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National Investigations of Human Rights Between National and International Law

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Abstract

This essay will examine the interplay between international and national law with regards to investigations of human rights violations. The duty to investigate violations of international law touches upon issues that up until recently were considered beyond the reach of international law. Since its recognition by the European Court of Human Rights in 1995, the procedural aspect of the right to life, i.e. the duty to investigate, has developed rapidly. In turn, also due to the unique legal relationship between the ECtHR and national courts, these developments have affected, and are still affecting, national law. This ongoing process of dialogue between national courts and international tribunals has greatly contributed to the development of the duty to investigate certain violation of international law, and the manner in which these investigations should be conducted.

A. Introduction

The duty to investigate, through the domestic law enforcement systems of States, certain violations of international law, especially certain violations of human rights law, is considered today to be virtually uncontested and self-evident. It is also commonly accepted that international law influences the way that those national investigations should be conducted. This view is shared by, amongst others, the European Court of Human Rights (ECtHR),[1] the Inter-American Court of Human Rights (Inter-American Court),[2] the Human Rights Committee,[3] the Committee Against Torture,[4] various United Nations fact finding missions,[5] scholars,[6] and NGOs.[7]

1 See for example, *McCann and Others v. the United Kingdom*, ECtHR, Judgment, Appl. No. 18984/91, 27 September 1995 [McCann].

2 See for example *Velasquez Rodriguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. Series C, No. 4 (1988) [Velasquez Rodriguez Case].

3 See for example *Joaquín David Herrera Rubio et al. v. Colombia*, Communication No. 161/1983, UN Doc CCPR/C/OP/2 (1990), 192 [Herrera v. Colombia].

4 See for example *Parot v. Spain*, UN Doc CAT/C/14/D/6/1990, 2 May 1995 [Parot v. Spain].

5 *Report of the International Commission of Inquiry on Libya*, UN Doc A/HRC/19/68, 2 March 2012. *Report of the Secretary-General's Panel of Experts on Accountability in*

This essay will focus on the duty to investigate under the *European Convention on Human Rights* (*European Convention*) and examine the development of international law's reach into national investigations, its influence upon procedures taken by national law enforcement mechanisms, and the relationship between national and international law. First, this essay will present a short background on the history of the duty to investigate violations of international law; it will be followed by an analysis of the development of the duty, as well as its guiding principles and procedures in the case law of the ECtHR. The essay will then briefly present a few examples of the way the jurisprudence of the ECtHR has influenced national courts in the United Kingdom (UK).

Sri Lanka (31 March 2011), available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf (last visited 28 January 2013).

6 N. Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law', 78 *California Law Review* (1990) 2, 449; D. F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale Law Journal* (1991) 8, 2537; J. E. Méndez, 'Accountability for Past Abuses', 19 *Human Rights Quarterly* (1997) 2, 255; C. C. Joyner, 'Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability', 26 *Denver Journal of International Law and Policy* (1998) 4, 591; K. E. Irwin, 'Prospects for Justice: The Procedural Aspect of the Right to Life Under the European Convention on Human Rights and Its Applications to Investigations of Northern Ireland's Bloody Sunday', 22 *Fordham International Law Journal* (1998) 4, 1822; J. E. Méndez & J. Mariezcurrena, 'Accountability for Past Human Rights Violations: Contributions of the Inter-American Organs of Protection', 26 *Social Justice* (1999) 4, 84; A. Mowbray, 'Duties of Investigation under the European Convention on Human Rights', 51 *International & Comparative Law Quarterly* (2002) 2, 437; J. Chevalier-Watts, 'Effective Investigations Under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?', 21 *European Journal of International Law* (2010) 3, 701.

