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Seeking the Final Court of Justice: The European Court of Human Rights and Accountability for State Violence in Northern Ireland

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I. INTRODUCTION

November 11, 1982. Three members of the Irish Republican Army (IRA)—Gervaise McKerr, Eugene Toman, and Sean Burns—are traveling together in a car on the Tullygally Road in rural County Armagh.[1] It is nighttime, and the road is damp with rain.[2] The three men are unarmed.[3] They are unaware that they are approaching a roadblock manned by members of the Headquarters Mobile Support Unit (HMSU), a counterinsurgency detachment of the Royal Ulster Constabulary (RUC) Special Branch.[4]

The roadblock's sole purpose is to stop the car driven by McKerr.[5] Two weeks earlier, three police officers were killed when an IRA bomb planted in a culvert exploded at Kinnego Embankment, ripping through their armored car.[6] The Special Branch suspects that Toman and Burns were involved in planning the Kinnego operation and has been following their movements.[7]

1. McKerr v. United Kingdom, 2001-III Eur. Ct. H.R. 475, 485 [hereinafter McKerr].
2. *Id.* ¶ 19 (quoting extensively from the unreported Northern Ireland Court of Appeals decision by Lord Justice Gibson).
3. *Id.* ¶ 11.
4. *See id.* ¶ 11. *See also* PETER TAYLOR, BRITS: THE WAR AGAINST THE IRA 241–53 (2001) (describing the counterinsurgency operations carried out by the HMSU in Northern Ireland in 1982, including the Tullygally Road incident).
5. McKerr, *supra* note 1, ¶ 19.
6. *See* TAYLOR, *supra* note 4, at 247-50.
7. McKerr, *supra* note 1, ¶ 14.

When the car carrying McKerr, Toman, and Burns reaches the checkpoint, the HMSU detachment opens fire, discharging 109 bullets.[8] The vehicle's three occupants are killed.

Over the course of the next month, the members of the HMSU responsible for killing McKerr, Toman, and Burns will take part in two similar operations resulting in the deaths of three additional, unarmed individuals. Two of the victims, Seamus Grew and Roddy Carroll, are active members of the Irish National Liberation Army (INLA), a paramilitary splinter group.[9] The third, Michael Tighe, is a seventeen year-old civilian with no paramilitary connections.[10]

In 1984, three of the members of the HMSU responsible for the deaths of McKerr, Toman, and Burns were brought to trial for their role in the events at Tullygally Road two years earlier. Lord Justice Gibson of the Northern Ireland Court of Appeals, sitting without a jury, found all three not guilty of murder, concluding that "there never was the slimmest chance that the Crown could have hoped to secure a conviction."[11] He added:

> I want to make clear that having heard the entire Crown case exposed in open court I regard each of the accused as absolutely blameless in this matter.
>
> I consider that in fairness to them that finding also ought to be recorded together with my commendation for their courage and determination in bringing the three deceased men to justice, in this case to the final court of justice.[12]

Lord Justice Gibson's controversial commendation was not, as it turns out, the final legal word on the events at Tullygally Road. On May 4, 2001, the *McKerr* incident was at the center of one in a series of four joined decisions (known collectively as the *Jordan et al.* decisions) handed down by the European Court of Human Rights (the "European Court" or "Court").[13] In these cases, the Court held that the United

8. *Id.* ¶ 11.
9. *See* TAYLOR, *supra* note 4, at 244–46
10. *See id.* at 250.
11. McKerr, *supra* note 1, ¶ 19.
12. *Id.* ¶ 20.
13. McKerr, *supra* note 1. Relevant excerpts of the other three cases are available in the appendix to McKerr, 2001-II Eur. Ct. H.R. at 537, and are also available in full on the European Court's website. European Court of Human Rights, http://www.echr.coe.int/echr/ (select "case-law" hyperlink; then follow "HUDOC" hyperlink; then enter applicant number for the following cases and click "Search"). Jordan v. United Kingdom, App. No. 24746/94, Eur. Ct. H.R. (May 4, 2001) [hereinafter Jordan]; Kelly and Others v. United Kingdom, App. No. 30054/96, Eur. Ct. H.R. (May 4, 2001) [hereinafter Kelly

Kingdom had violated the "right to life" enshrined in Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention")[14] by failing to conduct effective official investigations into the incidents at issue in order to determine the lawfulness of the use of lethal force by state agents.

The *Jordan et al.* decisions represent a landmark expansion of the procedural component of the right to life that the European Court has been developing since the mid-1990s. Although in previous cases the Court had found a violation of Article 2 based on the state's failure to properly investigate the use of lethal force by its agents, in the *Jordan et al.* decisions the Court fleshed out the meaning of this procedural requirement by holding that such investigations must meet specific and exacting standards of independence, effectiveness, promptness, and transparency. The Court reinforced its holdings in the *Jordan et al.* decisions in two other cases concerning the British state's use of lethal force in Northern Ireland: *McShane v. United Kingdom* and *Finucane v. United Kingdom*.[15]

The *Jordan et al.* decisions also add an important dimension to the debate over accountability for state violence during the conflict in Northern Ireland. The deaths that prompted the European Court's decisions are illustrative of broader patterns in the use of lethal force by the British state during the roughly thirty years of conflict in Northern Ireland known as "the Troubles." Since the signing of the Good Friday Agreement in 1998,[16] Northern Ireland has been involved in a difficult and fragile peace process. The question of how to deal with past human rights violations plays a major role in Northern Ireland's ongoing political transition. In particular, deaths resulting from state violence constitute a significant and highly emotive category of the nearly 3,700 deaths that occurred during the conflict. The issue of how to achieve accountability for these deaths within the broader framework of a peace process aimed at political compromise and societal reconciliation is of particular

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and Others]; Shanaghan v. United Kingdom, App. No. 37715/97, Eur. Ct. H.R. (May 4, 2001) [hereinafter Shanaghan].

14. Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]. For the full text of Article 2, see *infra* Part II.A.

15. McShane v. United Kingdom, App. No. 43290/98, 35 Eur. Ct. H.R. 593 (2002) [hereinafter McShane]; Finucane v. United Kingdom, App. No. 29178/95, 2003-VIII Eur. Ct. H.R.1 (2003) [hereinafter Finucane]. This article will use the term "*Jordan et al.*" to refer to all six cases from Northern Ireland in which the European Court found a procedural violation of Article 2 based on the United Kingdom's failure to conduct effective official investigations into lethal force deaths.

16. Agreement Reached in the Multi-Party Negotiations, U.K.-Ir., Apr. 10, 1998, 37 I.L.M. 751 [hereinafter Good Friday Agreement].

importance. The *Jordan et al.* decisions speak directly to the question of how institutions and state actors in Northern Ireland might operate in the future in order to ensure that investigations into lethal force deaths comply with international human rights norms. The decisions also open up difficult issues regarding the role of state violence during the past conflict, including the question of how past state violence should be dealt with in the present.

This article examines the impact of the European Court's right to life jurisprudence on the issue of accountability for state violence in Northern Ireland. To date, the initiatives undertaken by the United Kingdom to comply with the European Court's rulings are largely unsatisfactory. Piecemeal institutional reforms aimed at preventing future breaches of Article 2 have failed to fully address the underlying concerns identified by the Court, and domestic right to life jurisprudence has placed significant limitations on the extent to which past violations of the right to life can be dealt with effectively in British courts. The United Kingdom's response therefore calls into question both the government's commitment to honoring the *Jordan et al.* decisions and the capability of ordinary domestic criminal law to deal with systematic human rights abuses of the kind that occurred during the Northern Ireland conflict.

Part II of this article provides historical background on the issue of state violence in Northern Ireland, focusing on the ways in which the use of lethal force to combat political dissent and paramilitary violence created a situation in which protection of the right to life was minimized. Part III examines the European Court's Article 2 jurisprudence, tracing the development of the procedural component of the right to life from its creation in *McCann v. United Kingdom* through the *Jordan et al.* decisions. Part IV discusses the United Kingdom's attempts to comply with the *Jordan et al.* decisions through institutional reforms aimed at specific criticisms identified by the European Court. It also considers the impact of Britain's domestic right to life jurisprudence on the meaning and scope of Article 2 in the domestic context. Part V analyzes the current use of historical investigations and public inquiries aimed at dealing with lethal force deaths in Northern Ireland. The article argues that although these mechanisms have been given a certain impetus by the *Jordan et al.* decisions, they have also been limited in their effectiveness by the British government's reluctance to engage in a robust application of the right to life as defined by the European Court. Part VI evaluates the current status of the protection of the right to life in

Northern Ireland, paying particular attention to the impact of both international human rights law and the political imperatives of Northern Ireland's peace process on the implementation of *Jordan et al.* The article concludes by placing the *Jordan et al.* decisions within the broader context of recent efforts to reestablish political compromise in Northern Ireland, and argues that a greater adherence to the right to life would benefit the peace process.

II. LETHAL FORCE DEATHS IN NORTHERN IRELAND

Beginning in the late 1960s, Northern Ireland experienced roughly three decades of conflict between its Protestant unionist (or loyalist) majority, which favored maintaining the province's union with Britain, and Catholic nationalist (or republican) minority, which sought an end to British rule and the establishment of a united Ireland.[17] Between 1966 and 1999, 3,636 individuals died as a result of political violence.[18] Of these, 3,189, or nearly 90% of the total, were killed by either republican or loyalist paramilitary organizations.[19] By contrast, the security forces—the British Army, Royal Ulster Constabulary, and locally recruited reserve forces such as the Ulster Defence Regiment (UDR)—were responsible for 367 deaths.[20] Yet despite the relatively small number of deaths directly attributable to the state, the significance of state violence within the context of the conflict cannot be underestimated. Although the state's response to the Troubles was in many respects shaped by the nature of paramilitary violence and civil unrest, the reverse is also true—the actions of the state in confronting both real and perceived threats had a profound impact on the contours of the conflict.

Fionnuala Ní Aoláin has identified three major phases in the use of force by the state during the Troubles: militarization, normalization, and counterinsurgency.[21] Both the number and type of lethal force deaths varied within and between these phases as the British state pursued various strategies aimed at quelling unrest and securing Northern Ireland's position within the United Kingdom.

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17. A full explanation of the historical background to the conflict in Northern Ireland lies beyond the scope of this paper. For a comprehensive and balanced overview, see DAVID MCKITTRICK & DAVID MCVEA, MAKING SENSE OF THE TROUBLES: THE STORY OF THE CONFLICT IN NORTHERN IRELAND (2002).

18. DAVID MCKITTRICK ET AL., LOST LIVES: THE STORIES OF THE MEN, WOMEN AND CHILDREN WHO DIED AS A RESULT OF THE NORTHERN IRELAND TROUBLES 1476 (1999).

19. *Id.*

20. *Id.*

21. FIONNUALA NÍ AOLÁIN, THE POLITICS OF FORCE: CONFLICT MANAGEMENT AND STATE VIOLENCE IN NORTHERN IRELAND 26–71 (2000).

The militarization phase commenced in 1969 with the deployment of the British Army into an atmosphere of intense civil unrest and increasing paramilitary violence.[22] The soldiers quickly proved "demonstrably ill-equipped for the task in which they were engaged—in effect, a quasi-policing function in mainly urban areas, with poor training and a lack of local knowledge."[23] Their heavy-handed responses to marches, riots, and street violence resulted in the deaths of 188 individuals between 1969 and 1974.[24]

Bloody Sunday, which occurred on January 30, 1972, epitomized state violence during this period. On that day, British paratroopers shot and killed thirteen unarmed Catholics during a civil rights march in Derry.[25] The Widgery Tribunal, convened by the British government in the wake of Bloody Sunday, absolved the paratroopers of any wrongdoing and suggested that the demonstrators who were killed had posed a threat to safety and security.[26] From the outset, the nationalist community rejected these findings as a whitewash of the incident and further proof of Britain's unwillingness to uphold the rule of law in Northern Ireland.[27]

By the mid-1970s, the British government recognized that it faced a long-term crisis in Northern Ireland, and the failure of the overt military response to restore order during the early years of the conflict led to a shift in tactics. The government abandoned the militarization strategy in favor of normalization: political violence was recast as criminal activity, and the traditional institutions of law and order (such as the police and

22. *See id.* at 29–44.
23. *Id.* at 31.
24. *Id.* at 33.
25. *See* Angela Hegarty, *The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland*, 26 FORDHAM INT'L L.J. 1148, 1162–65 (2003) (providing an overview of Bloody Sunday). A fourteenth individual shot by the paratroopers on Bloody Sunday died later as the result of his wounds. *See id.* at 1163.
26. TRIBUNAL UNDER THE TRIBUNALS OF INQUIRY (EVIDENCE) ACT 1921, INQUIRY INTO THE EVENTS ON 30 JANUARY 1972 WHICH LED TO LOSS OF LIFE IN CONNECTION WITH THE PROCESSION IN LONDONDERRY ON THAT DAY, 1972, H.L. 101, H.C. 220.
27. During the 1990s, independent investigations into Bloody Sunday produced strong evidence that the fourteen dead marchers were unarmed and innocent of any wrongdoing at the time they were shot. *See generally* DON MULLAN, BLOODY SUNDAY: MASSACRE IN NORTHERN IRELAND (1997) (providing eyewitness accounts of the incident indicating that the actions of the British soldiers were not provoked by violence on the part of the victims). In 1998, the British government announced the creation of a second Bloody Sunday Inquiry into the day's events. To date, it is the largest and most expensive public inquiry in British history. Publication of the Inquiry's final report has been continually delayed and is still pending. *See* Bloody Sunday Inquiry, http://www.bloody-sunday-inquiry.org (last visited Sept. 28, 2007).

the courts) assumed greatly enhanced roles in the state's response to the paramilitary threat.[28] As the primary theater of conflict moved off the streets and into the courtrooms and prisons of Northern Ireland, the number of lethal force deaths dropped significantly.[29]

Nonetheless, Britain faced substantial international criticism for the legal processes implemented during the normalization phase, as their deviations from the patterns of the ordinary criminal justice system became apparent.[30] For example, in its landmark 1978 decision *Ireland v. United Kingdom*, the European Court of Human Rights held that the so-called "five techniques" employed during interrogations in Northern Ireland amounted to "inhuman or degrading treatment" under Article 3 of the European Convention.[31]

The normalization phase contained the seeds of its undoing. The removal of "special category status" from paramilitary prisoners gave rise to prison protests and the hunger strikes of 1980-81. This in turn provided the republican movement with the political momentum necessary to reinvigorate its war against the British state.[32] The counterinsurgency phase, which began in the wake of the hunger strikes and lasted until the paramilitary ceasefires in 1994, was characterized by a renewed campaign of violence on the part of paramilitary groups and proactive military activity by state agents.[33] Five of the six incidents at issue in the *Jordan et al.* decisions occurred during this period.

Broadly speaking, Britain's counterinsurgency initiatives during the 1980s and early 1990s took two forms. First, the state infiltrated paramilitary organizations with informers, obtained information regarding terrorist

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28. NÍ AOLÁIN, *supra* note 21, at 44–56.

29. *Id.* at 52. Between 1975 and 1980, fifty-four individuals were killed by security forces. *Id.*

30. *See id.* at 55–56.

