciplinary proceedings and proceedings for the exercise of remedies available to victims and their families’⁴⁸ and therefore result in the failure of the Article 2 ECHR test.⁴⁹ Consequently,

⁴³ *Yaşa* (n 32) para 100

⁴⁴ *ibid* para 100; *Ergi* (n 6) para 82

⁴⁵ *Isayeva* (n 12) para 210; *Isayeva et al* (n 12) para 209; *Estamirov and Others* (n 13) para 85; *Khamzayev and Others* (n 12) para 202

⁴⁶ See, for example, *Damayev* (n 33) para 85

⁴⁷ *Al-Saadoon and Others* (n 41) para 8 (emphasis added)

⁴⁸ *Erdogan and Others v Turkey* App no 19807/92 (ECtHR, 13 September 2006) para 88

⁴⁹ *McKerr* (n 5) para 144; *Jordan* (n 13) para 127

States are under an obligation to secure the evidence concerning the incident, including, *inter alia*, eyewitness 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.⁵⁰ As the Court has underlined, '[a]ny deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard'.⁵¹ That being said, the obligation to investigate is one of means and not results.⁵²

The first question is how the armed forces can effectively secure the area where the death has occurred. A useful insight into the relevant, practical, issues faced by the armed forces is provided by Brigadier (retired) Paphiti⁵³ in his written evidence to the Defence Committee of the House of Commons.⁵⁴ First, access to the scene of death can be 'extremely difficult and dangerous', especially if located in an area under the control of the belligerents, and thus collecting evidence can turn into a difficult, if not insurmountable, task. The Court nonetheless does not require immediate access, as it has explained that investigations must start as soon as control is gained over the area.⁵⁵ Also, to ensure the safety of personnel, practical alternative solutions must be sought.⁵⁶ If the area is under the control of the State forces, this should not be unfeasible, even in an extra-

⁵⁰ *Al-Skeini and Others* (n 13) para 166. See also *Isayeva* (n 12) para 21; *Isayeva et al* (n 12) para 211; *Salman v Turkey* App no 21986/83 (ECtHR, 27 June 2000) para 106; *Estamirov and Others I* (n 13) para 86; *Khamzayev and Others* (n 12) para 194

⁵¹ *Isayeva* (n 12) para 212; *Isayeva et al* (n 12) para 211; *Avşar v Turkey* App no 21986/83 (ECtHR, 10 July 2001) para 394; *Khamzayev and Others* (n 12) para 194

⁵² *Al-Skeini and Others* (n 13) para 166. See also *Isayeva et al* (n 12) para 211; *Estamirov and Others* (n 13) para 86

⁵³ Brig (ret) Paphiti served in the UK armed forces for over 25 years. He is one of the founding fathers of the Army Prosecuting Authority and was key in the development of the concept for the Army Legal Services Operational Law Branch that provides legal expertise to commanders.

⁵⁴ UK Parliament, 'Written Evidence from Brigadier (Rtd) Anthony Paphiti, UK Armed Forces Personnel and the Legal Framework for Future Operations, Session 2013-14' (UK Parliament, 7 January 2014) <<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmdfence/writev/futureops/law06.htm>> accessed 2 December 2018

⁵⁵ *Khamzayev and Others* (n 12) para 198

⁵⁶ *Cangöz and Others v Turkey* App no 7469/06 (ECtHR, 26 April 2016) para 125

territorial context, but if not, it might be that, for a variety of reasons (including the lack of consent of the territorial State), the State forces cannot access the area and so information cannot be gathered. Second, in a situation where members of the armed forces are present at the scene of the incident, the standard procedure would require those implicated to be disarmed and separated. Taking away the soldiers' weapons might make them an easy target, as 'there is an [*sic*] hostility (either expressed or not) to the foreign force', a predicament compounded by the fact that many people in States where armed forces are deployed carry and use 'weapons of varying lethality'.⁵⁷ Although this was noted by the Court and the concurring judges⁵⁸ in *Jaloud*,⁵⁹ the Court lamented the lack of precautions to separate the members of the armed forces⁶⁰ when they were in fact in charge of maintaining security in the area. The reason for separating the soldiers is that, given the opportunity and especially the time, they might 'collude with others to distort the truth'.⁶¹ The Court explained that 'the mere fact that appropriate steps were not taken to reduce the risk of collusion'⁶² was a shortcoming despite the fact that the concurrent judges recognised that

[s]eparating all the witnesses on the spot could have interfered with that duty [to provide security at the checkpoint]. Equally, to separate persons in a command position from their military personnel abruptly and in such an unstable environment seems rather dangerous.⁶³

⁵⁷ Paphiti (n 54)

⁵⁸ *Jaloud* (n 13) Joint Concurring Opinion of Judges Casadevall, Berro-Lefevre, Šikuta, Hirvelä, López Guerra, Sajä and Silvis, para 7

⁵⁹ *ibid* para 226

⁶⁰ *ibid* para 208

⁶¹ *ibid* para 207

⁶² *ibid* para 208

⁶³ *ibid* para 7 (Concurring Opinion)

Ensuring that each individual leaves separately and safely might not be possible, and therefore the Court displays a certain lack of flexibility in the application of this element in an extra-territorial setting.