7 Human Rights Watch, 'Unacknowledged Deaths: Civilian Casualties in NATO's Air Campaign in Libya' (May 2012), available at http://www.hrw.org/sites/default/files/reports/libya0512webwcover_0.pdf (last visited 28 January 2013); Amnesty International, 'Iraq: New Order, Same Abuses: Unlawful Detentions and Torture in Iraq' (13 September 2010), available at http://www.amnesty.org/en/library/asset/MDE14/006/2010/en/c7df062b-5d4c-4820-9f14-a4977f863666/mde140062010en.pdf (last visited 28 January 2013).

B. Background

While most of the major human rights treaties came into force in the 1950s and 1960s,[8] the duty of States to domestically investigate certain violations of those treaties was only fully recognized in the 1990s, through a binding judgment of the ECtHR. As will be elaborated below, the *European Convention* does not specifically mention a duty to conduct national investigations in certain cases or with regards to certain rights.[9] In fact, the word 'investigation' does not explicitly appear in any other major human rights treaty, with the exception of the *Convention Against Torture*.[10]

Several international actors have begun discussing the duty to investigate certain violations of international law, especially human rights violations, since the early 1980s. For example, the Human Rights Committee, as early as 1982, determined that States had an implied "duty to investigate in good faith all allegations of violations of the Covenant made

8 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222 [European Convention]; and, though not a formal treaty, the *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc A/810, 71.

9 Hence the need for a Court's judgment to establish the duty to investigate.

10 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85. The Convention states in Art. 12: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." It is interesting to note that even after first establishing the duty to investigate, as will be elaborated below, the ECtHR specifically compares the explicit obligation to investigate contained in the *Convention Against Torture* and the lack of such obligation under the *European Convention*. It then goes on to establish an implied duty to investigate: "Accordingly, where an individual has an arguable claim that he or she has been tortured by agents of the State, the notion of an 'effective remedy' entails […] a thorough and effective investigation capable of leading to the identification and punishment of those responsible […]. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a 'prompt and impartial' investigation whenever there is a reasonable ground to believe that an act of torture has been committed […]. However, such a requirement is implicit in the notion of an 'effective remedy' under Article 13." *Aydin v. Turkey*, ECHR, Judgment, Appl. No. 23178/94, 25 September 1997, para. 103 [Aydin v. Turkey].

against it and its authorities".[11] The early development of the duty to investigate was promoted, in particular, through the case law of the Inter-American Court,[12] further decisions of the Human Rights Committee,[13] the Committee Against Torture,[14] the UN Committee on the Elimination of Racial Discrimination,[15] and various other soft law[16] instruments such as a 1982 General Comment of the High Commissioner for Human Rights, articulating the duty to investigate disappearances,[17] or the United Nations *Principles on the Effective Prevention and Investigation of Extra-Legal*, Arbitrary and Summary Executions (1989)[18] and its Manual (1991).[19]

C. The Duty to Investigate Under the *European Convention*

The duty to investigate first received wide attention and greater status only when it was made legally binding upon parties to the *European Convention* in *McCann*, decided in September 1995 by the ECtHR.[20] The

11 *Bleier v. Uruguay*, Communication No. 30/1978, UN Doc CCPR/C/15/D/30/1978, 29 March 1982, para. 13.3.

12 Such as the *Velasquez Rodriguez Case*, *supra* note 2.

13 Such as *Lopez Burgos v. Uruguay*, Communication No. 52/1979, UN Doc CCPR/C/13/D/52/1979, 29 July 1981; *Barbato v. Uruguay*, Communication No. 84/1981, UN Doc CCPR/C/17/D/84/1981, 21 October 1982; *Almeida de Quinteros v. Uruguay*, Communication No. 107/1981, UN Doc CCPR/C/OP/2, 21 July 1983; *Herrera v. Colombia*, *supra* note 3; *S. E. v. Argentina,* Communication No. 275/1988, UN Doc CCPR/C/38/D/275/1988, 26 March 1990.

14 *Parot v. Spain*, *supra* note 4.

15 *L.K. v. Netherlands*, UN Doc CERD/C/42/D/4/1991, 16 March 1993.