31. Ireland v. United Kingdom, 2 Eur. Ct. H.R. 25, 58–62, 79–81 (1978). The "five techniques" used in Northern Ireland were: forcing detainees to remain in "stress positions" for long periods of time, putting bags on detainees' heads, exposing detainees to continuous white noise, depriving detainees of sleep, and depriving detainees of food and drink. *Id.* at 58. Article 3 of the European Convention declares: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention, *supra* note 14, art. 3.

32. Prior to the removal of special category status, paramilitary prisoners in Northern Ireland enjoyed a status similar to that afforded to prisoners of war under the Geneva Conventions. *See* NÍ AOLÁIN, *supra* note 21, at 45. After its removal, these prisoners were treated in a manner consistent with that of ordinary criminals. *Id.* Republican prisoners engaged in a lengthy and multifaceted protest aimed at the reinstitution of special category status, culminating in hunger strikes that led to the deaths of ten prisoners. The hunger strikes resulted in international criticism of the British government and renewed support, both in Northern Ireland and abroad, for the IRA and its political wing, Sinn Fein. *See generally* DAVID BERESFORD, TEN MEN DEAD: THE STORY OF THE 1981 IRISH HUNGER STRIKE (1987).

33. *See* NÍ AOLÁIN, *supra* note 21, at 57–70.

plots, and used specialized military and police units to engage paramilitaries in set-piece confrontations.[34] These confrontations frequently culminated in the use of overwhelming lethal force against paramilitary suspects even when it appeared that the suspects might easily have been arrested or otherwise prevented from carrying out attacks.[35] This recurring pattern of violence gave rise to allegations that the state was following a "shoot-to-kill" policy in regard to IRA suspects.

As a result of the HMSU's activities in County Armagh in 1982, the British government launched an inquiry into shoot-to-kill allegations under the leadership of John Stalker, a British police detective.[36] Stalker's investigation allegedly uncovered evidence of the existence of a shoot-to-kill policy, but its findings were suppressed by the government and lethal force deaths resulting from set-piece confrontations continued.[37] The shoot-to-kill controversy was perpetuated by a series of incidents, including the *Kelly and Others* incident, during which eight IRA members were killed during a raid on a rural police station in 1987,[38] the *McCann* incident, involving the deaths of three IRA activists in Gibraltar in 1988,[39] and the *Jordan* incident, where an IRA member in West Belfast was shot and killed while allegedly transporting illegal weapons in 1992.[40] The general failure of domestic courts to hold state agents criminally liable for their use of lethal force exacerbated nationalist outrage at these incidents. For example, between 1974 and 1994, thirty-

34. *See id.* at 58–64, 66–70. *See also* TAYLOR, *supra* note 4, at 270–85 (describing a number of the most controversial counterinsurgency incidents from the 1980s).

35. *See* NÍAOLÁIN, *supra* note 21, at 60–62, 66–68.

36. *See id.* at 60.

37. *See generally* JOHN STALKER, THE STALKER AFFAIR (1988) (providing a firsthand account of the investigation and subsequent cover-up).

38. *See* Kelly and Others, *supra* note 13. In 1987, eight men from the IRA's East Tyrone Brigade launched an attack on the RUC station in the village of Loughgall. *See* TAYLOR, *supra* note 4, at 271–78. The British Army had advance warning of the attack, and when the IRA unit arrived in Loughgall they were ambushed by the Army and RUC. Kelly and Others, *supra* note 13, ¶¶ 12-14. All eight IRA members were killed, along with an innocent bystander, Anthony Hughes. *Id.* ¶¶ 28, 43.

39. *See infra* Part II.B.

40. In 1992, the RUC received word that the IRA was planning to move weapons in the IRA stronghold of West Belfast. Jordan, *supra* note 13, ¶ 19. Members of the HMSU mistakenly identified a vehicle driven by IRA member Pearse Jordan as the car containing the weapons. *Id.* The HMSU proceeded to run Jordan's vehicle off the road, and fired on him as he attempted to exit the car. *Id.* Jordan died later after having been transported to the hospital with gunshot wounds. *Id.* ¶ 16. He was unarmed at the time he was killed, and despite initial statements to the contrary, no weapons were found in his car. *Id.* ¶ 13.

four state agents were prosecuted for the use of lethal force while on-duty, resulting in only eight convictions.[41]

Second, during the counterinsurgency phase, allegations arose of collusion between state agents and members of loyalist paramilitary organizations in carrying out assassinations of prominent Catholic nationalists. Symbolic of the collusion issue was the murder of Patrick Finucane, a defense lawyer who was well-known for defending IRA suspects.[42] After loyalist paramilitaries murdered Finucane in his home in 1989, evidence emerged suggesting the British Army either knew about or actively participated in the plot.[43] Similarly, the murder of republican political activist and suspected IRA member Patrick Shanaghan in 1991 gave rise to claims of collusion upon disclosure that the loyalists responsible for Shanaghan's death might have possessed sensitive British Army intelligence documents.[44] Two inquiries into allegations of collusion carried out by high-ranking British police officer Sir John Stevens allegedly uncovered evidence of collusion between state agents and loyalist paramilitaries, but like the findings of the Stalker Investigation into shoot-to-kill allegations these reports were never made public.[45]

The 1994 ceasefires called by the IRA and Combined Loyalist Military Command, an umbrella organization representing loyalist paramilitary groups, ushered in what might be characterized as a fourth phase of the Troubles: conflict resolution.[46] Paramilitary violence dropped significantly as a result of the ceasefires.[47] Similarly, state

41. Ní AOLÁIN, *supra* note 21, at 73.

42. For a thorough account of the murder of Patrick Finucane and its important place in the overall collusion controversy, see JUSTIN O'BRIEN, KILLING FINUCANE: MURDER IN DEFENCE OF THE REALM (2005).

43. *See* Finucane, *supra* note 15, ¶¶ 24-25. Brian Nelson, the intelligence officer for the Ulster Defence Association (UDA), the loyalist paramilitary group responsible for Finucane's death, was an informant for the British secret service. *Id.* ¶ 24. Following Finucane's murder, evidence emerged that Nelson had informed his handlers of the plot to kill the solicitor before the assassination was carried out. *Id.* ¶ 25.

44. *See* Shanaghan, *supra* note 13, ¶¶ 12–27. Prior to his death, Shanaghan had received a warning from the British Army that sensitive intelligence documents containing his picture and other personal information had fallen out of the back of a military vehicle, and might have ended up in the hands of loyalist paramilitaries. *Id.* ¶ 18. Shanaghan attempted to learn more about the contents of the missing intelligence documents from the British Army in order to assess the threat to his life, but the Army did not respond to his queries before he was killed. *Id.*

45. *See* Finucane, *supra* note 15, ¶¶ 21–33 (describing the work of the Stevens collusion inquiries).

46. For an account of the 1994 ceasefires, see MCKITTRICK & MCVEA, *supra* note 17, at 184–213.

47. *See* MCKITTRICK ET AL., *supra* note 18, at 1474 (providing figures for the total number of deaths resulting from political violence between 1995 and 1999).

agents were responsible for just five deaths between 1994 and 1999.[48] Confrontations between the state and civilians during this period stemmed frequently from riots and demonstrations reminiscent of those that took place during the earliest years of the conflict. For example, Dermot McShane, a Catholic, was killed by the British Army during the course of a riot triggered by the government's decision to allow a provocative Protestant march to proceed through a Catholic neighborhood in 1996.[49]

The 1998 Good Friday Agreement, negotiated by the governments of the United Kingdom and the Republic of Ireland, as well as the majority of Northern Ireland's political parties, cemented the peace process initiated by the paramilitary ceasefires.[50] The Agreement, which proposed a three-tiered power-sharing structure as a means of satisfying the political demands of both sides of the conflict, remains the foundational document upon which Northern Ireland's peace process rests.[51] Among the many problems the Agreement has faced, however, is a widespread and lingering dissatisfaction with the lack of provisions made for coming to terms with the violence of the past. Conspicuously absent from the Agreement is a "'past-specific mechanism' addressed at accountability or truth-telling."[52] As a result, the issue of accountability for state violence remains a salient political and legal issue in Northern Ireland. It is against this backdrop of decades of conflict and fragile peace that the European Court delivered its *Jordan et al.* judgments between 2001 and 2003.

48. *Id.* at 1476.

49. McShane was involved in a riot in Derry, and was standing behind a makeshift barrier, when an armored personnel carrier advanced on the barrier and ran him over. *See* McShane, *supra* note 15, ¶¶ 9–13. Marches held annually during the summer months by the Orange Order and other Protestant unionist organizations have long been a flashpoint for conflict between unionists and nationalists. Violence resulting from these marches spiked in the years following the paramilitary ceasefires, as the Orange Order insisted on its right to follow "traditional" parade routes in the face of increased hostility from local Catholic communities. *See generally* CHRIS RYDER & VINCENT KEARNEY, DRUMCREE (2001) (providing a history of the conflict over the "marching season").

50. *See* Good Friday Agreement, *supra* note 16.

51. *Id.*

52. Christine Bell, *Dealing with the Past in Northern Ireland*, 26 FORDHAM INT'L L.J. 1095, 1106 (2003).

III. EUROPEAN COURT JURISPRUDENCE ON THE RIGHT TO LIFE

A. Article 2 of the European Convention on Human Rights

The right to life occupies a vaunted position in international human rights law—it is, essentially, the right from which all others rights are derived.[53] Article 3 of the Universal Declaration of Human Rights states that "[e]veryone has the right to life, liberty and security of person."[54] Further, Article 6 of the International Covenant on Civil and Political Rights (ICCPR) sketches the basic contours of the right to life by requiring states to (1) afford legal protection to the right to life and (2) refrain from arbitrary deprivation of life.[55] All major regional human rights instruments contain similar statements regarding the right to life.[56]

Article 2 of the European Convention establishes the right to life in the European context. Similar to Article 6 of the ICCPR, Article 2 places an obligation on states to legally protect the right to life and limits permissible deprivation to a discrete set of circumstances. The text of Article 2 reads:

> 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 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 the escape of a person lawfully detained;

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53. *See, e.g.*, Kurt Herndl, *Foreword* to THE RIGHT TO LIFE IN INTERNATIONAL LAW XI (B.G. Ramcharan ed., 1983) (describing the right to life as "a primordial right which inspires and informs all other rights").

54. Universal Declaration of Human Rights, G.A. Res. 217A, at art. 3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

55. International Convention on Civil and Political Rights, art. 6, Dec. 16, 1966, 999 U.N.T.S. 171.

56. *See* American Convention on Human Rights art. 4, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 144, *available at* http://www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm ("Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."); African Charter on Human and Peoples' Rights, art. 4, *adopted* June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, *available at* http://www1.umn.edu/humanrts/instree/z1afchar.htm ("Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."). *See also* B.G. Ramcharan, *The Concept and Dimensions of the Right to Life*, *in* THE RIGHT TO LIFE IN INTERNATIONAL LAW, *supra* note 53, at 2–3 (describing the role of the right to life in international human rights instruments).

c. in action lawfully taken for the purpose of quelling a riot of insurrection.[57]

The importance of the right to life is underscored by Article 15(2) of the European Convention, which prohibits derogation from Article 2.[58] Moreover, in the *Jordan et al.* decisions, the European Court recognized that Article 2 "ranks as one of the most fundamental provisions in the Convention" insofar as it "enshrines one of the basic values of the democratic societies making up the Council of Europe."[59] Yet prior to its *McCann* decision in 1995, the European Court developed virtually no jurisprudence concerning the right to life. The European Commission screened out Article 2 complaints submitted to the Convention system for review before they reached the Court.[60]

Several of these failed Article 2 complaints stemmed from the conflict in Northern Ireland. In *Ireland v. United Kingdom*, the case dealing with the treatment of terrorist suspects in Northern Ireland's interrogation centers, the Commission held that the Article 2 portion of the complaint was inadmissible because the applicants failed to provide evidence of administrative practice.[61] Furthermore, in *Stewart v. United Kingdom* and *Kelly v. United Kingdom*, two cases concerning the use of lethal force against civilians by the British Army, the Commission accepted, without criticism, the Northern Ireland High Court's factual interpretations of the incidents and concluded that the use of lethal force had been "absolutely necessary" under the terms of Article 2.[62] The Commission

57. European Convention, *supra* note 14, art. 2.

58. *Id.* art. 15(2) ("No derogation from Article 2, except in respect of deaths resulting from lawful acts of war . . . shall be made under this provision."). In general, Article 15 permits states to derogate from certain of their obligations under the European Convention "in time of war or other public emergency threatening the life of the nation." *Id.* art. 15(1).

59. Jordan, *supra* note 13, ¶ 102; Kelly and Others, *supra* note 13, ¶ 91; McKerr, *supra* note 1, ¶ 108; McShane, *supra* note 15, ¶ 91; Shanaghan, *supra* note 13, ¶ 85.

60. Under the European Convention system, the European Commission receives initial petitions from applicants and reaches substantive decisions before such petitions are allowed to reach the Court. *See* DONALD W. JACKSON, THE UNITED KINGDOM CONFRONTS THE EUROPEAN CONVENTION ON HUMAN RIGHTS 13–15 (1997) (explaining the role of the European Commission in the Convention system).

61. Ireland v. United Kingdom, *supra* note 31. The doctrine of administrative practice allows the Court to consider evidence of systematic human rights abuses within the context of its consideration of an individual claim.

62. The underlying incidents in these two cases were highly controversial. The deceased in *Stewart* was a thirteen year-old boy killed by a rubber bullet. The Army claimed that he had been taking part in a riot at the time he was shot. Stewart v. United Kingdom, App. No. 10044/82, 39 Eur. Comm'n H.R. Dec. & Rep. 162 (1984). The

therefore declared both cases inadmissible to the Court. These decisions rendered the right to life meaningful only in theory. In practice, the Commission had established such a high threshold for bringing an Article 2 claim that the European Court had no opportunity to interpret the meaning and parameters of the provision.

B. Procedural Protection of the Right to Life

1. McCann v. United Kingdom*: Procedural Protection at the Planning and Control Stage*

The European Court's 1995 decision in *McCann v. United Kingdom* announced a sweeping change in right to life jurisprudence under the European Convention.[63] In *McCann*, the Court undertook its first analysis of the deliberate use of lethal force by state agents. The Court's decision identified a procedural component of the right to life. Specifically, it held that states must plan and control law enforcement actions where the use of lethal force is a possible outcome in such a way as to respect the right to life of the targets of the action—even where those targets are engaged in terrorist activity.

The underlying incident in *McCann* was perhaps the paradigmatic example of the alleged shoot-to-kill policy carried out by the British state during the counterinsurgency phase. In early 1988, British intelligence received credible reports that the IRA planned to stage a terrorist attack in the colony of Gibraltar.[64] Daniel McCann, Mairead Farrell, and Sean Savage were identified as the members of the IRA "active service unit" charged with carrying out the attack. All three were sighted in Spain on March 4, 1988 and subsequently placed under surveillance.[65] Their vehicle was identified as it crossed the border into Gibraltar,[66] but British intelligence allowed the suspects to proceed on the grounds that permitting them to enter the territory and plant their bomb would result in greater evidence for use at trial.[67]

The joint counterterrorist operation planned by British intelligence, the British Army's elite Special Air Service (SAS) unit, and local Gibraltar law enforcement officials proceeded on the basis of three interrelated

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deceased in *Kelly*, also a teenager, was shot while driving a stolen car towards a British Army roadblock. Despite the prevalence of such "joyriding" incidents in Belfast at the time, the Army insisted that the soldiers believed that the deceased was a terrorist. Kelly v. United Kingdom, App. No. 17579/90, 74 Eur. Comm'n H.R. 139 (1993).