Second, members of the armed forces must be interrogated about the incident⁶⁴ in an adequate manner. The Court has indicated that reliance on written evidence and/or reports produced by them,⁶⁵ as well as transcripts of interviews, was not sufficient, as it does not allow for the reliability or credibility of the accounts of those involved in the incident to be verified.⁶⁶ Crucial factual elements might have been, voluntarily or not, omitted, and contradictory information might not be cross-checked.⁶⁷ As a result, failure to collect the testimony of those implicated in the incidents might render it difficult to ascertain whether the force used was justified. It is submitted that, ideally, such interviews should take place back in the compound to ensure the security of all those involved. The reality is that military witnesses may not be interviewed quickly after the incident and in fact 'be deployed elsewhere or be engaged in combat'⁶⁸ and therefore unable to provide evidence. As a consequence, to ensure that the testimony of those involved in the incident is gathered promptly, the State should take steps so that these individuals remain available for questioning and are not deployed quickly after the incident. This also highlights the fact that the State must ensure that it deploys a sufficient number of military personnel as it would otherwise not be in a position to continue military operations whilst its personnel is being interviewed. This is neither a practical nor a legal impediment but one related to the allocation of resources by the government.

⁶⁴ *Aktas v Turkey* App no 24351/94 (ECtHR, 24 April 2003) para 306

⁶⁵ See, for example, *Cangöz and Others I* (n 56) para 127

⁶⁶ *McKerr* (n 5) para 144; *Jordan* (n 13) para 127

⁶⁷ *Cangöz and Others* (n 56) paras 127-133

⁶⁸ *Schmitt* (n 22) 54

Third, the Court has stressed that there must be an attempt at promptly identifying or locating witnesses, even in the context of military operations,⁶⁹ and to take their statements,⁷⁰ as this enables the investigators ‘to create a comprehensive picture of the circumstances of the killings’.⁷¹ Civilian witnesses might not be available, as they may have become refugees or internally displaced persons,⁷² or they may be located in a place to which the armed forces does not have access.⁷³ Yet, the Court requires the State to do its utmost to locate them.⁷⁴ In an extra-territorial context, this seems rather difficult. Even, when available, questioning them entails some degree of risk for investigators working in a ‘dangerous operational environment’.⁷⁵ Technically, a protection force could be deployed to ensure the safety of the investigators.⁷⁶ An additional problem is that witnesses might not be willing to cooperate with the Service Police⁷⁷ and/or not truthfully report the facts, as they might be biased against the military forces. The problem might be compounded by the local population’s suspicious attitude towards law and law enforcement.⁷⁸ Clearly, this is a practical difficulty that cannot be dismissed. Whilst, in *Jordan*, the Court acknowledged that the State could not be held responsible for a witness’ unwillingness to come forward,⁷⁹ in *Al-Skeini*, it explained that ‘every effort should have been taken to identify Iraqi eyewitnesses and to persuade them that they would not place themselves at risk by coming forward and giving information and that their evidence

⁶⁹ *Khashiyev and Akayeva* (n 12) para 160; *Musayev and Others v Russia* App nos 57941/00, 58699/00 and 60403/00 (ECtHR, 31 March 2008) para 162

⁷⁰ *Khashiyev and Akayeva* (n 12) para 160; *Önen v Turkey* App no 22876/93 (ECtHR, 14 May 2002) para 88

⁷¹ *Musayev and Others* (n 69) para 162

⁷² Schmitt (n 22) 54. See, for example, the situation of the first and second applicants in *Isayeva et al* (n 12) para 224

⁷³ *Amicus Curiae* Brief (n 40) para 10

⁷⁴ *Isayeva et al* (n 12) para 224

⁷⁵ *Army* (n 23) para 13

⁷⁶ *Park* (n 3) 153

⁷⁷ See *Paphiti* (n 54); Schmitt (n 22) 84

⁷⁸ See for example *Army* (n 22) para 13

⁷⁹ *Jordan* (n 13) para 118

would be treated seriously and acted upon without delay'.⁸⁰ This obligation of means rather than result is welcome though it remains to be seen how the Court will interpret 'every effort' in future cases. The dearth of (competent) interpreters to carry out such interviews is another impediment faced by the investigators when talking to potential witnesses.⁸¹ This, in contrast, is not an element impossible to fulfil: the State must ensure that interpreters are available.

Fourth, the 'crime' scene must be adequately and independently inspected so that all the evidence can be collected and preserved.⁸² This requires taking photographs of the crime scene and collecting empty cartridges and bullet fragments, recording their exact number and location, and numbering them individually.⁸³ Such a task is all the more important, as it enables the State to determine which/whose weapon fired the rounds and thus attribute individual responsibility. Given the tense security situation on the ground and the hostile environment in which investigators are working, it might be difficult to collect all cartridges and bullet fragments. Yet, again it is not impossible if the State is in control of the area. In a second phase, the forensic evidence must be thoroughly analysed.⁸⁴ In an extra-territorial setting, this raises a number of issues regarding which State should undertake the analysis, the place where the task should be discharged, the quality of the assessments,⁸⁵ and so on. Whilst such standards may be appropriate for armed conflicts taking place on the territory of a Member State, they do not seem to when applied in an extra-territorial context. In concrete terms, this means that, in future military

⁸⁰ *Al-Skeini and Others* (n 13) para 170

⁸¹ *Al-Skeini and Others* (n 13) para 30

⁸² *Jordan* (n 13) para 107; *Ateş v Turkey* App no 30949/96 (ECtHR, 31 July 2005) paras 96 and 108

⁸³ *Önen* (n 70) para 88; *Khashiyev and Akayeva* (n 12) para 146; *Kaya* (n 6) para 89 where no ballistic tests were carried out although spent cartridges had been found on site. See also *Akkum and Others* (n 31) para 219

⁸⁴ See, for example, *Estamirov and Others* (n 13) para 91

⁸⁵ See Schmitt (n 22) 54

operations, the armed forces will need to ensure that ‘access to such experts [is] an integral part of the planning process’⁸⁶ and appropriate resources allocated to this effect.