16 For a definition of "soft law", see for example: "[t]he realm of 'soft law' begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation." K. W. Abbott & D. Snidal, 'Hard and Soft Law in International Governance', 54 *International Organizations* (2000) 3, 421, 422.

17 Human Rights Committee, 'General Comment 6: Article 6', in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.1 (1994), 6.

18 *United Nations Principles on the Effective Prevention and Investigation of Extra-Legal,* Arbitrary and Summary Executions, ECOSOC Res. 1989/65, 24 May 1989.

19 United Nations Office at Vienna Centre for Social Development and Humanitarian Affairs*, United Nations Manual on the Effective Prevention and Investigation of Extra-Legal*, Arbitrary and Summary Executions, UN Doc E/ST/CSDHA/.12, 1991.

20 *McCann*, *supra* note 1. Note how the House of Lords explains that it was inconceivable in 1988 that the right to life would include a procedural aspect: "The

position of the UK government presented before the Court indicates the landmark nature of the decision. The UK implied that the duty to investigate does not derive from the Convention, urged the Court not to impose specific rules upon such investigation, and rejected the assertion that deviation from international standards for investigation, preliminary and under-developed as they were then, will result in a violation of the right to life:

> "The Government submitted that the inquest more than satisfied any procedural requirement *which might be read* into Article 2 para.1 of the Convention. In particular, they maintained that it would not be appropriate for the Court to seek to identify a single set of standards by which all investigations […] should be assessed. Finally, they invited the Court to reject the contention [...] that a violation of Article 2 para.1 will have occurred whenever the Court finds serious differences between the UN Principles on Extra-Legal Executions and the investigation conducted."[21]

meaning of the word 'how' in this legislation was, as stated, first established in *Ex p Rubenstein* in 1982. Not only was the 1988 Act (in which the present provision appears) itself a consolidating Act (and concerned, therefore, to enshrine the existing law) *but it was enacted at a time when Parliament can have had no thought that one day the United Kingdom might be under a procedural obligation to enquire into deaths pursuant to article 2 of the Convention*. As already observed*, it was not until 1995* that the European Court of Human Rights in *McCann* itself identified any such Convention duty." (emphasis added). *R (on the Application of Hurst) (Respondent) v. Commissioner of Police of the Metropolis (Appellant)*, Appellate Committee of the House of Lords, [2007] UKHL 13, paras. 28, 50 [Hurst]. See also Mowbray, *supra* note 6, 437. *R (on the Application of JL) (Respondent) v Secretary of State for Justice (Appellant)*, Appellate Committee of the House of Lords, [2008] UKHL 68, para. 22 [R (JL) v Secretary of State for Justice].

21 *McCann*, *supra* note 1, para. 158 (emphasis added). Note the very similar position presented by Uruguay, and the response of the Committee, in *Rodriguez v. Uruguay*, Communication No. 322/1988, UN Doc CCPR/C/51/D/322/1988, 19 July 1994, paras 8.5, 12.3: "the duty to investigate *does not appear in the Covenant* or any express provision, and there are consequently no rules governing the way this function is to be exercised […]. The Committee cannot agree with the State party that it has no obligation to investigate violations of Covenant rights by a prior regime, especially when these include crimes as serious as torture" (emphasis added). Or the position taken by Denmark in *Habassi v. Denmark*, Communication No. 10/1997, UN Doc CERD/C/54/D/10/1997, 17 March 1999, para. 7.5: "The State party argues that the police investigation in the present case satisfies the requirement *that can be inferred* from the Convention and the Committee's practice" (emphasis added).