63. McCann v. United Kingdom, 21 Eur. H.R. Rep. 97 (1995).
64. *Id.* ¶ 13.
65. *Id.* ¶¶ 21, 23.
66. *Id.* ¶ 38.
67. *Id.* ¶¶ 36–37.

threat assessments: (1) McCann, Farrell, and Savage were "dangerous terrorists" who would be armed and likely to use their weapons if confronted;[68] (2) the attack would be carried out by means of a car bomb, and a "blocking car" would not be used;[69] and (3) the operation would be a "button job," meaning that the suspects would have the capacity to detonate the bomb at considerable distance through the use of a small, concealable device.[70] After a cursory examination of the suspects' vehicle allegedly confirmed suspicions that it contained a bomb,[71] local law enforcement officials passed exclusive control of the operation to the SAS with the understanding that the soldiers' permissible actions included "the use of lethal force for the preservation of life."[72] Ultimately, the SAS confronted all three IRA suspects and opened fire when each suspect was deemed to have acted in a manner consistent with reaching for either a weapon or a detonation device.[73] Autopsies later determined that Farrell "had been shot three times in the back, from a distance of some three feet . . . . She had five wounds to the head and neck."[74] McCann "had been shot in the back twice and had three wounds to the head."[75] Savage was "riddled with bullets," having been shot sixteen times.[76] Additionally, the pathologist determined that strike marks in the pavement and the angle of Savage's wounds were consistent with having been shot in the head while on the ground.[77]

The United Kingdom's response to the Gibraltar incident was characterized as "a whitewash, backed up by a stone wall, followed by a tactical retreat as contradictory evidence was presented."[78] One-by-one, the threat assessments made by British intelligence prior to the counterterrorist operation proved incorrect.[79] Nonetheless, the British

68. *Id.* ¶ 23.
69. *Id.* The Court defined a "blocking car" as "a car not containing a bomb but parked in the . . . area in order to reserve a space for the car containing the bomb." *Id.*
70. *Id.* ¶¶ 24–31.
71. *Id.* ¶¶ 48–53.
72. *Id.* ¶ 54.
73. For a description of the shootings of McCann and Farrell, see *id.* ¶¶ 59–76. For a description of the shooting of Savage, see *id.* ¶¶ 77–90.
74. *Id.* ¶ 108.
75. *Id.* ¶ 109.
76. *Id.* ¶ 110.
77. *Id.*
78. JACKSON, *supra* note 60, at 57.
79. All three suspects were unarmed at the time of the shooting. McCann, *supra* note 63, ¶ 93. Although their intention was to detonate a car bomb in Gibraltar, the vehicle they had parked just prior to their deaths was in fact a "blocking car" and did not

government contended that the SAS's actions were reasonable in light of the potential terrorist threat it faced.[80]

The Court began its analysis in *McCann* by establishing an exceptionally high standard of necessity and proportionality for examining the use of lethal force by the state:[81]

> [T]he use of the term "absolutely necessary" in Article 2(2) 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 paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2.[82]

The Court emphasized that, due to the importance of the right to life in democratic societies, deprivations of life by the state were subject to "the most careful scrutiny, particularly where deliberate lethal force is used."[83] Therefore, the Court determined that its frame of reference for analyzing the lawfulness of the state's actions encompassed not only the moment at which state agents actually employed lethal force, but also "all the surrounding circumstances including such matters as the planning and control of the actions under examination."[84]

Using this heightened standard of review and expanded frame of reference, the Court found that the United Kingdom's use of lethal force against McCann, Farrell, and Savage violated Article 2 paragraph 2 of the Convention. The Court did not find evidence of either an explicit or implicit shoot-to-kill policy on the part of the state.[85] Nor did it hold that the individual SAS soldiers who used lethal force had committed a substantive violation of the right to life.[86] Instead, the Court focused on

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contain explosives. *Id.* ¶¶ 96, 98-99. The lack of explosives in the car ruled out the possibility that any of the suspects were reaching for a detonation device at the time they were shot, and furthermore it was uncertain whether or not the IRA even possessed the technological capability to carry out a "button job" in Gibraltar. *Id.* ¶¶ 112–17.

80. *Id.* ¶ 190.

81. According to Ní Aoláin, "[t]he right to life emerged from the *McCann* decision as a strict scrutiny right subject to enhanced review." Fionnuala Ní Aoláin, *Truth Telling, Accountability, and the Right to Life in Northern Ireland*, 5 EUR. H.R. L. REV. 572, 577 (2002).

82. McCann, *supra* note 63, ¶ 149.

83. *Id.* ¶ 150.

84. *Id.*

85. *Id.* ¶ 180.

86. *Id.* ¶ 200. The Court held that the individual soldiers' honest belief in the necessity of their actions absolved them of any wrongdoing. According to the Court:

> [T]he use of force by agents of the State in pursuit of one of the aims delineated in Article 2(2) of the Convention may be justified under this provision when it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the

three significant procedural flaws in the state's planning and control of the counterterrorist action. First, the state's decision to allow the suspects into Gibraltar rather than arrest them at the border represented a "serious miscalculation by those responsible for controlling the operation."[87] Second, the Court criticized the United Kingdom's steadfast reliance on threat assessments that proved to be false because such reliance resulted in "the absence of sufficient allowances being made for alternative possibilities."[88] Lastly, the Court held that the failure to allow for a margin of error in the threat assessments was compounded by the use of SAS soldiers who had been trained to use deadly force when confronted with a terrorist threat of the type described by their intelligence.[89]

The Court's assessment of the applicants' claims under Article 2(1)—specifically, that the British government had failed to uphold its obligation to protect the right to life under domestic law—was not determinative in *McCann*. Nonetheless, it proved extraordinarily significant in light of the Court's subsequent Article 2 decisions. The Court recognized that the Convention's legal prohibition on the arbitrary taking of life by the state would be ineffective without the existence of domestic procedures designed to review the lawfulness of the use of lethal force.[90] The Court held that Article 2, when read in conjunction with Article 1 of the Convention,[91] "requires by implication that there should be some form of effective official investigation when individuals have been killed as the result of the use of force by, *inter alios*, agents of the state."[92] In *McCann,* the Court determined that the coroner's inquest held under Gibraltar's domestic law, which took into account a substantial amount of evidence before rendering its verdict of "lawful killing," satisfied the *ex post facto* procedure requirement.[93] The Court therefore declined to elaborate on the form an effective official investigation should otherwise

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State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.

Id.

87. *Id.* ¶ 205.
88. *Id.* ¶¶ 206–10.
89. *Id.* ¶¶ 211–12.
90. *Id.* ¶ 160.
91. European Convention, *supra* note 14, art. 1 (mandating that states must "secure to everyone in their jurisdiction the rights and freedoms defined in [the] Convention").
92. *McCann*, *supra* note 63, ¶ 161.
93. *See id.* ¶¶ 103–21 (describing, in detail, the evidence presented in the Gibraltar coroner's inquest).

take.[94] Although the Court followed the *McCann* decision with a string of cases in which it held states liable for violating the procedural right to life at the planning and control stage,[95] it did not return to the issue of investigations into lethal force deaths until 2000.

2. Kaya v. Turkey*: Procedural Protection at the Investigative Stage*

In its 2000 decision in *Kaya v. Turkey*, the Court shifted its procedural inquiry away from the planning and control of law enforcement that resulted in the use of lethal force to the investigation that took place after the death occurred. In doing so, the Court identified the right to life component that would form the basis of its subsequent *Jordan et al.* decisions: the procedural right to life at the investigative stage.

Kaya concerned the death of an individual during a counterterrorist operation carried out by Turkish security forces in southeastern Turkey. The state alleged that the deceased was a member of the Workers' Party of Kurdistan (PKK) and was involved in a shootout with state agents when he was killed.[96] The deceased's brother, the applicant, by contrast, argued that the deceased was not involved in political activity and had been unlawfully killed by the security forces.[97] Independent fact-finding attempts failed to verify the events as described by either side, and as a result the Court was unable to conclude whether the deceased was killed in the unlawful circumstances alleged by his brother.[98] Consequently, the Court was unable to find a breach of Article 2 on the necessity and proportionality grounds used in *McCann*, where the state's responsibility for the deaths in question was undisputed.[99]

Instead of abandoning its Article 2 inquiry, however, the Court turned to an analysis of the state's *ex post facto* investigation of the incident. The Court had already established its authority to conduct such an analysis in *McCann*.[100] Recalling its determination that the legal prohibition on arbitrary killing would be meaningless if no procedures existed for reviewing the lawfulness of the use of lethal force by the state, and reiterating its stance that a combined reading of Articles 1 and 2 of the

94. *Id.* ¶ 162 ("[I]t 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, since public Inquest proceedings, at which the applicants were legally represented and which involved the hearing of 79 witnesses, did in fact take place.").

95. *See, e.g.*, Egri v. Turkey, E.H.R.R. 1998-IV; Avsar v. Turkey, Judgment, Eur. Ct. H.R. (July 10, 2001).

96. Kaya v. Turkey, App. No. 158/1996/777/978, Judgment, Eur. Ct. H.R., ¶¶ 11–15 (Feb. 19, 1998).

97. *Id.* ¶¶ 9–10.

98. *Id.* ¶¶ 74–78.

99. *See id.* ¶ 78.

100. *See supra* notes 90–92 and accompanying text.

Convention obliged states to carry out effective official investigations into lethal force deaths,[101] the Court embarked on an analysis of the minutiae of the investigative procedures used by Turkey following Kaya's death. The Court criticized the lack of a thorough crime scene analysis, the failure to take statements from soldiers involved in the shooting, the absence of corroborating evidence from local civilians who might have had information regarding the incident, and the ineffectiveness of the post-mortem examination carried out at the scene of the shooting.[102] Moreover, the Court rejected Turkey's argument that where the use of lethal force by the security forces occurred within the context of a prolonged counterterrorist campaign, the state was absolved of its duty to do anything more than meet the minimal requirements of its domestic law.[103] Turkey's investigative failures thus led the Court to hold that it had breached Article 2.[104]

C. The Jordan et al. Decisions: Effective Official Investigations into Lethal Force Deaths

In its four joined decisions of May 4, 2001, and subsequently in *McShane* and *Finucane*, the European Court built upon its decision in *Kaya* by articulating precise standards for the procedural requirement that states undertake "effective official investigations" into lethal force deaths. Specifically, the Court held that such investigations must be independent, prompt, effective, and transparent—terms which it defined in considerable detail. Working within this framework, the Court directed specific criticisms at the RUC, Department of Public Prosecutions (DPP), and coroner's inquest system for their roles in investigating lethal force deaths.

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101. Kaya, *supra* note 96, ¶ 86.
102. *Id.* ¶¶ 89–92.
103. *Id.* ¶ 91. In regard to the impact of the ongoing counterinsurgency campaign in southeastern Turkey on its Article 2 analysis, the Court explained:

> The Court notes that loss of life is a tragic and frequent occurrence in view of the security situation in south-east Turkey. However, neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces, more so in cases such as the present where the circumstances are in many respects unclear.

Id. (citation omitted).
104. *Id.* ¶ 92.

1. Components of an Effective Official Investigation

According to Ní Aoláin, "[e]ffective official investigation becomes the mantra of [the *Jordan et al.* decisions] and the significance of what that means is spelt out in some detail. There is a sense that the Court is not allowing the state any room to hide under vague and general platitudes but rather wants specific imperatives to follow the principle."[105] These imperatives are firmly rooted in international human rights law. The Court grounded its analysis in the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials ("UN Force and Firearms Principles"), which require states to engage in an "effective review process" of lethal force deaths caused by their agents.[106] In addition, the Court found support for its analysis in the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions ("UN Principles on Extra-Legal Executions"), which require "a thorough, prompt and impartial investigation" into lethal force deaths carried out by an investigative authority with the power to compel testimony from law enforcement officials involved in the fatal incident.[107] The Court also discussed the relevance of the United Nations' "Minnesota Protocol," which provides minimum guidelines for the conduct of inquiries into suspicious deaths, particularly those caused by the state.[108]

Based on these international principles, the Court identified four basic components of an effective official investigation. First, the individuals charged with carrying out the investigation must be "independent from those implicated in the events."[109] According to the Court, this requires "not only a lack of hierarchical or institutional connection but also a practical independence."[110] For example, it would not be sufficient for the police to investigate allegations of unlawful killing on the part of the military where the police and military have strong cross-institutional or operational ties.[111]

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105. Ní Aoláin, *supra* note 81, at 581.
106. *See, e.g.*, Jordan, *supra* note 13, ¶¶ 87–89.
107. *See, e.g.*, *id.* ¶ 91.
108. *See, e.g.*, *id.* ¶ 92.
109. *Id.* ¶ 106; Kelly and Others, *supra* note 13, ¶ 95; McKerr, *supra* note 1, ¶ 112; Shanaghan, *supra* note 13, ¶ 89; McShane, *supra* note 15, ¶ 95; Finucane, *supra* note 15, ¶ 68.
110. Jordan, *supra* note 13, ¶ 106; Kelly and Others, *supra* note 13, ¶ 95; McKerr, *supra* note 1, ¶ 112; Shanaghan, *supra* note 13, ¶ 89; McShane, *supra* note 15, ¶ 95; Finucane, *supra* note 15, ¶ 68.
111. *See* Kelly and Others, *supra* note 13, ¶ 114; McShane, *supra* note 15, ¶ 111 (both holding that the police investigation lacked the requisite independence even though the victims were killed by the military).

Second, investigations must be capable of leading "to a determination of whether the force used . . . was or was not justified in the circumstances" and "identify[ing] and punish[ing] . . . those responsible."[112] The Court stressed, however, that this was "not an obligation of result, but of means."[113] The effectiveness of investigations should be judged not on their actual outcomes, but rather on the reasonableness of the steps taken during the investigation and their utility for establishing the cause of death and the persons responsible.

Third, investigations into lethal force deaths must be prompt. The Court recognized that investigations might be delayed for a variety of reasons specific to a given situation, but nonetheless required that investigations proceed with "reasonable expedition."[114] Promptness, in the Court's view, is integral to the broader political and social credibility of the investigation into a lethal force death: "[A] prompt response . . . may generally be regarded as essential in maintaining public confidence in [the investigating authority's] adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."[115]

Fourth, effective official investigations must be transparent. In other words, they must be open to a degree of public scrutiny.[116] Most importantly, the Court insisted that transparency requires that "[i]n all cases . . . the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."[117] The role of the victims' families in the investigative process was a central concern in all six *Jordan et al.* decisions.

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112. Jordan, *supra* note 13, ¶ 107; Kelly and Others, *supra* note 13, ¶ 96; McKerr, *supra* note 1, ¶ 113; Shanaghan, *supra* note 13, ¶ 90; McShane, *supra* note 15, ¶ 96; Finucane, *supra* note 15, ¶ 69.

113. Jordan, *supra* note 13, ¶ 107; Kelly and Others, *supra* note 13, ¶ 96; McKerr, *supra* note 1, ¶ 113; Shanaghan, *supra* note 13, ¶ 90; McShane, *supra* note 15, ¶ 96; Finucane, *supra* note 15, ¶ 69.

114. Jordan, *supra* note 13, ¶ 108; Kelly and Others, *supra* note 13, ¶ 97; McKerr, *supra* note 1, ¶ 114; Shanaghan, *supra* note 13, ¶ 91; McShane, *supra* note 15, ¶ 97; Finucane, *supra* note 15, ¶ 70.