Fifth, if the use of force results in the death of a person, the Court requires an adequate autopsy to be completed.⁸⁷ Post-mortem examinations are not possible if there is no body, and often it is difficult, if not impossible, to retrieve the body. Besides safety concerns to enter an area that might be under the authority of the belligerent⁸⁸ or that might not be fully secured, an obstacle that investigators might, as in Iraq and Afghanistan, encounter relates to the population who, following local customs, refuses to surrender the body.⁸⁹ Indeed, in accordance with local customs and traditions, the deceased might be buried very quickly by their relatives.⁹⁰ Unless the body can be secured straight after the incident, there is little chance for the investigators to retrieve it. The autopsy must also be of a certain quality⁹¹ as an expert medical examination helps ascertain the circumstances of a death and thus undergirds the State’s obligation to carry out an effective domestic investigation. The Court checks, amongst other things, whether forensic specialists, rather than general practitioners,⁹² are taking part in the process, whether proper forensic photographs of the body have been taken,⁹³ whether the number of bullet entry and exit wounds has been recorded,⁹⁴ whether there are traces of bullets, shrapnel or other evidence,⁹⁵ whether injuries and marks on the body have been the

⁸⁶ Park (n 3) 153

⁸⁷ See, for example, *Estamirov and Others* (n 13) para 91

⁸⁸ UNCHR ‘Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions’ (2006) UN Doc E/CN.4/2006/53, para 36

⁸⁹ See, for example, Army (n 22) para 13 and UK Parliament, ‘Written Evidence from the Ministry of Defence to House of Commons Select Committee Defence, Operations in Afghanistan 2010-2012’ (UK Parliament, 30 September 2010) <<https://publications.parliament.uk/pa/cm201012/cmselect/cmdfence/554/554.pdf>> accessed 2 December 2018, para 19.6

⁹⁰ *Al-Skeini and Others* (n 13) para 30; Paphiti (n 54)

⁹¹ *Khashiyev and Akayeva* (n 12) para 163. See also *Salman* (n 50) paras 106-107

⁹² *Tanrikulu* (n 30) para 106

⁹³ *Salman* (n 50) para 106

⁹⁴ *Ateş* (n 82) para 109; *Akkum and Others* (n 31) para 196

⁹⁵ *Ateş* (n 82) para 109

subject of a histopathological analysis,⁹⁶ whether clothes have been examined,⁹⁷ and so on. The autopsy is a way to establish the circumstances relating to a person's death, as well as to enable the State to identify the potential perpetrator.⁹⁸ Information recovered from a body can be used to understand from which weapons bullets were fired, as well as from which distance, which type of weapons were used, whether gunpowder could be found on the fingers of the deceased, and so on.⁹⁹ As a result, the lack of pathologists and post-mortem facilities on site prevents an effective investigation¹⁰⁰ and only better planning and increased resources can remedy the problem. Yet, further challenges, as the *Jaloud* case illustrates, are present. Jaloud's son was killed by Dutch (and possibly Iraqi) forces whilst attempting to pass a vehicle checkpoint at speed in Iraq. The Netherlands launched an investigation into the fatal shooting. Yet, for a variety of legal and practical reasons, the Netherlands handed over the body into the care of the territorial State.¹⁰¹ Conscious of the likely poor quality of the post-mortem examination and legally unable to compel the Iraqi authorities to include its personnel at the autopsy, the Netherlands sent troops to oversee the autopsy. Unfortunately, the situation became so tense that the 'Netherlands personnel who were present in the hospital reported their fear of being taken hostage and left the premises for that reason'.¹⁰² Despite all these positive steps undertaken by the Netherlands and so trying to comply with their obligations of means, the Court asserted that 'no attempt was made to carry out the autopsy under conditions befitting an investigation into the possible criminal responsibility of an agent of the State, and in that the resulting report was inadequate'.¹⁰³ The Court showed no flexibility and

⁹⁶ *Salman* (n 50) para 106

⁹⁷ *Cangöz and Others* (n 56) paras 133-134

⁹⁸ See discussion in Russell (n 3) 136-137

⁹⁹ *Akkum and Others* (n 31) paras 196 and 218. Yet, the autopsy might not be of high evidential value if the State authorities have accepted the case of the death (Park (n 3) 153)

¹⁰⁰ Noted by the Court in *Al-Skeini and Others* (n 13) para 30

¹⁰¹ *Jaloud* (n 13) para 6 (Concurring Opinion)

¹⁰² *ibid* para 6 (Concurring Opinion)

¹⁰³ *ibid* para 227

understanding of the situation. An additional element that needs to be assessed is that the autopsy report must be translated.¹⁰⁴ As aforementioned, translators and interpreters must be made available to the armed forces.

Overall, it is not an easy task for the armed forces to follow the principle of effective investigation in an extra-territorial context. The Court's requirements are reasonable though in some instances, it is a difficult, though not an impossible, mission. With increased manpower and better resources, the armed forces would be in a better position though. The only real and in fact legal hurdle relates to carrying out autopsies when the territorial State has the right to take the body, and thus the armed forces are faced with an impossible mission to comply with the law. The Court has shown in this particular instance very little flexibility. It is rather disconcerting because the Court has on numerous occasions repeated that the obligation to undertake an effective investigation is not one of results but means.¹⁰⁵

4. PRINCIPLES OF PROMPT AND INDEPENDENT INVESTIGATION

Two additional interrelated principles are that the investigation be prompt and independent so as to ensure that the public maintains confidence in the State's monopoly of the use of force.