However, the Court famously rejected the UK's position and stated that the duty to investigate is implied in the Convention:

> "The obligation to protect the right to life […] read in conjunction with the State's general duty under Article 1 of the Convention [...] requires *by implication* that there should be *some form of effective official investigation* when individuals *have been killed* as a result of the use of force by, *inter alios*, agents of the State."[22]

The Court in *McCann* therefore only established a rather narrow obligation: to investigate cases of death resulting from the use of force, *inter alia*, by State agents.[23] However, even this narrow duty is different *in kind* than other duties explicitly enshrined in Art. 2 of the *European Convention* and, arguably, not necessarily what the States had in mind when concluding the Convention.[24] It is interesting to note that the Court acknowledged that

[22] *McCann*, *supra* note 1, para. 161. This line of reasoning, taken by the ECtHR, is identical to the one adopted by the Human Rights Committee with regard to the duty to investigate under the ICCPR in its General Comment No. 20: "Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant [...]. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective." See Human Rights Committee, 'General Comment 20: Article 7', in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, *supra* note 17, 30. However, the Human Rights Committee has sometimes, while taking a similar analytical approach, relied instead on the Optional Protocol and not on the Covenant: "It is *implicit* in article 4, paragraph 2, of the Optional Protocol [which stipulates that: 'the […] State shall submit to the Committee written explanations or statements clarifying the matter'] that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. In no circumstances should a State party fail to investigate fully allegations of ill-treatment when the person or persons allegedly responsible for the ill-treatment are identified by the author of a communication." See *Herrera v. Colombia*, *supra* note 3, para. 10.5 (emphasis added). It is also similar to the approach taken by the Inter-American Court of Human Rights in the case of *Godínez Cruz v Honduras*, Int.-Am. Ct. H. R. Series C, No. 5 (1989), para 175. Though this reasoning was developed more than a decade before *McCann*, it was not relied on, or even mentioned, by the ECtHR.

[23] *McCann*, *supra* note 1.

[24] See the quote from *Hurst* in *supra* note 20.

the duty to investigate is only implied in the Convention, and it did not rely on any external source for that determination.[25]

Nevertheless, since *McCann*, the duty to investigate is no longer implied but an established obligation. In fact, the Court frequently turns to this procedural aspect of the right to life,[26] and, as the Court's jurisprudence developed, of other rights enshrined in the *European Convention*. The Court in *McCann*, though setting forth the new dictum with regards to the obligation to investigate, did not eventually hold the UK in violation of the right to life with regards to the investigation conducted. This case turned out to be an exceptionally rare determination by the Court that an investigation conducted by a State had met the (as yet not fully articulated) procedural requirements of Art. 2.[27]

25 Though, as mentioned above, at the time *McCann* was given there were several other sources establishing a duty to investigate human rights violations, such as the Inter-American Court, decisions of the Human Rights Committee, and the UN *Principles on the Effective Prevention and Investigation of Extra-Legal*, Arbitrary and Summary Executions, (these principles are only briefly mentioned earlier in the judgment ant explicitly relied on by the ECtHR). Several of these sources were already referred to above (see for example *supra* notes 11-15). Furthermore, even after *McCann*, when establishing a duty to investigate under Art. 13 of the European Convention, the Court still referred to an implied obligation. See *Aydin v. Turkey*, *supra* note 10.

26 See, as an example, the list of cases dealing with the duty to investigate between *McCann* in September 1995 and *McKerr* in May 2001: *Kurt v. Turkey*, ECHR, Judgment, Appl. No. 24276/94, 25 May 1998 [Kurt]; *Güleç v. Turkey*, ECHR, Judgment, Appl. No. 21593/93, 27 July 1998 [Güleç]; *Ergi v. Turkey*, ECHR, Judgment, Appl. No. 23818/94, 28 July 1998; *Yaşa v. Turkey*, ECHR, Judgment, Appl. No. 22495/93, 2 September 1998; *Kaya v. Turkey*, ECHR, Judgment, Appl. No. 22729/93, 19 February 1998 [Kaya]; *Assenov and Others v. Bulgaria*, ECHR, Judgment, Appl. No. 24760/94, 28 October 1998; *Oğur v. Turkey*, ECHR, Judgment, Appl. No. 21594/93, 20 May 1999; *Çakıcı v. Turkey*, ECHR, Judgment, Appl. No. 23657/94, 8 July 1999; *Tanrıkulu v. Turkey*, ECHR, Judgment, Appl. No. 23763/94, 8 July 1999; *Mahmut Kaya v. Turkey*, ECHR, Judgment, Appl. No. 22535/93, 28 March 2000; *Ertak v. Turkey*, ECHR, Judgment, Appl. No. 20764/92, 9 May 2000; *Timurtas v. Turkey*, ECHR, Judgment, Appl. No. 23531/94, 13 June 2000 [Timurtas].