115. Jordan, *supra* note 13, ¶ 108; Kelly and Others, *supra* note 13, ¶ 97; McKerr, *supra* note 1, ¶ 114; Shanaghan, *supra* note 13, ¶ 91; McShane, *supra* note 15, ¶ 97; Finucane, *supra* note 15, ¶ 70.

116. Jordan, *supra* note 13, ¶ 109; Kelly and Others, *supra* note 13, ¶ 98; McKerr, *supra* note 1, ¶ 115; Shanaghan, *supra* note 13, ¶ 92; McShane, *supra* note 15, ¶ 98; Finucane, *supra* note 15, ¶ 71.

117. Jordan, *supra* note 13, ¶ 109; Kelly and Others, *supra* note 13, ¶ 98; McKerr, *supra* note 1, ¶ 115; Shanaghan, *supra* note 13, ¶ 92; McShane, *supra* note 15, ¶ 98; Finucane, *supra* note 15, ¶ 71.

2. *Criticisms of the United Kingdom's Investigative Mechanisms*

The Court rejected the British government's contention that investigations carried out by the police and DPP, the coroner's inquest process, and civil proceedings initiated in connection with four of the six *Jordan et al.* decisions cumulatively satisfied Article 2's procedural requirements. It summarily dismissed the utility of civil proceedings in such matters on the grounds that (1) these proceedings were initiated by the applicants, not the state, and (2) the civil proceedings were incapable of identifying and punishing any alleged perpetrators.[118] Responsibility for initiating outcome-oriented investigations into lethal force deaths therefore rests with the state. In terms of the other investigative mechanisms, the Court conceded that the cumulative actions of various state agencies might in some circumstances satisfy Article 2's procedural requirements, but held that in these six cases the mechanisms employed by the United Kingdom failed to meet the standards for an effective official investigation.[119]

a. Police Investigations

The Court held that the police investigations into all six *Jordan et al.* incidents failed to evince the independence required by the procedural component of Article 2.[120] In *Jordan* and *McKerr*, responsibility for the investigation rested with RUC officers who were institutionally and hierarchically connected to the officers responsible for the deaths.[121] In *Kelly and Others* and *McShane*, where the RUC conducted investigations into deaths caused by military personnel, the Court concluded that the RUC's role in the underlying counterinsurgency actions compromised its independence in investigating the soldiers.[122] In *Shanaghan* and *Finucane*, where collusion between state agents and loyalist paramilitaries allegedly resulted in the deaths, the Court criticized the police investigation for failing to promptly address the accusations of collusion and held that the RUC investigators were not sufficiently independent from the state agents who allegedly plotted with the paramilitaries.[123]

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118. Jordan, *supra* note 13, ¶ 105; Kelly and Others, *supra* note 13, ¶ 94; McKerr, *supra* note 1, ¶ 111; Shanaghan, *supra* note 13, ¶ 88.

119. *See, e.g.*, Jordan, *supra* note 13, ¶ 100.

120. Jordan, *supra* note 13, ¶¶ 118–19; Kelly and Others, *supra* note 13, ¶¶ 113–15; McKerr, *supra* note 1, ¶¶ 124–29; Shanaghan, *supra* note 13, ¶¶ 102–05; McShane, *supra* note 15, ¶¶ 109–14; Finucane, *supra* note 15, ¶¶ 74–76.

121. Jordan, *supra* note 13, ¶ 119; McKerr, *supra* note 1, ¶¶ 124–29.

122. *See supra* note 111 and accompanying text.

123. Shanaghan, *supra* note 13, ¶¶ 102–05; Finucane, *supra* note 15, ¶¶ 74–76.

b. Department of Public Prosecutions

The Court criticized the DPP's failure, in five of the six incidents, to provide reasons for deciding not to seek prosecutions.[124] The Court noted, however, that Northern Ireland's domestic law did not require the DPP to give reasons for its decisions.[125] Moreover, in Northern Ireland, unlike in England and Wales, judicial review of the DPP's decisions was virtually impossible due to the inability of coroner's inquest juries to return verdicts such as "unlawful killing" that would provide a basis for legal challenges to the DPP's initial prosecutorial decision.[126]

The lack of transparency in the DPP's decision-making process also undermined the effectiveness of the British government's response to the lethal force deaths in question. The DPP's failure to give reasons for its decisions limited the potential for public scrutiny of such cases and hindered the full participation of the victims' families in the investigatory process.[127] These failures were compounded where, as in Northern Ireland, "the police investigation procedure itself is open to doubts of a lack of independence and is not amenable to public scrutiny."[128] Crucially, the Court seems to imply that the combined actions of the police and DPP in response to lethal force deaths undermined public confidence in legal processes generally.

c. Coroner's Inquests

The Court recognized the importance of coroner's inquests in the debate over lethal force deaths in Northern Ireland. Because of the general lack of criminal prosecutions and public inquiries in connection with such matters, inquests became the primary vehicle for investigating deaths caused by the state.[129] In *McCann*, the Court held that the coroner's inquest into the Gibraltar deaths satisfied the United Kingdom's

124. Reasons for the decision not to prosecute were only given in *McShane*, and then only under the threat of legal action by the family of the victim. *See* McShane, *supra* note 15, ¶ 88.

125. *See, e.g.*, Jordan, *supra* note 13, ¶ 122.

126. *See id.*

127. Kelly and Others, *supra* note 13, ¶¶ 113–15; McKerr, *supra* note 1, ¶¶ 124–29; Shanaghan, *supra* note 13, ¶¶ 102–05; McShane, *supra* note 15, ¶ 114; Finucane, *supra* note 15, ¶¶ 74–76.

128. Jordan, *supra* note 13, ¶ 123; Kelly and Others, *supra* note 13, ¶ 117; McKerr, *supra* note 1, ¶ 123; Shanaghan, *supra* note 13, ¶ 107; Finucane, *supra* note 15, ¶ 82.

129. Ní Aoláin, *supra* note 81, at 584.

obligations under Article 2(1) of the Convention because it "provided a detailed review of the events surrounding the killings and provided the relatives of the deceased with the opportunity to examine and cross-examine witnesses involved in the operation."[130] By contrast, in the *Jordan et al.* decisions, the Court harshly assessed the role of inquests in Northern Ireland.

The Court identified two significant flaws in the Northern Ireland inquest procedure. First, Rule 9(2) of the Northern Ireland Coroner's Rules did not allow authorities to compel those suspected of causing death to give evidence.[131] In the incidents at issue in the *Jordan et al.* decisions, as in most other incidents concerning the state's use of lethal force in Northern Ireland, the security force personnel implicated in the deaths did not attend the inquests and provided only limited testimony through written statements or interview transcripts.[132] In the Court's view, the inability of the coroner's inquests to compel testimony from those responsible for causing death "detract[ed] from the inquest's capacity to establish the facts immediately relevant to the death, in particular the lawfulness of the use of force."[133] As a result, the inquests failed to meet the critical effectiveness component of Article 2's procedural mandate.[134]

Second, the Court took issue with the restricted scope of permissible verdicts under Northern Ireland's coroner's rules. While coroner's juries in England and Wales—and also in Gibraltar, under whose laws the inquest in *McCann* operated—were capable of returning a number of verdicts, including "unlawful killing," in Northern Ireland coroner's juries were limited to determining (1) the identity of the deceased person and (2) the date, place, and cause of death.[135] This limitation on permissible verdicts constrained the effectiveness of inquests insofar as it rendered them only marginally useful in conducting future criminal prosecutions. In England and Wales, if the jury rendered a verdict of "unlawful killing," it would oblige the DPP to reconsider an initial decision not to prosecute and would require the DPP to give reasons for a continued decision not to prosecute that could be challenged in the courts.[136] By contrast, in Northern Ireland, judicial review of the DPP's decisions was not possible in large part because coroner's inquests could not pass judgment on the lawfulness of the killing. Under these

130. Jordan, *supra* note 13, ¶ 125.
131. *Id.* ¶¶ 68, 127.
132. *Id.* ¶ 127.
133. *Id.*
134. *Id.*
135. *Id.* ¶¶ 64, 129.
136. *Id.* ¶ 129.

circumstances, "the only relevance the inquest [had] to a possible prosecution [was] that the Coroner [might] send a written report to the DPP if he consider[ed] a criminal offence may have been committed."[137] It was not apparent, however, that in the event such a letter was sent to the DPP, it would be under any obligation to reconsider its decision or to provide reasons for refusing to take further action.[138]

In all six cases, the Court determined that the inquests did not satisfy the promptness component of an effective official investigation. Each of the inquests was substantially delayed in commencement, and several were postponed in the midst of the proceedings.[139] Most egregiously, the inquest into the *McKerr* incident was still ongoing nearly twenty years after the deaths occurred.[140] The Court tied the issue of promptness to its consideration of the transparency of the inquests—specifically, the involvement of next-of-kin in the process. Delays in the inquest procedures frequently resulted from the state's failure to provide the victims' families with witness statements and other information critical to their meaningful participation in the process, which led to prolonged legal wrangling over disclosure. The Court held that the next-of-kin's inability to review documents produced to the inquest was a significant flaw in the investigative process.[141] Moreover, the Court recognized that the reluctance to disclose such documents during inquests in Northern Ireland was notably at odds with the practice prevailing elsewhere in the United Kingdom in the wake of the Stephen Lawrence Inquiry, which had liberalized the rules governing disclosure of documents in English and Welsh inquests.[142]

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137. *Id.*
138. *Id.*
139. The Jordan inquest was delayed for eight years and four months. Jordan, *supra* note 13, ¶ 136. The Kelly inquest was delayed for more than eight years before it was even opened. Kelly and Others, *supra* note 13, ¶ 130. The Shanaghan inquest was delayed for over four and a half years. Shanaghan, *supra* note 13, ¶ 119.
140. McKerr, *supra* note 1, ¶ 152.
141. Jordan, *supra* note 13, ¶ 134; Kelly and Others, *supra* note 13, ¶ 128; McKerr, *supra* note 1, ¶ 148; Shanaghan, *supra* note 13, ¶ 117.
142. *See, e.g.*, Jordan, *supra* note 13, ¶ 84. The Stephen Lawrence Inquiry investigated the death of a black youth in London at the hands of a gang of white teenagers, and uncovered significant failings on the part of the London Metropolitan Police in investigating the incident. The full report of the Stephen Lawrence Inquiry is *available at* http://www.archive.official-documents.co.uk/document/cm42/4262/sli-00.htm.

IV. THE UNITED KINGDOM'S RESPONSES TO THE *JORDAN ET AL.* DECISIONS

Member states of the Council of Europe are required under international law to honor the decisions of the European Court and to ensure compliance with its decisions in domestic law and practice.[143] A Committee of Ministers under the auspices of the Council of Europe supervises the execution of the Court's judgments in the states against which they are directed.[144]

In March 2002, the British government submitted a 35-point "package of measures" to the Committee of Ministers detailing the steps it planned to take in order to implement the *Jordan et al.* decisions.[145] The package of measures spoke only to future-oriented institutional reforms. It did not recommend new investigations into the incidents at issue in *Jordan et al.*, and indeed the United Kingdom has avoided launching any new investigations.[146] Moreover, by means of the Human Rights Act 1998

143. European Convention, *supra* note 14, art. 46(1) ("The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.").

144. *Id.*, art. 46(2) ("The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.").

145. The government's submission is unpublished. For a summary of its proposals, see Christine Bell & Johanna Keenan, *Lost on the Way Home? The Right to Life in Northern Ireland*, 32 J. L. & SOC'Y 68, 76 (2005). *See also* Comm. of Ministers, *Interim Resolution RESDH(2005)20—Action of the Security Forces in Northern Ireland: Measures taken or envisaged to ensure compliance with the judgments of the European Court of Human Rights in the cases against the United Kingdom listed in Appendix III*, 40 E.H.R.R. SE26 (2005) [hereinafter February 2005 Interim Resolution] (setting forth the United Kingdom's proposals as of February 2005 at Appendix II).

146. *See* Comm. of Ministers, *Cases Concerning the Action of Security Forces in Northern Ireland—Stocktaking of Progress in Implementing the Court's Judgments*, CM/Inf/DH(2006)4 revised 2 (June 23, 2006), https://wcd.coe.int/ViewDoc.jsp?id=1014497 [hereinafter June 2006 Information Document]. A new inquest in the Jordan case was placed on hold pending a decision by the House of Lords. *See id.* ¶¶ 190–91. This decision was handed down in March 2007 and has limited the permissible scope of any future inquest into the Jordan incident. *See infra* notes 179–82 and accompanying text. A 2004 judgment by the House of Lords declined to order a fresh investigation into McKerr. *See* June 2006 Information Document, *supra*, ¶ 193; *see also infra* notes 165–68 and accompanying text. The case is now subject to a forthcoming investigation by the Police Ombudsman for Northern Ireland. *See* June 2006 Information Document, *supra*, ¶ 196; *see also infra* Part IV.A. The government has suggested that the Kelly and Others and Shanaghan cases fall within the terms of reference of the Historical Enquiries Team recently established to investigate open murder files relating to the conflict in Northern Ireland, but at this point there is no evidence that these investigations have commenced. *See* June 2006 Information Document, *supra*, ¶¶ 200–01, 205–06; *see also infra* Part IV.A. An inquest into the McShane incident was expected to begin in 2005, but has been delayed. *See* June 2006 Information Document, *supra*, ¶¶ 197–98. The government's sole concession in Finucane has been to propose a public inquiry into the solicitor's death, although one individual has been convicted for his role in Finucane's

(HRA),[147] the British judiciary has developed a domestic right to life jurisprudence that has limited the applicability of Article 2's procedural protections in the domestic context. Consequently, the Committee of Ministers has expressed a degree of dissatisfaction with the United Kingdom's response to the *Jordan et al.* decisions. In its June 2006 assessment of the United Kingdom's progress, the Committee recognized that institutional reforms were moving in the direction of compliance with the decisions but also criticized the United Kingdom for failing to fulfill its "continuing obligation" to conduct Article 2-compliant investigations into the deaths at issue.[148]

A. Institutional Reforms

The institutional reforms initiated by the British government have been described as a "piece-meal and minimalist approach to addressing discrete . . . defects" identified by the European Court in *Jordan et al.*[149] The United Kingdom has refrained from engaging in a comprehensive reform program. For example, the United Kingdom has not established new, Article 2-compliant mechanisms for investigating lethal force deaths and prosecuting those accused of the illegal deprivation of life. Instead, it has made minor changes to pre-existing structures.

The government's response to the Court's criticism of police investigations relies heavily on changes to Northern Ireland's policing structures that pre-date the *Jordan et al.* decisions. Police reform was a central component of the Good Friday Agreement, which sought to make the police force human rights compliant and acceptable to both segments of the community.[150] The 1999 Patten Report recommended a far-reaching overhaul of the RUC, and its findings resulted in a substantial

murder. *See id.* ¶ 202. The proposed terms of the inquiry have caused a great deal of public controversy, and the inquiry has yet to be established. *See infra* notes 246–53 and accompanying text.

147. Human Rights Act, 1998, c. 42, *available at* http://www.opsi.gov.uk/ACTS/acts1998/19980042.htm (last visited Mar. 11, 2007).