4.1. PROMPT INVESTIGATION

As the Court posited, '[a] requirement of promptness and reasonable expedition is implicit' in the context of investigations under Article 2 ECHR.¹⁰⁶ This requirement stems from the need to maintain public confidence¹⁰⁷ in adherence to the rule of law and prevent

¹⁰⁴ *ibid* para 170

¹⁰⁵ See for example *Jaloud* (n 13) para 186; *Acar* (n 9) para 223

¹⁰⁶ *Isayeva* (n 12) para 212; *Mahmut Kaya v Turkey* App no 21986/93 (ECtHR, 28 March 2000) paras 106-107; *Estamirov and Others* (n 13) para 87; *Khamzayev and Others* (n 12) para 195

¹⁰⁷ *Isayeva* (n 12) para 213; *Isayeva et al* (n 12) para 212; *Khashiyev and Akayeva* (n 12) para 144

the appearance of collusion in, or tolerance of, unlawful acts.¹⁰⁸ Also, gathering useful evidence becomes more difficult with the passage of time¹⁰⁹ and so the chances of the investigation to be completed are diminished. In specific situations, the Court has stressed that failure to comply with this requirement of promptness might ‘exacerbate still further the climate of impunity and insecurity in the region and thus create a vicious circle’.¹¹⁰ It is consequently in the interest of the armed forces to act in accordance with this requirement.

‘What constitutes prompt commencement depends on the context of the case’,¹¹¹ but crucially the principle relates to the threshold of the trigger of the obligation to investigate and the timing of the investigation which has been explained earlier on. It is interesting to note that complying with this requirement is not particularly challenging for States as it is standard procedure for armed forces to complete reports after allegations of civilian casualty.¹¹² The requirement of promptness is likely to be fulfilled. For example, the UK’s procedure, as enshrined in the Shooting Incident Review Policy,¹¹³ mandates that a report on the incident be completed promptly by those involved in the

¹⁰⁸ *Isayeva* (n 12) para 213; *Khashiyev and Akayeva* (n 12) para 144; *McKerr* (n 5) paras 111 and 114; *Khamzayev and Others* (n 12) para 195

¹⁰⁹ *Zubayrayev v Russia* App no 67797/01 (ECtHR, 10 January 2008) para 98

¹¹⁰ *Yaşa* (n 32) para 104

¹¹¹ *Russell* (n 3) 127

¹¹² For example, in Afghanistan, there were two investigations, one carried out by the State and another by ISAF. The aim of ISAF investigations was ‘to record [civilian casualty] allegations and learn the lessons to improve [Tactics Techniques and Procedures] in the future’. MoD (n 89) para 19.5

¹¹³ Official information on the procedure is sparse and thus recourse must be had to various sources. Whenever possible the most up-to-date information was used bearing in mind that such guidelines change often. Documents used include Park (n 3) 142-148; Paphiti (n 54), Permanent Joint Headquarters (UK), OP TELIC: Policy for the Reporting, Recording, Review and Investigation of Shooting Incidents, D/PJHQ/1/1610/1/1, 8 November 2004; MoD (n 89) and repeated in UK Parliament, ‘Written Evidence from the Ministry of Defence to House of Commons Defence Committee, UK Armed Forces Personnel and the Legal Framework for Future Operations, Twelfth Report of Session 2013-24’ (UK Parliament, November 2013) <<https://publications.parliament.uk/pa/cm201314/cmselect/cmdfence/931/931.pdf>> 2 December 2018.

incident and that thereafter a further report be written by an officer within 48 hours with a view to assisting the Commanding Officer in deciding on the next course of action.

A potential noteworthy problem is the quality of the report as the Court dismisses justifications, such as reports being drafted in the heat of the moment and in which there are so-called ‘innocent omissions’.¹¹⁴ Fulfilling the principle of promptness does not indeed displace the State’s obligation to carry out an *effective* investigation.

4.2. INDEPENDENT INVESTIGATION

An additional requirement is that those investigating the incident must be independent from those implicated in the events.¹¹⁵ Much alike the justification for an investigation to be prompt, the requirement of independence is warranted by the need for public confidence.

The Court has stressed that, irrespective of the form of the investigation, ‘the independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms’,¹¹⁶ an element that also applies in a military context.¹¹⁷ At first sight, this requirement appears to be difficult to comply with, bearing in mind that there are no other investigative authorities present on the territory apart from the armed forces themselves and the local police. In this context, the armed forces play the dual role of law-violator and law-enforcer. Yet, practice and case-law show that compliance is feasible.

Institutional independence is understood as the ability of the investigating authorities to act without interference.¹¹⁸ The case of *Al-Skeini* is emblematic of the

¹¹⁴ *Akkum and Others* (n 31) paras 195 and 202

¹¹⁵ *Isayeva* (n 12) para 211; *Isayeva et al* (n 12) para 210; *Güleç* (n 6) paras 81-82. See also *Cangöz and Others* (n 56) para 126 (in which case the soldiers carried out the initial and critical phases of the investigation)

¹¹⁶ *Isayeva* (n 12) para 211; *Isayeva et al* (n 12) para 210; *Ergi* (n 3) paras 83-84; *McKerr* (n 5) para 128