27 "The Commission found by a majority that there had been no violation. But the Court held, following the opinion of the Commission, that article 2 of the Convention required by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the state: *This procedural or investigative obligation as it came to be called, if foreshadowed at all by previous jurisprudence, had not been generally appreciated*. But the Court found, on the facts, that various shortcomings in the conduct of the inquest of which complaint had been made had not 'substantially hampered the carrying out of a thorough, impartial and careful examination of the

It is important to note that the Court qualified its assertion in *McCann*: i) it restricted this obligation to cases of death, and ii) refused to comment on the exact procedure an investigation should follow, and limited itself to requiring 'some form of effective investigation'.[28] However, as the Court's jurisprudence in this area has developed, these self-imposed restrictions have diminished. For example, on the question of the circumstances that give rise to the duty to investigate, the Court expanded the obligation to investigate to cases of severe injury that do not result in death[29] and cases of disappearances (even where there is no evidence concerning the fate of the missing person).[30]

On the procedural requirements from an investigation, the ECtHR had begun to develop its case law, and to instruct States as to exactly how to fulfill their obligation in that regard. In a long line of cases, dealing with various situations ranging from death to torture to disappearances, the Court laid down principles to be followed and even specific investigative steps that States should take if they wish to meet the Court's requirement for an 'effective investigation'. It is arguably on this procedural aspect that the Court most deviated from its initial statement, and developed requirements that far surpass those of other international fora in their specificity. Furthermore, it is this aspect that affects national law in a way not contemplated in the past by States. It demonstrates the significant influence by international law on areas of law once reserved for the State's sole discretion.

Very early in the post-*McCann* case law, the Court specified several general principles[31] that an investigation must fulfill in order to meet the procedural requirements implied in the Convention, and in the Court's terminology, to amount to an 'effective investigation'. By way of

circumstances surrounding the killings'". *Jordan (AP) (Appellant) v. Lord Chancellor and Another (Respondents) (Northern Ireland)*, Appellate Committee of the House of Lords, [2007] UKHL 14, para. 28 (emphasis added) [Jordan v. Lord Chancellor]. It is far more common for the Court to determine that an investigation has not met the requirements of the Convention.

28 *McCann, supra* note 1, para. 161.

29 Addressed either through the right to life enshrined in Art. 2 of the *European Convention* or through the prohibition against torture or inhumane treatment in Art. 3, depending on the circumstances.

30 See *Timurtas*, *supra* note 26, paras 81-90. Ironically, other international fora recognized the obligation to investigate this category of cases in an opposite order, before establishing an obligation to investigate cases of death.

31 Now sometimes referred to as 'universal principles'.

interpreting this phrase, the Court determined that an investigation must be independent and impartial,[32] prompt,[33] thorough,[34] allow public scrutiny,[35] and involve the next-of-kin of the victim.[36] The Court further added that the purpose of an investigation is to establish the facts of the incident and lead, where appropriate, to the accountability of those involved in wrongdoing. The Court then went on to articulate each of these broad principles and establish specific rules for conducting an 'effective investigation' while referring to highly detailed investigative actions. Examples of such specific steps include autopsies conducted by specialized pathologists,[37] the exact timing of questioning witnesses,[38] forensic measures to detect gunpowder traces,[39] etc. According to the Court, a deviation from the principles that were determined as required for the effectiveness of the investigation or lack of a specific investigative step might lead to a determination that a violation of the duty to investigate has occurred.