148. June 2006 Information Document, *supra* note 146, ¶ 244.

149. Bell & Keenan, *supra* note 145, at 75.

150. *See* Good Friday Agreement, *supra* note 16, at art. 9, annexes A and B (proposing the creation of a Commission on Policing for Northern Ireland and a review of Northern Ireland's criminal justice system).

reconfiguration of Northern Ireland's police force, now known as the Police Service of Northern Ireland (PSNI).[151]

The British government has also relied on the creation of the independent Police Ombudsman for Northern Ireland as a means to respond to the Committee of Ministers.[152] Under the Police (Northern Ireland) Act, the Police Ombudsman is given the power to investigate allegations of misconduct and abuse on the part of the PSNI, including allegations of the illegal use of lethal force.[153] The British government has claimed that the existence of the Police Ombudsman alleviates the independence issues raised by the *Jordan et al.* decisions in relation to police investigations.[154]

Although the Ombudsman is structurally separate from the PSNI, and therefore capable of carrying out independent investigations of the police, its mandate does not cover situations where the army is responsible for the deaths in question. According to the British government, such incidents will be investigated by the PSNI despite the European Court's determination, in *Kelly and Others* and *McShane*, that police investigations into the use of lethal force by the military do not meet the Article 2 standard for independence where the police and military have clear operational links.[155] While this issue is less likely to arise in future cases given the limited role currently played by the British Army in Northern Ireland, the PSNI's lack of independence poses a significant problem for investigations of lethal force incidents that occurred during the past

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151. INDEPENDENT COMMISSION ON POLICING FOR NORTHERN IRELAND, A NEW BEGINNING: POLICING IN NORTHERN IRELAND (1999), *available at* http://www.nio.gov.uk/a_new_beginning_in_policing_in_northern_ireland.pdf [hereinafter PATTEN REPORT]. *See also* Police Service of Northern Ireland, http://www.psni.police.uk (providing an overview of Northern Ireland's current policing system).

152. *See* Police Ombudsman for Northern Ireland, http://www.policeombudsman.org. Nuala O'Loan serves as the Police Ombudsman. *See id.* At O'Loan's disposal is a staff of over 100, including a team of independent investigators. *See* June 2006 Information Document, *supra* note 146, ¶ 9.

153. Police (Northern Ireland) Act, 2000, c. 32, Part VIII, *available at* http://www.opsi.gov.uk/acts/acts2000/20000032.htm [hereinafter Police (Northern Ireland) Act] (establishing the statutory powers of the Police Ombudsman). *See also* Police Ombudsman for Northern Ireland, "What We Do," *at* http://www.policeombudsman. org/about.cfm ("[W]e can investigate a matter if we have reason to think that a police officer may have committed a criminal offence or broken the police code of conduct. We can also investigate a matter if the Secretary of State, the Chief Constable or the Policing Board asks us to.").

154. *See* Comm. of Ministers, *Cases Concerning the Action of Security Forces in Northern Ireland*, Information Document CM/Inf/DH(2005)21, 6 Oct. 2005, ¶ 9 [hereinafter October 2005 Information Document] ("[T]he United Kingdom government has indicated that, since November 2000, there has been an independent Police Ombudsman in Northern Ireland with the power to investigate all complaints against the police . . . . The Ombudsman is completely independent in deciding what is a complaint and how it should be handled.").

155. *See supra* notes 111, 122 and accompanying text.

conflict. Similarly, the Ombudsman's capacity for carrying out historical investigations is also limited by its ability to investigate incidents that occurred prior to the signing of the Good Friday Agreement only where such incidents were "grave and exceptional."[156]

Reform of the DPP's role in handling lethal force deaths has focused on the issue of giving reasons for decisions not to prosecute. In March 2002, the Attorney General made a general statement in the House of Lords in favor of giving reasons in future cases concerning the use of lethal force by state agents.[157] This policy statement is reflected in the text of the Code for Prosecutors developed for use by Northern Ireland's new Public Prosecution Service (PPS).[158] Critically, however, the Code also gives the PPS the right to refuse to give reasons based on "public interest considerations."[159]

It remains unclear whether such changes will impact the extent to which reasons are given in controversial cases such as those in *Jordan et al.* Thus far, the PPS has given reasons for its continued decision not to seek prosecutions in only one of the *Jordan et al.* cases: *McKerr.*[160] Additionally, the Northern Ireland Queen's Bench decision in *In Re John Boyle* called into question the judiciary's commitment to reviewing decisions not to prosecute.[161] Absent judicial scrutiny of prosecutorial decisions, policy statements in favor of giving reasons are likely to produce little change in the way prosecutions are handled.

Changes to the coroner's inquest system are arguably the most extensive responses to the *Jordan et al.* decisions. The 2003 Luce Review of coroner's practices in England, Wales, and Northern Ireland recommended changes to the inquest system that, if implemented in their

156. *See infra* Part IV.A.

157. *See* February 2005 Interim Resolution, *supra* note 143, at 5.

158. PUBLIC PROSECUTION SERVICE OF NORTHERN IRELAND, CODE FOR PROSECUTORS, ¶ 4.12.4, *available at* http://www.ppsni.gov.uk/site/default.asp?CATID=77 [hereinafter CODE FOR PROSECUTORS] (generally supporting the giving of reasons in cases "occasioned by the conduct of agents of the State"). The Public Prosecution Service was established as part of the ongoing review of the criminal justice system in Northern Ireland. It has assumed the prosecutorial responsibilities previously held by the DPP. *See* Public Prosecution Service of Northern Ireland, http://www.ppsni.gov.uk/site/default.asp?CATID=3, (About the PPS) (last visited Aug. 22, 2007).

159. CODE FOR PROSECUTORS, *supra* note 158, § 4.12.4.

160. *See* Bell & Keenan, *supra* note 145, at 75 n.22.

161. In Re John Boyle [2004] NIQB 63 (N. Ir.) (failing to undertake judicial review of the DPP's decision not to prosecute). *See also* Bell & Keenan, *supra* note 145, at 75 ("Whether the DPP's stated policy will produce further reasons in cases of alleged state wrongdoing remains to be tested, although early evidence is not encouraging.").

entirety, could help ensure that the inquests are Article 2 compliant.[162] Further, Northern Ireland's coronial laws have been amended to require state agents suspected of involvement in suspicious deaths to attend the inquests. Nonetheless, these state agents may still refuse to answer questions on the grounds that their answers may be self-incriminatory.[163]

Consequently, despite these changes in the law, coroner's inquests may continue to fail to meet Article 2's requirements. Other coroner's inquest reform issues—such as the scope of inquests, the types of permissible verdicts, and the need for public transparency—lie at the heart of several recent domestic cases that have raised doubts about the parameters of the right to life within the United Kingdom.

B. Domestic Right to Life Decisions

The lynchpin of the reforms carried out by the British government in the wake of the *Jordan et al.* decisions is the Human Rights Act 1998 (HRA). The Act entered into force on October 2, 2000, and purports to incorporate the rights created by the European Convention into United Kingdom domestic law. Specifically, Article 6(1) of the HRA prohibits "public authorities" such as police, prosecution services, and coroner's services from acting in a manner "incompatible" with the European Convention.[164]

Domestic courts have raised three major issues concerning the applicability and content of the HRA and the right to life under British domestic law. First, domestic courts have questioned whether the HRA applies to cases in which the death occurred prior to its entry into force on October 2, 2000. Second, domestic courts have grappled with the

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162. SECRETARY OF STATE FOR THE HOME DEPARTMENT, DEATH CERTIFICATION AND INVESTIGATION IN ENGLAND, WALES AND NORTHERN IRELAND: THE REPORT OF A FUNDAMENTAL REVIEW, 2003, Cm. 5831 [LUCE REVIEW]. Among the recommendations made by the Luce Review were: greater coordination between coroners and the police; greater involvement of the next-of-kin of the victim in the inquest process; expanded terms of reference for inquests, including allowing coroners to examine the "immediate circumstances" surrounding the death; the holding of public inquests for victims killed by "law and order services;" and allowing coroners to consider the role of specific individuals in causing death. *Id.* at 200–05. Most importantly, the Luce Review concluded that "[i]n cases engaging Article 2 of the European Convention on Human Rights the inquest should in principle be the main forum for the investigation, in conjunction as appropriate with other investigative processes for which the State is responsible." *Id.* at 226.

163. *See* Coroners (Amendment) Rules (Northern Ireland) 2002, S.R. 37, § 9(1) (N. Ir.), *available at* http://www.opsi.gov.uk/sr/sr2002/20020037.htm ("No witness at an inquest shall be obliged to answer any question tending to incriminate himself or his spouse.").

164. Human Rights Act, *supra* note 147, at art. 6(1) ("It is unlawful for a public authority to act in a way which is incompatible with a Convention right.").

requirements that the HRA places on "public authorities," in particular coroner's inquests, in right to life cases. Lastly, in the *Widgery Soldiers* decision, the English Court of Appeals established a balancing test for comparing substantive and procedural right to life claims that arguably limits the prospects for holding state agents accountable for the illegal use of lethal force. Taken together, these three strands of domestic right to life jurisprudence call into question the United Kingdom's commitment to honoring the letter and spirit of the *Jordan et al.* decisions, especially as regards incidents of lethal force that occurred during the Troubles.

1. Retrospective Application of the Human Rights Act

The most important question arising out of domestic right to life jurisprudence is whether the HRA applies retroactively to deaths that occurred before October 2, 2000. In *In Re McKerr* (2004), the House of Lords overturned an earlier Northern Ireland Court of Appeals decision that would have required the British government to undertake a new, Article 2-compliant investigation into the deaths of McKerr, Toman, and Burns.[165] The Lords held that the HRA did not require a new investigation because the rights enshrined in the HRA did not exist at the time the deaths occurred.[166]

In Re McKerr effectively established a twin-track approach to the right to life in the United Kingdom.[167] First, it held that the procedural protections established by the European Court in *Jordan et al.* exist only at the international level. They do not, in and of themselves, constitute a domestic right. Second, although the HRA does contain a procedural right analogous to that contained in Article 2 of the European Convention, the domestic right only applies to deaths that occurred after the HRA came into force. Petitioners bringing claims resulting from pre-HRA deaths have no redress in domestic courts and therefore must take their claims to the European Court. Crucially, *In Re McKerr* absolved the United Kingdom of any obligation to reinvestigate the *Jordan et al.* incidents, notwithstanding the European Court decisions and the

165. In Re McKerr, [2004] UKHL 12 (appeal taken from N. Ir.).
166. *Id.*
167. *See* FIONA DOHERTY & PAUL MAGEEAN, NORTHERN IRELAND HUMAN RIGHTS COMMISSION, INVESTIGATING LETHAL FORCE DEATHS IN NORTHERN IRELAND 24–25 (2006).

Committee of Ministers' insistence that the United Kingdom is under a "continuing obligation" to conduct effective official investigations.[168]

In Re McKerr was notably at odds with two House of Lords decisions rendered on the exact same day: *Middleton* and *Sacker*.[169] Both cases involved the deaths of individuals in English prisons prior to the implementation of the HRA, yet in both cases, the Lords assumed the HRA's retrospective application and applied Article 2 standards to the United Kingdom's *ex post facto* investigation of the deaths. As the Lords in *Middleton* explained: "In this appeal no question was raised on the retrospective application of the Human Rights Act 1998 and the [European] Convention."[170] They were assumed to be applicable.[171] The decision in *Sacker* contained a similar statement regarding retrospective application.[172]

Two decisions by the Northern Ireland Court of Appeals, *Re Jordan's Application* and *Re McCaughey and Grew*, muddied the waters further regarding the HRA's retrospective application.[173] In *Re Jordan's Application*, one in a series of cases concerning judicial review of the coroner's inquest into Pearse Jordan's death, the appellate court accepted the applicants' argument that Article 3 of the HRA[174] was generally applicable as a tool of statutory construction and thus applied to all ongoing inquest proceedings regardless of the House of Lords' decision in *In Re McKerr*.[175] Referencing the discrepancy between *In Re McKerr* and the *Middleton* and *Sacker* decisions, Girvan, J. observed that the court had "received no real explanation how it came about that the state authorities were taking opposite views on the applicability of the Convention in the English cases and the Northern Ireland case."[176]

Nevertheless, just four months after *Re Jordan's Application*, a differently constituted Northern Ireland Court of Appeals held in *Re McCaughey and Grew* that Article 3 of the HRA only applied when

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168. *See supra* note 148 and accompanying text.

169. R. (Middleton) v. Her Majesty's Coroner for the W. Dist. of Somerset [2004] 1 A.C. 182 [hereinafter Middleton]; R. (Sacker) v. Her Majesty's Coroner for the County of W. Yorkshire [2004] 1 W.L.R. 796 [hereinafter Sacker].

170. Middleton, *supra* note 169, ¶ 50.

171. *Id.*

172. Sacker, *supra* note 169, ¶ 29.

173. Re Jordan's Application for Judicial Review [2004] NICA 29 [hereinafter Jordan's Application 2004]; Police Service of Northern Ireland v. Owen McCaughey and Pat Grew [2005] NICA 1 [hereinafter McCaughey].

174. Human Rights Act, *supra* note 147, § 3(1) ("So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the [European] Convention rights.").

175. Jordan's Application 2004, *supra* note 173, ¶ 23.

176. *Id.*

Convention rights were applicable in the first place.[177] Because *In Re McKerr* explicitly did away with Convention rights for deaths that occurred before the HRA came into force, Article 3 could not be used to require the British government to adhere to Article 2 procedural standards when investigating lethal force deaths.[178]

Both *Re Jordan's Application* and *Re McCaughey and Grew* were appealed to the House of Lords.[179] The Lords issued a joint decision on the cases in March 2007.[180] In the Jordan portion of this decision, the Lords upheld *In Re McKerr*, affirming that the HRA does not apply retrospectively to deaths occurring before October 2, 2000.[181] Consequently, any future coroner's inquest into Jordan's death will be prohibited from reaching an expanded verdict similar to that upheld in *Middleton* and *Sacker*.[182] The importance of this decision for the future of the right to life under British domestic law cannot be overestimated. It places significant constraints on the procedural protections of Article 2 of the European Convention for victims of state violence during the conflict in Northern Ireland.