¹¹⁷ *Al-Skeini and Others* (n 13) para 169; *Isayeva* (n 12) paras 210-211

¹¹⁸ *Park* (n 3) 56

difficulties faced by armed forces abroad.¹¹⁹ Investigations undertaken by the Special Investigation Branch of the Royal Military Police of the UK were deemed to fall short of the required standards¹²⁰ namely because, though the Royal Military Police has a separate chain of command, the investigations could be triggered either by the Commanding Officer of the units concerned or by the Special Investigation Branch *proprio motu* whenever it became aware of an incident. However, the Provost Marshal or the Commanding Officer of the unit involved could instruct the Special Investigation Branch to terminate the investigation, thereby interfering in the investigation process and calling into question the independence of the investigation.¹²¹ The investigating authority must be and must be seen to be operationally independent of the military chain of command,¹²² and its members must not come from the same unit or chain of command. In *Jaloud*, the Court stressed that the independence and therefore the effectiveness of an investigation might ‘be called into question if the investigators and the investigated maintain close relations with one another’.¹²³ Yet, in this case, the Court found no evidence supporting the view that the two elements, that is, the Royal Military Constabulary and the military personnel, colluded ‘to the point of impairing the quality of [the] investigations’.¹²⁴

Practical independence, on the other hand, relates to a physical dimension, the close proximity between the investigators and those implicated. Yet, as the Court explained in *Jaloud*, the fact that they shared quarters or that the investigators were subordinated to the investigated were not seen as running foul of the principle.¹²⁵ The

¹¹⁹ See *Park* (n 3) 55-56

¹²⁰ *Al-Skeini and Others* (n 13) para 171

¹²¹ For a description of the investigation procedure into Iraqi civilian deaths at the time, see *Al-Skeini and Others* (n 13) paras 28-29

¹²² *ibid* para 169

¹²³ *Jaloud* (n 13) para 188

¹²⁴ *ibid* para 189

¹²⁵ *ibid* para 190

reason for this was that there did not seem to be any nexus between the investigators and the individuals implicated in the incident.¹²⁶

Whilst this judgment shows that the Court has some understanding of the difficulty of separating armed forces deployed abroad, it confirms the jurisprudence relating to the need to ensure that the investigation be independent in law and in practice. Case-law emphasises that the principle of independence is interrelated with the other principles¹²⁷ and that ultimately the Court ‘allows for independence to be contentious to a certain degree insofar as it does not hinder effectiveness of the investigation’.¹²⁸ This may elucidate the leeway given to the Dutch armed forces inasmuch as the lack of independence did not have any practical implications on the effectiveness of the investigation.

In conclusion the armed forces are able to abide by the principles of promptness and independence. Here, it is not ‘mission impossible’ at all, and the Court gives States some latitude. Yet, there is a further requirement that needs to be met, that of public scrutiny in the investigation.

5. PRINCIPLE OF PUBLIC SCRUTINY IN THE INVESTIGATION

As Chevalier-Watts explains, ‘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’.¹²⁹ The twin aims are to allow for victim participation and challenge of the outcome of the investigation, as well as to ensure public scrutiny more generally: ‘public scrutiny provides a procedural safeguard’.¹³⁰

¹²⁶ Park (n 3) 56

¹²⁷ *Tunç and Tunç* (n 11) para 225

¹²⁸ Jaka Kukavica and Veronika Fikfak, ‘Strasbourg’s U-Turn on Independence as Part of an Effective Investigation under Article 2’ [2015] CLJ 415, 417

¹²⁹ Chevalier-Watts (n 3) 715

¹³⁰ Russell (n 3) 151

In *McKerr*, the Court noted the importance of public scrutiny, for ‘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’.¹³¹ In the specific situation of the deployment of troops abroad, one could question who the ‘public’ in the expression ‘public confidence’ is. Is it the public at home or the public of the territorial State? Remarkably, the Court has never entered into such a debate. If the objective is to offer transparency in the sense of information about the process and its integrity, then both the public at home and abroad are encompassed. As Schmitt explains, ‘transparency, particularly among an affected population, generally enhances counterinsurgency operations’,¹³² a point also made by the Court itself, though in a domestic context.¹³³ After all, ‘once people begin to doubt whether a war is being conducted in a humane way, their support is indeed likely to “erode or even reverse itself rapidly, no matter how worthy the political objective”’.¹³⁴ However, if the objective is to offer accountability, defined as ‘the imposition and ultimately acceptance of legal responsibility [...] for military conduct’,¹³⁵ then it is more likely that the public abroad is the object of interest and the focus is accordingly placed on (judicial) remedies.

Whilst it is accepted that ‘the degree of public scrutiny required may well vary from case to case’, in all cases, the victim or next-of-kin must be involved in the procedure¹³⁶ ‘to the extent necessary to safeguard his or her legitimate interests’.¹³⁷

¹³¹ *McKerr* (n 5) para 160; see *Jordan* (n 13) para 108

¹³² Schmitt (n 22) 78; see also Office of the High Commissioner for Human Rights, Special Rapporteur Calls on the Government and the International Community to Make Renewed Efforts to Prevent Unlawful Killings, Press Release, 15 May 2008

¹³³ *McKerr* (n 5) para 160

¹³⁴ Michal Drabik, ‘A Duty to Investigate Incidents Involving Collateral Damage and the United States Military’s Practice’ (2013) 22 *Minnesota Journal of International Law Online* 15, 30

¹³⁵ Wong (n 26) 114

¹³⁶ *Isayeva* (n 12) para 214; *Isayeva et al* (n 12) para 213; *Khashiyev and Akayeva* (n 12) para 144

¹³⁷ *Isayeva* (n 12) para 214; *McKerr* (n 5) para 115; *Jordan* (n 13) para 109; *Cangöz and Others* (n 56) para 144; *Khamzayev and Others* (n 12) para 196

Besides granting victims or relatives access to the procedure,¹³⁸ the Court endows them with a right to information¹³⁹ (for example, the right to access the case file¹⁴⁰). As a result, individuals have ‘some sort of right to active participation in the investigation’.¹⁴¹ To allow for the next-of-kin’s involvement, the victim must first be identified and then the next-of-kin informed of his/her death. In an extra-territorial context, this requirement might be difficult to satisfy, as armed forces might not know the local population well. Often, it is the next-of-kin who will, later, approach, through a lawyer, the armed forces and is then included in other types of investigations, such as judicial review, rather than in earlier investigations. If that is the case, then there is no violation of Article 2 ECHR since the involvement of the next-of-kin has been ensured at a later stage.