The Court's approach to investigations might be said to reach an almost final level of theoretical articulation in the cases of *Hugh Jordan*[40] and *McKerr*,[41] both given less than six years after *McCann*.[42] The detailed analysis of the principles of an 'effective investigation' symbolizes the great advancement made in this area, especially when remembering the thin reasoning given by the Court in *McCann* and its statement that what is

32 First established in February 1998 in *Kaya*, *supra* note 26, para. 87.

33 First established in May 1998 in *Kurt*, *supra* note 26, para. 124.

34 First established in July 1998 in *Güleç* , *supra* note 26, paras 82-83.

35 First established in February 1998 in *Kaya*, *supra* note 26, para. 87.

36 First established in May 2001 in *Hugh Jordan v. the United Kingdom*, ECHR, Judgment, Appl. No. 24746/94, 4 May 2001, para. 133 [Jordan v. United Kingdom, ECHR]. These two principles could be described as two aspects of transparency.

37 *Tanlı v. Turkey*, ECHR, Judgment, Appl. No. 26129/95, 10 April 2001, para. 150.

38 *McKerr v. the United Kingdom*, ECHR, Judgment, Appl. No. 28883/95, 4 May 2001, para. 126 [McKerr v. United Kingdom, ECHR].

39 *Kaya*, *supra* note 26, para. 89.

40 *Jordan v. United Kingdom*, ECHR, *supra* note 36.

41 *McKerr v. United Kingdom*, ECHR, *supra* note 38.

42 "Nor, moreover, could he be said to have breached the procedural obligation to hold a sufficient inquiry into the death – an obligation which the ECtHR first found to be implicit in Article 2 in *McCann v United Kingdom* [...] and has developed in subsequent caselaw to the point now reached in this very case, *McKerr v. United Kingdom* [...] (and the other three Northern Ireland cases determined in parallel with it)." *In re McKerr (AP) (Respondent) (Northern Ireland)*, Appellate Committee of the House of Lords, [2004] UKHL 12, para. 90 [McKerr v. United Kingdom, House of Lords].

required from States is just 'some form of effective official investigation'.[43] The principles developed and elaborated from this obscure phrase of 'effective investigation' are:

> "For an investigation [...] to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be *independent* from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence [...]. The investigation must also be *effective* in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified [...] and to the identification and punishment of those responsible [...]. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident [...]. A requirement of *promptness* and reasonable expedition is implicit […] there must be a sufficient element of *public scrutiny* [...] to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the *next-of-kin of the victim* must be involved in the procedure [...]."[44]

The development of the Court's approach is easily visible, and quite remarkable when considering the short period of time between *McCann* and *Jordan*.[45] The effect of this detailed jurisprudence of the ECtHR regarding the requirements of international law upon national courts and law will be briefly presented below. While there is evidence to suggest that the ECtHR's jurisprudence regarding the duty to investigate has influenced

43 This language is still being used by the Court, though today, when considering the elaborated requirements posed by the Court, it might be considered to be mere lip-service to earlier case law.

44 *Jordan v. United Kingdom*, ECHR, *supra* note 36, paras 106-109 (emphasis added).

45 This is so despite the fact that the Court continues to state that: "It is not for this court 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 [...]. Nor can it be said that there should be one unified procedure satisfying all requirements". *McKerr v. United Kingdom*, ECHR, *supra* note 38, para. 159. While the Court does not oblige a single procedure, its requirements for 'effective investigation' limit the procedural options available for the States.

several European national jurisdictions, such as Spain,[46] Germany[47] and Slovenia[48] (which have explicitly referred to and relied on the ECtHR in such matters), the following part of the essay will focus on UK courts as an example of the way domestic courts have internalized the ECtHR's requirements.[49]

D. National Laws

Despite the lack of States' explicit consent to be bound by this duty, UK national courts, mostly due to unique characteristics of the *European Convention* and Court,[50] have internalized this obligation, which is now a part of the UK's national law. Through this process, developments in the interpretation of international law by the ECtHR are incorporated

46 *Dorprey v. First Instance Criminal Court N 7 of Valencia*, Constitutional Appeal, ILDC 1418 (ES 2007). Directly referring to: *Martinez Sala and Others v. Spain*, ECHR, Judgment, Appl. No. 58438/00, 2 November 2004. See also *Falcón Ros v. Section N 4 of the Provincial Court of Murcia*, Constitutional Appeal Judgment of the Constitutional Court, ILDC 1421 (ES 2008).