2. Content of the Domestic Right to Life

Beyond the issue of when the HRA applies is the question of what rights the HRA actually contains. Domestic decisions concerning the HRA's content have focused on the role of coroner's inquests in death investigations. Although the European Court's ruling in *McCann* made it clear that a properly constituted inquest would satisfy Article 2's

177. McCaughey, *supra* note 173, ¶ 44.
178. *Id.*
179. *See Families of IRA Men Killed by British Forces File Lawsuit at House of Lords*, EVENING ECHO, Jan. 17, 2007, *available at* http://www.eveningecho.ie/news/bstory.asp?j=170431840&p=y7x43z4zx&n=170432449.
180. Jordan (AP) (Appellant) v. Lord Chancellor and another (Respondents) (N. Ir.), McCaughey (AP) (Appellant) v. Chief Constable of the Police Serv. N. Ir. (Respondents) (N. Ir.) [2007] UKHL 14 [hereinafter Jordan & McCaughey].
181. *Id.* ¶¶ 34–35. ("Does section 3 of the Human Rights Act apply . . . in cases where the death pre-dates 2 October 2000 in the light of the decision in *In Re McKerr*? . . . No. The decision in *McKerr* precludes reliance on section 3 of the [HRA] in any inquest into a death occurring before the Act came into force on 2 October 2000.").
182. *Id.* ¶ 41 ("In the forthcoming, but lamentably delayed, inquest the jury may not return a verdict of lawful or unlawful killing but may make relevant factual findings pertinent to the killing of Pearse Jordan.").

procedural obligations,[183] in the *Jordan et al.* decisions the Court declined "to specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents."[184] Initially, this allowed the British government to challenge cases that alleged deficiencies in the inquest procedure by arguing that (1) the failure of one institutional mechanism did not amount to an Article 2 violation because (2) not all the criteria needed to be met in any one forum so long as other investigative mechanisms were available.[185] Thus, in *Re Jordan's Application* and *Re Adams' Application*, Northern Ireland courts held that the state's failure to disclose documents relevant to the inquests did not necessarily indicate a failure of the entire investigation.[186] The court further concluded that even where an inquest is held, it need not be the only way for the state to discharge its Article 2 duties: other inquiries "freestanding" of inquests might also be acceptable, meaning that coroner's inquests were under no obligation to fulfill the state's Article 2 duties.[187]

The House of Lords generally resolved these issues in *Middleton* and in *Ex Parte Amin*, another English death-in-custody case.[188] In *Amin*, the House of Lords recognized that the *Jordan et al.* decisions require that the state deliver a minimum level of content under the HRA in all instances.[189] Because an inquest was no longer possible in the case, the Lords held that the state was required to satisfy its Article 2 obligations by means of an "independent public investigation" where the victim's family was legally represented and had access to all relevant materials.[190]

In *Middleton*, the House of Lords affirmed that in most circumstances coroners must assume that their inquests will represent the primary means by which the state fulfills its Article 2 obligations.[191] Inquest juries must be allowed to make a final determination of the state's responsibility for the death in question. Consequently, the Lords held

183. *See* McCann, *supra* note 63, ¶¶ 157–64 (holding that the inquest held under Gibraltar law in the *McCann* case complied with Article 2's procedural requirements).

184. Jordan, *supra* note 13, ¶ 143; Kelly and Others, *supra* note 13, ¶ 137; McKerr, *supra* note 1, ¶ 159; Shanaghan, *supra* note 13, ¶ 123.

185. Bell & Keenan, *supra* note 145, at 80.

186. Jordan, Re Application for Judicial Review [2001] N.I.Q.B. 32 [hereinafter Jordan Application 2001]; Adams, Re Application for Judicial Review, [2001] N.I.C.A. 1 [hereinafter Adams Application].

187. Jordan Application 2001, *supra* note 186.

188. Middleton, *supra* note 169; R. (Amin) v. Secretary of State for the Home Department [2004] 1 A.C. 653 [hereinafter Amin].

189. Amin, *supra* note 188, ¶ 32 (holding that "the [European] Court, particularly in *Jordan* . . . has laid down minimum standards which must be met, whatever form the investigation takes").

190. *Id.*

191. Middleton, *supra* note 169.

that, in reaching a finding as to "how" a death occurred, inquests must be capable of specifying not only "by what means" but also "in what circumstances" an individual died.[192] This ruling broadened the required scope of coroner's inquests and brought them in line with the Gibraltar inquest of which the European Court approved in *McCann*.[193]

The *Re McCaughey and Grew* decision called into question the broad scope for coroner's inquests established in *Middleton* and *Amin*. Keeping with its holding that Convention rights do not apply retroactively to deaths occurring before October 2, 2000, the court held that the police were not required to disclose all relevant documents to the coroner's inquest.[194] This issue was considered by the Lords in its March 2007 joint decision on the *Jordan* and *McCaughey* appeals. In perhaps the only ray of hope for Article 2's domestic application to come out of the Lords' decision, the Lords held that, barring a successful application for privilege or public interest immunity, the government was required to disclose all relevant documents to the coroner's inquest.[195]

3. Substantive v. Procedural Right to Life Claims

The English Court of Appeals decision in *Lord Saville of Newdigate v. Widgery Soldiers* was equally important for Article 2's domestic application.[196] In that case, the court considered the question of whether paratroopers involved in the events of January 30, 1972 should be required to testify openly before the Bloody Sunday Inquiry in Derry.[197] The soldiers claimed, and the court agreed, that requiring them to testify openly would pose a significant risk to their lives, thereby potentially violating their substantive right to life.[198] The court found for the soldiers and established a balancing test wherein the substantive protections afforded by Article 2 invariably trump procedural protections—in this

192. *Id.*
193. *See supra* notes 93–94 and accompanying text.
194. McCaughey, *supra* note 173, ¶¶ 32–36.
195. Jordan & McCaughey, *supra* note 180, ¶ 45 ("I would accordingly allow Mr. McCaughey's appeal on this point, and declare that section 8 of the [Northern Ireland Coroner's Rules] requires the Police Service of Northern Ireland to furnish to a coroner to whom notice under section 8 is given such information as it then has or is thereafter able to obtain (subject to any relevant privilege or immunity) concerning the finding of the body or concerning the death.").
196. Lord Saville of Newdigate & Ors. v. Widgery Soldiers & Ors., [2001] EWCA (Civ) 2048 [57] [hereinafter Widgery Soldiers].
197. *See supra* note 27.
198. Widgery Soldiers, *supra* note 196.

case, the right of Bloody Sunday victims' families to an effective official investigation.[199] As a result, although the soldiers were required to testify before the inquiry, they were allowed to do so from behind screens during a special session held in London rather than Derry. Furthermore, in the transcripts of the proceedings, the soldiers were identified by letters (e.g. "Soldier X") rather than by their names.[200]

The *Widgery Soldiers* decision undoubtedly had a detrimental effect on the Bloody Sunday Inquiry's capacity to fulfill its mandate. Additionally, it may undermine other inquiries into incidents of past state violence. This is important insofar as public inquiries and other historical investigations currently play a critical role in the search for accountability for state violence in Northern Ireland.

V. INVESTIGATING LETHAL FORCE DEATHS IN NORTHERN IRELAND

In *Finucane*, the European Court recognized the difficulties inherent in reopening investigations into past lethal force deaths.[201] By their very nature, such investigations lack the promptness necessary for an effective official investigation. Also, given the amount of time that has passed since the lethal force deaths (in some cases, more than thirty years), a lack of evidence and witnesses could undermine the effectiveness of the investigations by failing to provide a foundation for criminal prosecutions.

Despite these potential deficiencies and the contrary trend in domestic right to life jurisprudence, investigations into past incidents of the use of lethal force by the state have commenced in Northern Ireland in the wake of *Jordan et al.* These investigations fall primarily outside the boundaries of the ordinary criminal justice system and have taken two forms. First, the PSNI's Historical Enquiries Team (HET) and the Police Ombudsman have reopened files on numerous conflict-related deaths in an attempt to reassess evidence and, where appropriate, initiate fresh prosecutions. Second, three public inquiries have refocused attention on the debate over collusion.

In many respects, these historical investigations offer a more effective alternative to dealing with lethal force deaths through the criminal justice system, where piecemeal institutional reforms are primarily forward-looking and restrictive domestic jurisprudence hinders the search for accountability. In this respect, historical investigations may be better suited to ensuring that the British government complies with its Article 2 obligations. At the same time, however, structural limitations

199. *See* Bell & Keenan, *supra* note 145, at 83; Hegarty, *supra* note 25, at 1179–80.
200. *See* Bloody Sunday Inquiry, *supra* note 27 (follow "Hearing Transcripts" hyperlink).
201. *See* Finucane, *supra* note 15, ¶¶ 72–83.

inherent in the mandates of the HET, Police Ombudsman, and public inquiries may render them less than optimal for this purpose. Moreover, historical investigations face a number of obstacles related to the United Kingdom's general reluctance to engage in a robust domestic application of Article 2's procedural protections with respect to Northern Ireland's past. For example, in 2005, the United Kingdom introduced legislation that, if passed, would have granted amnesty to a number of state agents involved in controversial lethal force deaths.[202] Thus, while historical investigations play a major role in contextualizing the important position of lethal force deaths on Northern Ireland's legal and political landscapes, they also further demonstrate the difficulties inherent in seeking accountability for past state violence.

A. The Historical Enquiries Team and Police Ombudsman

The British government initially justified its decision not to open new investigations into three of the *Jordan et al.* cases—*McKerr*, *Kelly and Others*, and *Shanaghan*—in part on the grounds that these cases would be eligible for review by an historical investigations unit within the PSNI.[203] In January 2006, the PSNI established a Historical Enquiries Team charged with reviewing and, where appropriate, reinvestigating a total of 3,268 deaths that took place between 1968 and the signing of the Good Friday Agreement in 1998.[204] Presumably, these cases include deaths resulting from state violence, as well as murders by paramilitary groups where state collusion is alleged. According to Peter Hain, Britain's Secretary of State for Northern Ireland, it is "quite possible" that perpetrators will face prison sentences as a result of the HET's work.[205]

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202. *See infra* Part IV.C.

203. February 2005 Interim Resolution, *supra* note 145.

204. *See* Press Release, Police Service of Northern Ireland, New Police Historical Enquiries Team (Jan. 20, 2006), *available at* http://www.psni.police.uk/index/media_centre/press_releases/pg_press_releases_2006/pr_2006_january/pr-police-historical-enquiries-team.htm [hereinafter HET Press Release]. *See also* Historical Enquiries Team, Police Service of Northern Ireland, http://www.psni.police.uk/index/departments/ historical_enquiries_team.htm [hereinafter Historical Enquiries Team] ("We envisage a re-examination process for all deaths attributable to the security situation with case reviews leading to re-investigation in appropriate circumstances where there are evidential opportunities.").

205. *Murder Review Team to Begin Work*, BBC NEWS, Jan. 23, 2006, http://news.bbc.co.uk/1/hi/northern_ireland/4636634.stm.

Analysis of the HET's structures and mandates through the prism of the *Jordan et al.* decisions highlights both potential benefits and drawbacks. The HET places considerable emphasis on the role of victims' families in the historical review process, as evidenced by one of the HET's primary objectives: providing the next-of-kin of victims with "a greater level of resolution."[206] At the practical level, the HET has established a Family Liaison to work with bereaved families by (1) soliciting from these families their thoughts on what issues remain outstanding in regards to their relatives' deaths, and (2) maintaining contact throughout the review and investigation processes in order to keep them informed of the HET's work.[207] The Family Liaison undoubtedly represents an attempt by the HET to comply with the requirement of transparency established by the European Court, and has drawn cautious praise from human rights groups.[208]

A more difficult issue is whether the HET is sufficiently independent of the police to carry out historical reviews, especially of incidents that call into question the actions of the security forces during the conflict. The HET strives for a degree of independence within its ranks. Its commander, David Cox, is a former commissioner of the London Metropolitan Police.[209] Rank-and-file membership is divided between a Review team, consisting of externally seconded officers from other United Kingdom police forces and the Republic of Ireland's Garda Siochana, and an Investigation team drawn from local recruits.[210]

The HET will not investigate any deaths caused by the RUC prior to 1998; instead, these will be handled by the Police Ombudsman.[211] While assigning these cases to the Ombudsman raises potential problems,[212] it avoids the most direct conflict-of-interest dilemma occasioned by the HET's operations. Nonetheless, two slightly less obvious dilemmas remain. First, it is unclear whether the HET will maintain review and

206. Historical Enquiries Team, *supra* note 204.

207. *Id.* ("Our view is that this whole initiative begins and ends with the families of the victims. To that end, our starting point will be to include in every review an acknowledgement of what outstanding issues have been raised by the families, and every resolution process will include a response to address those matters.").

208. *See, e.g.*, Jane Winter, British-Irish Rights Watch, *Director's Report*, Jan. 31, 2006, http://www.birw.org/Report%202006/Jan%2006.html (noting favorably the HET's stated intention to "share as much information as possible with bereaved families").

209. *See* ALAN BRECKNELL & PAUL O'CONNOR, THE PAT FINUCANE CENTRE, THE SEARCH FOR TRUTH—PULLING HEN'S TEETH 2 (2005), *available at* http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/63/The_search_for_truth.doc (last visited Sept. 30, 2007).

210. Historical Enquiries Team, *supra* note 204.

211. Jane Winter, British-Irish Rights Watch, *Director's Report*, Dec. 31, 2005, http://www.birw.org/report%202005/Dec%2005.html.

212. *See infra* notes 216–29 and accompanying text.

investigation authority over deaths caused by paramilitaries with the alleged collusion of state forces, most often the RUC. Collusion cases represent a large gray area with substantial potential for mishandling under the current investigative regime. Allowing such cases to remain with the HET on the grounds that they are "paramilitary" rather than "police" deaths will have the likely effect of obscuring investigations into collusion.[213] Second, there is no evidence that the HET will be relieved of its oversight of deaths caused by the British Army. In fact, the Police Ombudsman's limited mandate prevents it from taking such cases.[214] This will lead to a situation where the HET, a unit of the PSNI, is likely to investigate deaths caused by the military during counterinsurgency operations in which the police played a supporting role. In *Kelly and Others* and *McShane*, the European Court specifically held that police investigation of the Army in such circumstances compromised the practical independence of the investigation.[215]

The function of the Police Ombudsman for Northern Ireland is to act as an independent fact-finding and investigatory body for complaints against the PSNI.[216] Under the Police (Northern Ireland) Act, the investigative powers of the Police Ombudsman extend primarily to contemporary allegations of wrongdoing.[217] The Ombudsman may review historical cases (i.e. cases arising from incidents that occurred over one year before the bringing of a complaint, or cases relating to events that occurred prior to the Ombudsman's establishment in 1998) only where such investigations are warranted by "grave and exceptional" circumstances.[218] Once such investigations are commenced, however, the Police Ombudsman has the power to recommend that the PSNI initiate internal disciplinary proceedings against certain officers, suggest that the PSNI undertake fresh investigations, and, where warranted, recommend that the Public Prosecution Service bring charges against police officers implicated in wrongdoing.[219]

213. *But see infra* notes 230–31 and accompanying text (describing a recent, effective investigation into allegations of collusion carried out by the Police Ombudsman).
214. *See* June 2006 Information Document, *supra* note 146, ¶ 19.
215. *See supra* notes 111, 122 and accompanying text.
216. *See* Police Ombudsman, "What We Do," *supra* note 153.
217. *Id.*
218. *See* Police (Northern Ireland) Act, *supra* note 153.
219. *Id.*

The standard attached to the term "grave and exceptional" is unclear.[220] It appears that the Police Ombudsman has a great deal of discretion in determining whether and under what circumstances a historical investigation meets the requirements for further review. The Ombudsman's recent investigation into the 1969 death of Samuel Devenny is particularly useful in fleshing out the meaning of the term.[221] Devenny died after suffering a heart attack shortly after he was beaten by RUC officers who raided his home looking for young men involved in a riot.[222] The Ombudsman did not undertake an entirely new investigation but rather sought to determine what the RUC had done in response to the death when it occurred. The Ombudsman's research revealed the existence of an RUC investigation which had determined that the officers who raided Devenny's home were responsible, at the very least, for seriously wounding Devenny and members of his family.[223]

The Devenny case raises the question of whether the Police Ombudsman considers all historical cases involving the use of lethal force by the RUC to be "grave and exceptional." Samuel Devenny was the second of fifty-five individuals killed by the RUC between 1968 and 1998.[224] The HET, presumably, will turn over these investigations to the Police Ombudsman.[225]

Although moving these investigations to the Police Ombudsman's office eliminates the independence problem that would arise if the HET maintained control of the files, the Ombudsman's review raises other problems. First, the Police Ombudsman's mandate only covers serving members of the police force, leaving open the question of whether or not its investigations could lead to prosecutions of retired officers, who are technically no longer part of the force.[226] Second, the Police Ombudsman may not seek prosecutions in cases where the complaints have already been the subject of criminal proceedings or internal police disciplinary

220. *See* Comm. Of Ministers, *Cases Concerning the Action of Security Forces in Northern Ireland-Outstanding Issues*, CM/Inf/DH(2006)4 Addendum (Jan. 27, 2006), https://wcd.coe.int/ViewDoc.jsp?id=986575&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB%%&BackColorLogged=FFAC75 ("Information on how these terms are interpreted in practice . . . would be useful . . . .").