The Court has also set limits on the extent to which relatives can be involved and the concomitant duties of the authorities. This is particularly relevant in military operations with specific rules of engagement, classified materials, information on sources of intelligence, and so on that may compromise national security.¹⁴² The Court has shown some flexibility by accepting that the disclosure or publication of materials that deal with ‘sensitive issues with possible prejudicial effects to private individuals or other investigations [...] cannot be regarded as an automatic requirement under Article 2’.¹⁴³ However, as Park points out, the relevant case-law stems from counter-terrorism operations rather than regular armed forces operations, and the Court might have thus only recognised the special implications of releasing information on future similar operations.¹⁴⁴ Moreover, the Court does not give the State *carte blanche* over which

¹³⁸ *Bati and Others v Turkey* App no 33097/96 and 57834/00 (ECtHR, 3 June 2004) para 137

¹³⁹ *Oğur* (n 12) para 92; *Estamirov and Others* (n 13) para 92

¹⁴⁰ *Khashiyev and Akayeva* (n 12) paras 148 and 150; *Khamzayev and Others* (n 12) para 203

¹⁴¹ Fiona Leverick, ‘What Has the ECHR Done for Victims? A United Kingdom Perspective’ (2004) 11 IRV 177, 185. See also Borelli (n 3) 374

¹⁴² *Drabik* (n 139)

¹⁴³ *Jordan* (n 13) para 121; *McKerr* (n 5) para 129

¹⁴⁴ *Park* (n 3) 53

information cannot be released: it does examine the type and content of the information that remains undisclosed to the relatives.¹⁴⁵

Additionally, the outcome of the investigation must be promptly brought to the attention of the next-of-kin,¹⁴⁶ stating the reasons for the specific course of action adopted.¹⁴⁷ A certain level of detail is required; '[i]t is not enough simply to state that there is insufficient evidence or to give general reasons'.¹⁴⁸ Such an outcome would deny the victim or his/her relative the ability and opportunity to challenge the decision not to prosecute an individual suspected of the crime,¹⁴⁹ and ultimately fail to 'reassure[s] the public that the rule of law ha[s] been respected'.¹⁵⁰ In the context of military operations abroad, the difficulty resides in informing the relatives of the outcome, as they might not be traceable in enemy held territory, or communication with them might be, for practical reasons, impossible.¹⁵¹ Moreover, the reasons for reaching such an outcome might be that some information is confidential or has been provided by informers whose safety might be at stake. That being said, the State is allowed to draw with care and skill a justification so as to both respect the rights of the victims and their next-of-kin and avoid undue prejudice to others.

As a conclusion, the principle of public scrutiny can be partially fulfilled by the armed forces abroad. Practical impediments that are clearly visible in the initial stages of the investigations can however be remedied later on using other, additional methods of investigation. The Court's flexibility in that regard is welcome.

¹⁴⁵ *Cangöz and Others* (n 56) paras 123 and 145-146

¹⁴⁶ *Finucane v UK* App no 29178/95 (ECtHR, 1 July 2003) para 83. *Damayev* (n 33) para 87. See also *Isayeva* (n 12) para 222 in which the Court explained that a list of names without further details sent to a regional administration does not satisfy this requirement as the victims cannot be appropriately informed.

¹⁴⁷ *Jordan* (n 13) para 124; *Finucane* (n 146) para 83

¹⁴⁸ *Leverick* (n 141) 188

¹⁴⁹ See *Jordan* (n 13) para 123; *Finucane* (n 146) para 82; *Isayeva* (n 12) para 222; *Khamzayev and Others* (n 12) paras 205-206; *Damayev* (n 33) paras 87-88 and 90

¹⁵⁰ *Jordan* (n 13) para 124; *Finucane* (n 146) para 83

¹⁵¹ *Schmitt* (n 22) 84

The principles of effectiveness, promptness, independence and public scrutiny of investigations into alleged violations of Article 2 ECHR appear to contain a few elements with which it might be difficult, though not necessarily impossible, for armed forces deployed abroad to comply. For some, the Court appears to be unable or unwilling to understand these difficulties, and thus the question is whether it might be possible to instil further flexibility in the Court's jurisprudence.

6. INSTILLING FURTHER FLEXIBILITY IN THE COURT'S JURISPRUDENCE

It must be reminded that the Court has crafted principles and elements thereof based on situations either happening in a domestic setting and/or in peacetime and has applied them to military operations at home and abroad. As a result, while they might be perfectly suitable in this limited context, they are, as illustrated above, sometimes too detailed and difficult to apply outside the national territory of a State. It is argued that the Court should espouse a contextual approach when applying these requirements. The point is not to criticise the principles and elements as such but to instil more flexibility in their application.

To appreciate why the Court has crafted such elaborate elements within the principles, it is worth recalling that the very aim of its existence is to provide a supranational remedy to individuals whose rights have been violated and not remedied at national level. It would defeat the purpose of the Convention if States could avoid being sanctioned by simply claiming that running an investigation was too difficult. After all, 'a duty to investigate is not a duty for its own sake; it is supposed to serve justice and enhance respect for law by punishing violators and providing victims with potential grounds for due compensation'.¹⁵²

¹⁵² Drabik (n 139) 33

Indeed, besides safeguarding the substantive rights enunciated in the Convention, the Court has developed an approach towards securing such rights, thereby espousing a ‘practical and effective’ interpretation doctrine.¹⁵³ The right to life is one of these archetypal rights that has been so interpreted as to secure effective respect by not only ensuring that life is not taken arbitrarily but also that a mechanism be in place to ensure that, if it does happen, the State is obliged to examine whether a violation has occurred. In *McCann* where this doctrine was first used, the Court highlighted that Article 2 ECHR had to be ‘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] Convention.”’¹⁵⁴ The Court ‘focuses upon the need for “practical and effective” observance of Convention rights’¹⁵⁵ and has therefore obliged States to become active rather than passive¹⁵⁶ in their obligations.