47 *Duty to Investigate Case*, Final Judgment, Federal Constitutional Court, 2 BvR 2307/06, ILDC 1569 (DE 2010).

48 *Constitutional Complaint*, Decision of the Slovenian Constitutional Court, Up-555/03-41; Up-827/04-26, ILDC 631 (SI 2006) [Constitutional Complaint]. Subsequent references to this decision are based on a translation prepared by Oxford Reports on International Law and can be found at http://www.oxfordlawreports.com/subscriber_article?script=yes&id=/oril/Cases/lawildc631si06&recno=30&module=ildc&category=Sources,%20foundations%20and%20principles%20of%20international%20law (last visited 28 January 2013).

49 The UK was selected for more detailed research since language considerations enabled greater access to domestic court decisions but also because of the relatively large volume of ECtHR cases involving the UK. As a comparison, the ECtHR found that the UK violated Art. 3 in 48 cases, while it found Spain to violate Art. 3 in 'only' 15 cases, Germany in 14, and Slovenia in 14. The differences are even greater with regard to Art. 2 violations. The UK was found to violate this Art. in 40 cases, while Slovenia was 'only' found to violate this Art. in 5 cases, and no violations of Art. 2 were found with regard to Spain or Germany.

50 According to Art. 53 of the *European Convention*, *supra* note 8, 248 "The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties" and according to the UK *Human Rights Act 1998*, domestic courts must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights (see *Human Rights Act* 1998, Art. 2)

completely into national law and are enforced by national courts.[51] In this dialogue between States and various international actors, States generally wish to retain their sovereignty[52] and international actors[53] seek to impose upon States unified procedures for effective investigations. This dialogue between national and international courts is constantly changing on the question of the procedural scope of the duty to investigate.

As early as 2003,[54] the House of Lords has relied exclusively on the jurisprudence of the ECtHR to establish the relevant law for conducting an investigation into a crime committed: "The issue in this appeal is whether the United Kingdom has complied with its duty under article 2 of the European Convention [...] to investigate the circumstances in which this crime came to be committed."[55] In a different case, it relied on the

51 The importance of the close cooperation of national courts and the ECtHR was addressed by the Slovenian Constitutional Court: "The ECrtHR operates according to the principle of subsidiarity. In other words: the application of EConvHR to all 46 member states of the Council of Europe, in which 800 million people live, cannot be carried out by the ECrtHR itself. [...] Hence, it follows that states themselves by means of their regulations and the operation of regular and constitutional courts provide for the application of EConvHR. The particularity of EConvHR is that it is an act that is constantly evolving and being augmented by means of the case-law of the ECrtHR, which is its undisputable guardian and master." *Constitutional Complaint*, Concurring Opinion of Judge Dr. Ciril Ribičič *supra* note 48.

52 Note the approach taken by the House of Lords: "Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg." *McKerr v. United Kingdom*, House of Lords, *supra* note 42, para. 65.