221. Police Ombudsman for Northern Ireland, *Police Ombudsman Releases Findings on Devenny Investigation*, Oct. 4, 2001, http://www.policeombudsman.org/Publicationsuploads/devenny.pdf [hereinafter Devenny Report].

222. *Id.*

223. *Id.*

224. *See* Submission by Jane Winter, Director, British-Irish Rights Watch, to the House Committee on International Relations, Mar. 15, 2006, Appendix A [hereinafter Winter Submission].

225. *Id.* ¶ 21.

226. *Id.* ¶ 16.

hearings.[227] Although a significant number of the fifty-five historical police killings resulted in one or both of these processes, very few resulted in prosecutions or disciplinary actions against the officers involved. Currently, these matters cannot be reinvestigated or retried in domestic courts.[228] This restriction effectively renders moot the British government's suggestion that the *McKerr* case could be handled through an historical investigation, since the three policemen responsible for the deaths of McKerr, Toman, and Burns were already brought to trial and cleared of wrongdoing by Lord Justice Gibson.[229]

Despite these potential constraints, the Police Ombudsman's investigations into state violence continue to produce important results. On January 22, 2007, the Ombudsman's office released the final report of a groundbreaking three-year investigation into allegations of collusion between the police and loyalist paramilitaries. The investigation, known as "Operation Ballast," uncovered evidence that loyalist paramilitary gunmen who also acted as informers for the RUC Special Branch were responsible for at least ten murders between 1991 and 2003.[230] In order to maintain the services of these informers, the Special Branch allegedly shielded them from criminal prosecution even though it was aware of the serious crimes they had committed.[231] Operation Ballast is arguably the most comprehensive and convincing report on the existence of collusion to date, and it provides strong evidence that the Ombudsman's office may be the most well-placed historical investigation mechanism for dealing with such allegations. Additionally, Operation Ballast sheds light on one of the murkiest aspects of the Troubles and provides new impetus to a series of ongoing public inquiries into collusion in Northern Ireland.

B. Public Inquiries into Collusion

The public inquiry model provides an alternative to the coroner's inquest process for the investigation of controversial deaths.[232] Traditionally,

227. *Id.* ¶ 17.
228. *Id.*
229. *See supra* note 146 and accompanying text.
230. POLICE OMBUDSMAN FOR NORTHERN IRELAND, STATEMENT BY THE POLICE OMBUDSMAN FOR NORTHERN IRELAND ON HER INVESTIGATION INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF RAYMOND MCCORD JUNIOR AND RELATED MATTERS, Jan. 22, 2007, *available at* http://cain.ulst.ac.uk/issues/police/ombudsman/poni220107mccord.pdf (last visited March 27, 2007).
231. *Id.*
232. *See* NÍ AOLÁIN, *supra* note 21, at 175–78.

British law allows for the establishment of either statutory inquiries under the Tribunals of Inquiry (Evidence) Act 1921, or non-statutory, ad hoc inquiries.[233] Public inquiries established under the Tribunals of Inquiry Act are vested with comprehensive legal powers similar to those of a High Court, including the power to compel witnesses and require the disclosure of evidence.[234] Moreover, statutory inquiries must be held in public, and witnesses are afforded the same rights as witnesses in civil proceedings.[235] Ad hoc inquiries may possess these legal characteristics to varying degrees depending on the manner in which they are constituted. At the very least, ad hoc inquiries are expected to treat witnesses fairly and to complete their work with reasonable efficiency and expediency.[236]

Public inquiries normally cannot replicate the accountability and retribution functions of criminal proceedings. As Dermot Walsh observes:

> The purpose of such a Tribunal of Inquiry is not to establish the guilt or innocence of the parties allegedly involved, but to establish the truth, if any, behind the allegations which have led to the crisis. Where its report exposes wrongdoing, the task of taking the necessary corrective action falls elsewhere. The Tribunal's value lies in its capacity to persuade the public that the full facts have been established, and generally to assist in restoring public confidence in the integrity of government.[237]

Notwithstanding this limitation, properly conducted public inquiries can play a meaningful role in bringing a degree of resolution to disputed incidents. They may also provide the impetus for the criminal justice system to undertake "necessary corrective action" in certain cases. In England and Wales, public inquiries are an increasingly popular mode of legal process for dealing with a variety of situations ranging from rail accidents to medical malpractice. The British government has been a willing participant in these inquiries.[238]

By contrast, public inquiries have played a much more limited and controversial role in Northern Ireland. Five public inquiries related to the Troubles were established between 1968 and 1979. Three of these were ad hoc inquiries whose proceedings took place in private,[239] while

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233. *See* Hegarty, *supra* note 25, at 1156–57. Use of the Tribunal of Inquiry Act is infrequent and reserved for cases of particular importance. As of 2000, only 22 inquiries had been established under the Act. *See* NÍ AOLÁIN, *supra* note 21, at 175.

234. NÍ AOLÁIN, *supra* note 21, at 175.

235. *Id.* at 175–76.

236. Hegarty, *supra* note 25, at 1157.

237. Dermot Walsh, *The Bloody Sunday Tribunal of Inquiry: A Resounding Defeat for Truth, Justice, and the Rule of Law*, http://cain.ulst.ac.uk/events/bsunday/walsh.htm (last visited May 11, 2006).

238. Hegarty, *supra* note 25, at 1157.

239. *See id.* at 1160–61. These ad hoc inquiries were the Cameron Inquiry, which investigated the civil disturbances that marked the beginning of the Troubles in 1968; the Bennett Inquiry, which examined allegations of police brutality and ill-treatment during

two were established under the Tribunals of Inquiry Act and maintained at least a modicum of public involvement.[240] It remains questionable whether these inquiries uncovered the "truth" and reestablished public confidence in the law.[241] According to Hegarty, the British government used these inquiries "not as a tool to find truth and establish accountability for human rights violations, but as a way of deflecting criticism and avoiding blame."[242]

Against this uninspiring historical backdrop, three public inquiries into allegations of state violence have recently been convened in Northern Ireland. The Hamill, Nelson, and Wright inquiries each deal with the issue of collusion between paramilitary organizations and agents of the state.[243] These inquiries arose in response to reports issued in 2004 by Canadian judge Peter Cory, which found that sufficient evidence of collusion existed in these cases to warrant further investigations.[244] Cory's investigations, in turn, stemmed from formal talks (the so-called Weston Park negotiations) between the British government and Northern Ireland's leading republican political party, Sinn Fein, in 2001, during which an agreement was reached to investigate allegations of collusion.[245]

The Hamill, Nelson, and Wright inquiries, as well as the investigations carried out by Judge Cory, are linked to the controversy over the murder of Patrick Finucane. In 2003, shortly before the European Court's

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interrogations; and the Parker Inquiry, which examined interrogation procedures for terrorist suspects. *Id.*

240. *See id.* These were the Widgery Tribunal relating to Bloody Sunday and the Scarman Inquiry into the practices of Northern Ireland's unionist government and the reasons for the civil disturbances of 1969. *Id.*

241. *Id.* at 1149.

242. *Id.* at 1159.

243. Robert Hamill, a Catholic youth, was beaten to death by a loyalist gang in 1997, allegedly within sight of an RUC patrol that failed to intervene. *See* Robert Hamill Inquiry, http://www.roberthamillinquiry.org (last visited Dec. 1, 2007). Rosemary Nelson, a human rights lawyer, was killed when a bomb attached to her car exploded in 1999. Prior to the murder she had been the recipient of threats and abuse from RUC officers. *See* Rosemary Nelson Inquiry, http://www.rosemarynelsoninquiry.org (last visited Dec. 1, 2007). Billy Wright, jailed leader of the Loyalist Volunteer Force (LVF) paramilitary organization, was murdered by republican fellow-prisoners under suspicious circumstances in 1997. *See* Billy Wright Inquiry, http://www. billywrightinquiry.org (last visited Dec. 1, 2007).

244. CORY COLLUSION INQUIRY REPORT: ROBERT HAMILL, 2004, H.C. 471, http://www.nio.gov.uk/cory_collusion_inquiry_report_(without_appendices)_robert_hamill.pdf; CORY COLLUSION INQUIRY REPORT: ROSEMARY NELSON, 2004, H.C. 473, http://www.nio.gov.uk/cory_collusion_inquiry_report_(without_appendices)_rosemary_nelson.pdf; CORY COLLUSION INQUIRY REPORT: BILLY WRIGHT, 2004, H.C. 472, http://www.nio.gov.uk/cory_collusion_inquiry_report_(without_appendices)_billy_wright.pdf.

245. *See infra* notes 259–62 and accompanying text.

decision in *Finucane*, a British government inquiry under the leadership of Sir John Stevens, the senior British police officer who chaired earlier investigations into allegations of collusion, recommended further investigation into Finucane's death.[246] The Third Stevens Inquiry concluded that there was ample evidence of security force collusion in the murders of Finucane and others, and asserted that as a result of this collusion "innocent people were murdered or seriously injured."[247] Similarly, Judge Cory recommended a public inquiry into Finucane's murder in his 2004 reports.[248]

In September 2004, in response to the Cory Reports, British Secretary of State Paul Murphy announced the government's intent to conduct a public inquiry into Finucane's death. However, Murphy stipulated that, owing to "public interest, including the requirements of national security," the proposed Finucane Inquiry would operate "on the basis of new legislation."[249] This new legislation took the form of the Inquiries Act 2005,[250] which was greeted by a storm of criticism. Opponents of the Inquiries Act argue that it undermines the effectiveness of public inquiries by allowing the British government to set their terms of reference and limit public access to inquiry findings—even by going so far as to prohibit the publication of certain information on the basis of "public interest."[251] Judge Cory has publicly recommended that members of the Canadian judiciary refrain from participating in inquiries organized under the Act.[252] The Finucane family has steadfastly refused to take part in an inquiry held under the Inquiries Act and has continually demanded the establishment of a fully independent, international investigation into the matter.[253]

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246. SIR JOHN STEVENS, STEVENS ENQUIRY: OVERVIEW AND RECOMMENDATIONS, Apr. 17, 2003, http://news.bbc.co.uk/1/shared/spl/hi/northern_ireland/03/stephens_inquiry/pdf/stephens_inquiry.pdf.

247. *See Stevens Statement: Key Extracts*, BBC NEWS, Apr. 17, 2003, http://news.bbc.co.uk/1/hi/northern_ireland/2956557.stm.

248. CORY COLLUSION INQUIRY REPORT: PATRICK FINUCANE, 2004, H.C. 470, at 107, http://www.nio.gov.uk/cory_collusion_inquiry_report_(with_appendices)_pat_Finucane.pdf.

249. *See* O'BRIEN, *supra* note 42, at 166–67 (reproducing the Secretary of State's statement on the proposed Finucane Inquiry in its entirety).

250. Inquiries Act, 2005, c. 12 (Eng.), *available at* http://www.opsi.gov.uk/acts/acts2005/20050012.htm.

251. *See* Northern Ireland Human Rights Commission, *The Inquiries Bill: A Briefing from the Northern Ireland Human Rights Commission*, Jan. 2005, http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/65/147.doc; British-Irish Rights Watch, *The Inquiries Bill: An End to Public Inquiries*, Nov. 29, 2004, http://www.birw.org/Public%20Inquiries.html.

252. Letter from Hon. Peter Cory, Former Justice Supreme Court Can., to Chris Smith, Chairman H. Comm. On Int'l Relations (Mar. 15, 2005), *available at* http://www.birw.org/Letter%20from% 20Judge%20Cory.html.

253. *See* Pat Finucane Centre, http://www.serve.com/pfc/#murderpf (last visited Dec. 1, 2007) (providing links to documents supporting the Finucane family's call for an independent international inquiry into Finucane's death).

Despite the controversy caused by the Inquiries Act, the British government initially "converted" both the Wright and Hamill inquiries to the new legislation.[254] These conversions were widely viewed as a "test run" in order to put pressure on the Finucane family to relent and allow for an inquiry to take place under the Inquiries Act.[255] In the process, however, the government may have jeopardized the effectiveness of both the Wright and Hamill inquiries and delayed the start of a new investigation into Finucane's death. With the assistance of Amnesty International, British-Irish Rights Watch, and the Committee on the Administration of Justice, Billy Wright's father initiated a successful legal challenge to the government's conversion of his son's inquiry to the Inquiries Act 2005 on the grounds that such an inquiry would not comply with Article 2 of the European Convention.[256] The Hamill Inquiry, however, is still proceeding on the basis of the Inquiries Act.

The government's use of inquiries following the *Jordan et al.* decisions seems to confirm Hegarty's suspicion that self-interest, rather than a desire to investigate human rights abuses, is propelling government action. In cases concerning collusion between state agents and paramilitary groups, the government's reluctance to allow for an inquiry that meets the effective official investigation standard is not surprising. Arguably, the European Court's decisions in *Shanaghan* and *Finucane* have opened up a wide number of deaths to potential investigation, thereby expanding the effective reach of Article 2. Confirmed evidence of collusion would undoubtedly be damaging to the British state. Nonetheless, the failure to investigate these matters—especially the death of Finucane,

254. *See* Jane Winter, British-Irish Rights Watch, *Director's Report*, Nov. 30, 2005, http://www.birw.org/report%202005/Nov%2005.html [hereinafter BIRW November 2005 Director's Report] (noting that the Wright Inquiry was converted despite the opposition of Billy Wright's family, their lawyers, and concerned non-governmental organizations); Jane Winter, British-Irish Rights Watch, *Director's Report*, Mar. 31, 2006, http://www.birw.org/Report%202006/Mar%2006.html [hereinafter BIRW March 2006 Director's Report] (noting the conversion of the Hamill Inquiry).

255. *See, e.g.*, BIRW March 2006 Directors Report, *supra* note 254 (suggesting that a primary motive behind the conversion of the Hamill Inquiry was to "undermine the opposition of Patrick Finucane's family to an Inquiries Act Inquiry").

256. *See* Jane Winter, British-Irish Rights Watch, *Director's Report*, May 2, 2006, http://www.birw.org/Report%202006/April%2006.html ("Amnesty International, British -Irish Rights Watch and the Committee on the Administration of Justice have made a third party intervention in the case brought by Bill Wright's father, David Wright .... All four organizations are supporting David Wright's claim that the Inquiries Act is not compatible with Article 2 of the European Convention on Human Rights ... because it cannot deliver an effective, independent investigation ....").

whose murder was directly considered by the European Court—will have detrimental legal and political ramifications in Northern Ireland. With no public inquiry forthcoming, Finucane's death remains a point of contention.[257]

C. "On-the-Runs" Legislation and the Question of Amnesty

Should members of the security forces face accountability for their use of lethal force? From a human rights perspective, especially in light of the *Jordan et al. decisions*, the answer to this question is yes. Yet within the political confines of Northern Ireland, whether and to what extent to enforce accountability remains a significant question. Recently proposed and quickly withdrawn British legislation aimed at dealing with "on-the-runs" (i.e. members of paramilitary groups wanted in connection with past violence) raised the issue of amnesty, or some variant thereof, for certain members of the police and military.[258] Crucially, the proposed legislation drew attention to the fact that past state violence cannot be divorced from the paramilitary violence that gripped Northern Ireland for decades.