Heightened protection of human rights and precision in the application of the principles is no doubt welcome all the more, as ‘scrutiny from outside increases pressure to have military operations conducted properly in the first place’.¹⁵⁷ As a matter of fact, ‘[s]ome military practitioners have agreed that the human rights framework, with some adjustment for the realities of military operations, is a valuable system of accountability’.¹⁵⁸ Whilst the Court must be praised for having developed a ‘method for ensuring that human rights are not easily sacrificed on the altar of political expediency within Member States’,¹⁵⁹ in this instance, it is not for political expediency that the

¹⁵³ Jean-Paul Costa, ‘On the Legitimacy of the European Court of Human Rights’ Judgments’ (2011) 7 *EuConst* 173, 177

¹⁵⁴ *McCann and Others* (n 5) para 161. See under different formulations *Akkum and Others* (n 31) para 249; *Kaya* (n 6) para 105; *Ergi* (n 6) para 82; *Damayev* (n 33) para 78; See also *Park* (n 3) 48

¹⁵⁵ Alistair Mowbray, ‘The Creativity of the European Court of Human Rights’ (2005) 5 *HRLR* 57, 77

¹⁵⁶ *ibid* 78

¹⁵⁷ *Drabik* (n 139) 32

¹⁵⁸ *Wong* (n 26) 121

¹⁵⁹ Onder Bakircioglu and Brice Dickson, ‘The European Convention in Conflicted Societies: The Experience of Northern Ireland and Turkey’ (2017) 66 *ICLQ* 263, 266

procedural rights under Article 2 ECHR are not complied with, rather it is the physical (and sometimes legal) inability of the armed forces to comply. To some extent, added resources and manpower can remedy some of the physical difficulties but not always. It is not about letting States off the hook but about understanding the real ‘impossibilities’ rather than ‘difficulties’ faced by the armed forces when deployed abroad.

The Court has underlined that it has granted some leeway to States and is cognisant of the inherent practical difficulties faced by the investigators performing their tasks.¹⁶⁰ It thus seemingly allows for a contextual approach towards compliance. In *Al-Skeini*, the Court conceded that ‘in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by the investigators’.¹⁶¹ In particular, it noted that such circumstances might lead to investigators using less effective methods and to delays.¹⁶² The Court goes to great length to formally acknowledge the difficult situation, it ‘is prepared to make reasonable allowances for the relatively difficult conditions under which the Netherlands military and investigators had to work’.¹⁶³ The Court specifically mentions the fact that the investigators are in a foreign country, they are not familiar with the language and culture of the country, the local population is hostile towards them, there is a shortage of local pathologists and facilities for autopsies, the danger inherent in any activity at that time, and so on.¹⁶⁴

However *Al-Skeini* and *Jaloud* reveal that the Court is sometimes not prepared to acknowledge in its *application* of the law the inherent constraints that impede a full and effective investigation.¹⁶⁵ In these cases, ‘the Court has simply applied the Convention

¹⁶⁰ *Al-Skeini and Others* (n 13) para 165 as reiterated in *Jaloud* (n 13) para 186. See also *Jaloud* (n 13) para 226

¹⁶¹ *ibid* para 168

¹⁶² *ibid* paras 164-165 as reiterated in *Jaloud* (n 13) para 186

¹⁶³ *Jaloud* (n 13) para 226

¹⁶⁴ *ibid* para 226 and *Al-Skeini and Others* (n 13) para 168

¹⁶⁵ See *Biotti and De Cillia* (n 3) 6; *Park* (n 3) 153; *Chevalier-Watts* illustrates this well too, using cases involving Russia (*Chevalier-Watts* (n 3) 598)

[...] as if the issue were no different from that arising in relation to a normal law enforcement operation'.¹⁶⁶ In *Jaloud*, the Court seems to have 'in fact applied the Convention in a relatively stringent and "undiluted" fashion',¹⁶⁷ a fact recognised in no uncertain terms by a minority of judges themselves (!) in the Joint Concurring Opinion:

[t]o conclude, we consider that the Court has rightfully underlined that in a context such as the incident under scrutiny there may be obstacles to performing what may seem the most effective manner of investigation. However, this point of departure does not sit easily with all aspects of the subsequent painstaking analysis undertaken by the Court.¹⁶⁸

After all, the obligation of investigation is one of means and not results, and as the Court said itself, 'all *reasonable* step [*sic*] must be taken to ensure'¹⁶⁹ an effective investigation. Yet, it seems that even when States take all reasonable steps and explore various avenues, such as in *Jaloud*, they run foul of the requirements.