In July 2001, the parties to the Good Friday Agreement—the governments of Britain and the Republic of Ireland, as well as the majority of Northern Ireland's political parties—met to discuss outstanding issues related to the peace process.[259] Among the issues was the question of how to deal with "on-the-runs"—republicans being sought by the British state for offenses. Under the Good Friday Agreement and subsequent legislation, the majority of paramilitary prisoners in both the United Kingdom and the Republic of Ireland became eligible for "early release" provided that the organizations to which they belonged maintained "complete and unequivocal" ceasefires.[260] This raised the question of how the peace process should deal with members of paramilitary groups (most importantly, members of the IRA) who believed they were being sought for an offense, escaped from prison following conviction, absconded while on bail prior to conviction, or were awaiting extradition.[261] The Good Friday Agreement and subsequent prisoner release legislation failed to address these situations. The Weston Park Proposals that emerged from the July 2001 talks stated that "it would be a natural development

257. *See* Kevin Connolly, *Stevens Inquiry Exposes NI Divisions*, BBC NEWS, Apr. 17, 2003, http://news.bbc.co.uk/1/hi/northern_ireland/2957445.stm.

258. Northern Ireland (Offences) Bill, 2005, Bill [54/1] (U.K.), *available at* http://www.nio.gov.uk/northern_ireland_offences_bill.pdf [hereinafter Offences Bill 2005] (last visited Feb. 12, 2006) (withdrawn on January 10, 2006).

259. *See* Bell, *supra* note 52, at 1130–32.

260. Good Friday Agreement, *supra* note 16, § 10.

261. Bell, *supra* note 52, at 1131–32.

of the [prisoner release] scheme for prosecutions not to be pursued and . . . as soon as possible, and in any event before the end of the year, [the British and Irish governments will] take such steps as are necessary in their jurisdictions to resolve this difficulty so that those concerned are no longer pursued."[262]

A response finally arrived in late 2005 in the form of the Northern Ireland (Offences) Bill.[263] The Offences Bill envisioned a process by which both "on-the-runs" and, critically, certain members of the security forces suspected of involvement in lethal force deaths would face criminal convictions before a special tribunal. However, they would not be required to attend hearings before the tribunal and would be freed on license without serving prison sentences if convicted.[264] The bill was roundly criticized by all of Northern Ireland's political parties. Its inclusion of state forces in the scheme provoked particularly harsh reactions. For example, Sinn Fein rejected the bill as amounting to an "amnesty" for agents of the state who should face prison sentences for their crimes.[265] At the other end of the political spectrum, the Democratic Unionist Party (DUP), the province's largest unionist party and a stalwart opponent of the Good Friday Agreement, argued that the Offences Bill unfairly placed the actions of state agents in defending law and order on the same level as those of terrorists bent on murder and destruction.[266] British-Irish Rights Watch, for its part, reluctantly accepted the "on-the-runs" portion of the legislation as a necessary political evil insofar as it grew out of the provisions of the Good Friday Agreement, but condemned the inclusion of state agents on the grounds that this component of the legislation was not part of the Good Friday Agreement, and furthermore contravened basic human rights principles.[267]

In the face of criticism from virtually all shades of political opinion in Northern Ireland, the British government withdrew the Offences Bill in

262. John Reid & Brian Cowen, Weston Park Proposals ¶ 20 (Aug. 1, 2001), http://www.nio.gov.uk/weston_park_document.pdf.
263. Offences Bill 2005, *supra* note 258.
264. *Id.*
265. *See* Katherine Baldwin, *Britain Scraps Amnesty Plan for N. Irish Fugitives*, REUTERS, Jan. 11, 2006.
266. *See id.*
267. *See* BIRW November 2005 Director's Report, *supra* note 254 ("We consider that members of the security forces . . . are public servants. . . . Higher standards can be expected from public servants than those that can be hoped for from terrorists.").

January 2006.[268] The withdrawal of the bill leaves open the question of how the government will ultimately honor its Weston Park commitments to deal with "on-the-runs" in a manner consistent with the early release provisions of the Good Friday Agreement. It also remains to be seen whether and to what extent state forces will be included in any amnesty-type initiative aimed at dealing with past political violence. The reasoning offered by British-Irish Rights Watch for accepting special legislation for "on-the-runs" but rejecting it for state agents is logical up to a point, but it denies the political reality of a situation in which both state and non-state actors must be held accountable for their actions in a manner consistent with the imperatives of the peace process.

The *Jordan et al.* decisions seem to rule out the possibility that any form of amnesty for state agents would be compliant with relevant principles of human rights law—these decisions require that thorough investigations are carried out with an eye towards establishing criminal accountability where warranted. However, a potential discrepancy arises in areas where state and non-state violence overlap, such as with allegations of collusion. Here, the *Shanaghan* and *Finucane* decisions imply that certain acts of violence carried out by non-state actors (i.e. paramilitary organizations) are subject to the same standards of an effective official investigation under Article 2 as are incidents of state violence.[269] This raises the question of whether legislation such as the Offences Bill would be human rights compliant regardless of the parties it is intended to cover.

Thus, although the actual "on-the-runs" legislation would have applied to a very small number of state and non-state actors, the accountability issues it raises have broader ramifications for the peace process. Such issues demonstrate that accountability for state violence is merely one piece in the larger puzzle of Northern Ireland's past. Impliedly, a more broad-ranging and comprehensive legal approach to past violence might be required in order to satisfy competing demands for truth and justice, amnesty and accountability.

VI. EVALUATING THE RIGHT TO LIFE IN NORTHERN IRELAND

The European Court has recognized that the deaths at issue in *Jordan et al.* "cr[y] out for an explanation."[270] This statement accurately implies that the *Jordan et al.* incidents have legal, political, and social relevance

268. *See Government Scraps Fugitive Plans*, BBC NEWS, Jan. 11, 2006, http://news.bbc.co.uk/1/hi/northern_ireland/4602314.stm.

269. Shanaghan, *supra* note 13; Finucane, *supra* note 15.

270. Jordan, *supra* note 13, ¶ 124; Kelly and Others, *supra* note 13, ¶ 118; Shanaghan, *supra* note 13, ¶ 108.

in Northern Ireland that extends beyond the individual cases at issue. Providing an explanation for how and why these deaths occurred, and seeking to hold accountable those responsible for the illegal use of lethal force, is critical within the context of Northern Ireland's ongoing peace process.

The *Jordan et al.* decisions offer a blueprint for the way in which lethal force deaths may be prevented in the future, as well as for the way in which past incidents may be dealt with in the present. By clarifying and strengthening the procedural component of the right to life, the decisions make a positive contribution to the search for peace in Northern Ireland by applying international human rights norms to the abuses that occurred during the Troubles.

Six years after the first of these decisions was handed down, an analysis of the United Kingdom's response to *Jordan et al.* raises important questions concerning the current state of protection of the right to life in Northern Ireland. On the one hand, the institutional reforms initiated by the British government represent important steps towards ensuring that similar violations of Article 2 do not occur in the future. The Committee of Ministers, in its June 2006 pronouncement on the cases, recognized that the British government has improved existing procedures and added important new safeguards for dealing with lethal force deaths.[271]

On the other hand, meeting the requirements of the *Jordan et al.* decisions requires more than simply establishing additional procedural safeguards for future cases. When the United Kingdom's responses to the European Court's rulings are viewed from the vantage point of past incidents of state violence, their utility is far less clear. Domestic right to life jurisprudence, especially in light of the House of Lords' rulings in *In Re McKerr* and the recent *Jordan* and *McCaughey* appeals, has had the effect of prohibiting the application of Article 2's procedural component to the vast majority of lethal force incidents that emerged from the conflict in Northern Ireland. It is telling that the House of Lords decisions most protective of the right to life as described by the European Court—*Middleton*, *Sacker*, and *Amin*—relate to individual death-in-custody incidents that occurred in England.[272] When the incidents at issue relate to state violence in Northern Ireland, as was the case in *In Re McKerr*, the *Jordan* and *McCaughey* appeals, and *Widgery*

271. June 2006 Information Document, *supra* note 146, "Summary."
272. *See supra* notes 169–72, 188–93 and accompanying text.

Soldiers, the Lords have failed to interpret the right to life in a manner consistent with international human rights law as established in *Jordan et al.*[273] As Bell and Keenan note, "[b]oth the House of Lords and the lower courts in Northern Ireland acknowledge[] in small ways that 'something different is going on' in the Northern Ireland cases. However, this recognition of 'something different' is used by the courts as an excuse to 'back off' a robust bringing back home of Article 2's procedural requirement."[274] The result of this domestic jurisprudence—as well as of domestic legislation such as the Inquiries Act 2005, which has stalled attempts to establish an inquiry into the death of Patrick Finucane—is that the United Kingdom has yet to fulfill its "continuing obligation" to initiate Article 2-compliant investigations into the incidents at issue in *Jordan et al.*, a fact which the Committee of Ministers recognized even as it praised the United Kingdom's future-oriented institutional reforms.[275]

In light of this discrepancy between future-oriented and backward-looking applications of the right to life, it is worth considering why the United Kingdom has been generally reluctant to apply Article 2 to state violence in Northern Ireland. At least part of the answer lies in the complex and unique political transition currently taking place in Northern Ireland. As a number of observers have pointed out, Northern Ireland's peace process is not paradigmatic of similar transitions that have taken place in other parts of the world.[276] The wave of democratizations that occurred during the 1980s and 1990s in Africa, Latin America, and Eastern Europe were, on the whole, precipitated by decisive, far-reaching political and social transformations. This normally included the ouster of the previous regime under which human rights abuses occurred and the establishment of a new political order that placed the protection of human rights at its core.

By contrast, the British state responsible for human rights violations during the Troubles remains in power, presiding over Northern Ireland's transition. This fact constrains the choices available for dealing with the past, especially insofar as those choices would involve shedding light on some of the more sinister aspects of Britain's role in Northern Ireland, such as the illegal use of deadly force by its soldiers or cooperation between the security forces and loyalist paramilitary death squads. A robust application of Article 2 to the issue of state violence during the

273. *See supra* notes 165–68, 179-82, 196–200 and accompanying text.
274. Bell & Keenan, *supra* note 145, at 86–87.
275. June 2006 Information Document, *supra* note 146.
276. *See, e.g.*, Bell & Keenan, *supra* note 145; Hegarty, *supra* note 25.

Troubles would potentially have serious ramifications for the British government.

Nonetheless, although important, Britain's role in Northern Ireland's transition remains only one piece of a far more complex puzzle. Although the British government appears, in many respects, to be acting out of self-interest when it moves to prevent a robust application of Article 2, it might also be attempting to act in the best interests of the Northern Ireland peace process. The issue of state violence is an extremely sensitive one, and it polarizes Northern Ireland's two communities. Bell and Keenan have identified two dynamics at work in Northern Ireland's peace process: a vertical dynamic comprising the relationships between individuals and the state and a horizontal dynamic concerned with the relationship between unionists and nationalists.[277] When the United Kingdom blocks Article 2-compliant investigations into lethal force deaths, it is arguably jeopardizing the vertical dynamic. Yet at the same time, Britain might argue that it is attempting to strengthen the horizontal dynamic. The government's ability to engage fully with Northern Ireland's past is limited by the strain such an engagement would place on unionist/nationalist relations and, by extension, the peace process.

Further, the Good Friday Agreement, arguably by design, leaves open the issue of how to deal with past violence, and instead focuses on the creation of a political framework for compromise and power-sharing.[278] Although this is a reasonable political solution in many respects, at some level Northern Ireland will have to come to terms with its past in order to ensure future political cooperation.[279] Given this, it is important to remember that in Northern Ireland state violence cannot be divorced from political violence as a whole.

Once again, the *McKerr* incident serves as a prism through which to consider violence and accountability. It is worth remembering that two of the victims at Tullygally Road were suspected of having planted a bomb that resulted in the deaths of three members of the RUC shortly

277. Bell & Keenan, *supra* note 145, at 69–70.

278. *See* CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS 60–65 (2000) (describing the emphasis on structural accommodations and power-sharing in the Good Friday Agreement).

279. *See, e.g.*, NORTHERN IRELAND AFFAIRS COMMITTEE, WAYS OF DEALING WITH NORTHERN IRELAND'S PAST: INTERIM REPORT—VICTIMS AND SURVIVORS. GOVERNMENT RESPONSE TO THE COMMITTEE'S TENTH REPORT OF SESSION 2004–05, 2005-6, H.C. 530 *available at* http://www.publications.parliament.uk/pa/cm200506/cmselect/cmniaf/530/530.pdf (explaining the importance of victims' issues in the ongoing peace process).

before they themselves were killed. While this does not provide an excuse for the actions of the HMSU in shooting the IRA members at the roadblock, it does point to the intimate connection between violence perpetrated by non-state actors and violence perpetrated by the state over the course of the conflict. Similarly, the fate of Lord Justice Gibson, the jurist whose exoneration and commendation of the HMSU caused such controversy in the wake of the incident, highlights this intimate connection. Three years after rendering his decision, Gibson and his wife were killed by the IRA in a carefully planned landmine attack as they crossed the border into Northern Ireland on their way home from a holiday in the Republic.[280] Non-state violence must also be dealt with as part of the overall process of peace and reconciliation in Northern Ireland. To ensure the full application of Article 2, the British state must take a more holistic approach to Northern Ireland's past.

VII. CONCLUSION

On March 26, 2007, Northern Ireland's largest political parties and bitterest enemies, the Democratic Unionist Party and Sinn Fein, announced plans to revive the power-sharing government envisioned by the Good Friday Agreement that had laid dormant since 2002.[281] This decision has revived hopes that the worst years of the Northern Ireland conflict are over and that political compromise rather than violent conflict will characterize the province's political landscape in the future.

In order to fully realize the promise of this historic step, the United Kingdom must work to ensure that the violence of the Troubles is dealt with in a manner that is compatible both with international human rights law and the imperatives of the peace process. For the families of the victims of the *Jordan et al.* incidents, and for all other victims of violence throughout Northern Ireland, a full explanation of the reasons for their suffering has been too long delayed. The European Court's Article 2 jurisprudence provides an important and useful roadmap for reaching a true "final court of justice." The challenge for the British government lies in meeting these decisions head-on. To the extent the United Kingdom seeks to minimize or escape responsibility for past human rights violations, it will inevitably meet them again in the form of continued political strife in Northern Ireland, as the ghosts of the past "linger at the margins of political debate and legal process, stymieing the capacity of all such systems to move forward."[282] By contrast, dealing

280. *See* TAYLOR, *supra* note 4, at 250.
281. *See* Eamon Quinn & Alan Cowell, *Ulster Factions Agree to a Plan for Joint Rule*, N.Y. TIMES, Mar. 27, 2007, at A1.
282. Ní Aoláin, *supra* note 81, at 590.

with the decisions in a manner consistent with human rights law and the imperatives of Northern Ireland's peace process will strengthen prospects for a just and lasting peace.