One way to instil flexibility in the application of the principles and elements is for the Court to follow its jurisprudence which it spelled out in plain terms in the *Tunç and Tunç* case in 2015 by ensuring that these principles 'are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed'.¹⁷⁰ In the *Jaloud* and *Al Skeini* cases the Court seemed sometimes too focused on specific, detailed elements and losing the overview of the purpose of Article 2 ECHR. As the Judges in the Joint Concurring Opinion in *Jaloud* ask: 'Is it really within the competence of our Court to set the standards for investigations at this detailed level in unstable situations such as these which prevailed in Iraq?'.¹⁷¹ If, as the Court maintains, the aim of the procedural

¹⁶⁶ In relation to the Chechen cases, see *Borelli* (n 4) 29

¹⁶⁷ *ibid* 32

¹⁶⁸ *Jaloud* (n 13) para 8

¹⁶⁹ *Al-Skeini and Others* (n 13) para 67 (emphasis added). See also *Isayeva* (n 12) para 212

¹⁷⁰ *Tunç and Tunç* (n 11) para 225. See also *Lovyginy* (n 11) para 103; *Sarbyanova-Pashaliyska and Pashaliyska* (n 16) para 37; *Síním* (n 11) para 65; *Mazepa and Others* (n 16) para 70

¹⁷¹ *Jaloud* (n 13) para 7

aspect of Article 2 ECHR is to secure effective respect for the right to life, then surely what matters most is that the investigation be effective overall and not that each principle/element be observed. It is thus submitted that the guiding principles of adequacy of the investigative measures, the promptness and independence of the investigation, as well the public scrutiny of the investigation, must be taken as a whole. In doing so, the Court would be able to offer some flexibility in its approach.

Some principles, such as that of promptness, independence and public scrutiny, are reasonable and can be fulfilled by armed forces operating abroad. However, where flexibility and situational awareness is sought is in relation to the elements of the principle of effectiveness. The Court needs to understand that investigations in an extra-territorial context are carried out in a different environment where often an established rule of law framework does not exist, the population is extremely hostile, enforcing the law or performing certain tasks might lead to further hostility and might in fact jeopardise the mission, the nature and quantity of the resources available (for example, human resources, logistics) is limited, the armed forces must often work with foreign troops as part of a multinational operations which operate under specific legal rules, the host State has to comply with its own international legal obligations, and so on.¹⁷² The Court must take these factors into account when examining whether the armed forces have undertaken an effective investigation. It is thus imperative that ‘the specificities of the obligation must be interpreted in context’.¹⁷³

7. CONCLUSION

¹⁷² Noëlle Quéniwet and Aurel Sari, *Human Rights and Military Operations: Confronting the Challenges. Workshop Report*, Occasional Paper No 2, University of Exeter Strategy and Security Institute, July 2015, available at <https://nanopdf.com/download/human-rights-and-military-operations-confronting-the-challenges-workshop-report_pdf> (last accessed 2 December 2018), 7-8

¹⁷³ *Amicus Curiae* Brief (n 40) para 40

In earlier case-law, the Court stated that ‘[t]he armed forces of a country exist to protect the liberties valued by a democratic society, and so the armed forces should not be allowed to march over, and cause substantial damage to such principles’.¹⁷⁴ This article does not argue that the armed forces should be free of constraints when deployed in an extra-territorial context. The role of the Court is ‘to challenge bad faith and a lack of political will, which poses an obstacle to adherence to Convention rights’.¹⁷⁵

Undoubtedly the principles should remain valid in the Court’s assessment of State compliance with Article 2 ECHR. Yet, investigations must be carried out if practically feasible. Complying with each principle and each element within the principles is sometimes difficult, though not always ‘mission impossible’, for armed forces deployed abroad. The Court has certainly demonstrated flexibility with regard to some principles such as that of promptness, independence and public scrutiny. Where however the Court has been more intransigent and shown less understanding for the situation on the ground relates to the principle of effectiveness. This might be explained by the fact that this principle is often viewed as the most fundamental one. To some extent, it can be considered as the overarching principle in as much as promptness, independence and public scrutiny contribute to and ensure an effective investigation. Moreover, as ‘the essential purpose of such an investigation is [...] in those cases involving State agents or bodies to ensure their accountability for deaths occurring under their responsibility’¹⁷⁶ only an *effective* investigation can clarify the circumstances leading to the death of an individual (and thus determine whether the force used was lawful) and, if appropriate, identify the alleged perpetrators. As a result, it seems that the Court has considered the fulfilment of some principles such as that of effectiveness and elements thereof (for

¹⁷⁴ *Smith and Grady v UK* App nos 33985/96 and 33986/96 (ECtHR, 27 September 1999) para 83

¹⁷⁵ *Russell* (n 3) 132

¹⁷⁶ *Al-Skeini and Others* (n 13) para 163, *Varnava and Others* (n 37) para 191; *Acar* (n 9) para 121

example, an adequate autopsy) more important than others and so shown less flexibility in their application in situations of (armed) violence in an extra-territorial context.

The potential imposition of detailed requirements to all military operations, including those abroad, and the Court's lack of situational awareness when applying the law has led States whose armed forces are involved abroad to beg the Court to interpret the law in such a way that it does not 'place an impossible or disproportionate burden on a Contracting State'.¹⁷⁷ It is a remarkable pleading, bearing in mind that, in early cases on investigations under Article 2 ECHR, the Court had acknowledged 'the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources' and accordingly recognised that 'positive obligations must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities'.¹⁷⁸ Similar comments concerning the deployment of armed forces in an extra-territorial context have, however, not hindered the Court in applying the law with some disregard to the prevailing security situation and reality of armed conflict.

Whilst the author concedes that adopting a flexible, contextual approach would result in limiting the possibility to punish those responsible and provide adequate remedy to victims and thus seems to offer a 'sliding scale' of duties, it must be stressed that the obligation to investigate still remains. After all, States still need to prove that they fulfilled their 'obligations of means' by using all feasible means and methods to abide by the principles.

¹⁷⁷ *Al-Skeini and Others* (n 13) para 152

¹⁷⁸ *Brecknell* (n 42) para 70