53 The ones most relevant for the purpose of the duty to investigate are UN bodies, international tribunals, and NGOs.

54 As noted above, the jurisprudence of the ECtHR on this issue only matured in 2001.

55 *Regina v. Secretary of State for the Home Department (Respondent) ex parte Amin (FC) (Appellant)*, Appellate Committee of the House of Lords, [2003] UKHL 51, para. 1 [Regina v. Secretary (Amin)]. Compare to a similar approach taken by the Slovenian Constitutional Court: "According to the ECrtHR, in cases in which the allegation of the violation of Articles 2 and 3 of EConvHR is probable, the notion of an effective remedy [...] also entails a thorough and effective investigation [...] including effective access by the injured party or his/her relatives to the investigatory procedure [...]. According to the case-law of the ECrtHR, a prompt and thorough investigation is particularly important, as an incomplete investigation is tantamount to undermining the effectiveness of any other remedies that may have existed. The

jurisprudence of the ECtHR, as opposed to relying on previous UK case law, for articulating relevant requirements for conducting an investigation in order to ensure public confidence that justice has been upheld.[56] For example, the Court discussed independence,[57] public scrutiny,[58] and involvement of next-of-kin,[59] as developed by the ECtHR.

The House of Lords summarized its decision by stating:

> "[the State] was right to insist that the European Court has not prescribed a single model of investigation to be applied in all cases. There must [...] be a measure of flexibility in selecting the means of conducting the investigation. But [the Appellant] was right to insist that the Court [...] has laid down minimum

above-mentioned right is not explicitly guaranteed by the Constitution [...]. In view of the above-mentioned, Article 15 § 4 of the Constitution is to be understood in a manner such that it also includes the right to an independent investigation [...]. Although Article 15 § 4 of the Constitution guarantees the judicial protection of human rights, in view of the above-mentioned case-law of the ECrtHR with reference to Article 13 of EConvHR, only an investigation conducted outside the scope of judicial proceedings that is independent and guarantees effective participation to the persons affected suffices in the above-discussed situations." *Constitutional Complaint*, *supra* note 48, paras 30-39.

56 "It is essential both for the relatives and for public confidence in the administration of justice and in the state's adherence to the principles of the rule of law that a killing by the state be subject to some form of open and objective oversight [...]. The Court has not required that any particular procedure be adopted to examine the circumstances of a killing by state agents, nor is it necessary that there be a single unified procedure [...]. But it is 'indispensable' (*Jordan*, paragraph 144) that there be proper procedures for ensuring the accountability of agents of the state so as to maintain public confidence and allay the legitimate concerns that arise from the use of lethal force". *Regina v. Secretary (Amin)*, *supra* note 55, para. 20.

57 "[F]or an investigation [...] to be effective, it may generally be regarded as necessary (*Jordan*, paragraph 106) 'for the persons responsible for and carrying out the investigation to be independent from those implicated in the events…This means not only a lack of hierarchical or institutional connection but also a practical independence…'" *Id.*

58 "While public scrutiny of police investigations cannot be regarded as an automatic requirement under article 2 (*Jordan*, paragraph 121), there must (*Jordan*, paragraph 119) 'be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case'." *Id*.

59 "'In all cases', as the Court stipulated in *Jordan*, paragraph 109: 'the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.'" *Id*.

> standards which must be met, whatever form the investigation takes."[60]

In subsequent cases, the House of Lords has also, while discussing issues related to investigations, resorted to the principles and rules established by the ECtHR.[61] A recent case might exemplify the way the House of Lords is relying, interpreting, and elaborating upon the case law of the ECtHR while determining the content of national law:

> "[T]he Appellate Committee of the House of Lords [...] summarised the Strasbourg jurisprudence as to the effect of this provision:
> The procedural obligation requires a State, of its own motion, to carry out an investigation […] that has the following features: i) [...] a sufficient element of public scrutiny [...] ii) [...] conducted by a tribunal that is independent [...] iii) The relatives of the deceased must be able to play an appropriate part in it. iv) It must be prompt and effective [...] These features are derived from the Strasbourg jurisprudence."[62]

These cases are an illustration of the process in which a national court is interpreting concepts derived from international law, for the purpose of implementing them into the national legal system, while an international tribunal can guide and redirect this interpretation into directions it thinks are

60 *Id.*, para. 32.

61 *Regina v. Police Complaints Authority (Respondents) ex Parte Green (FC) (Appellant)*, Appellate Committee of the House of Lords, [2004] UKHL 6; *McKerr v. United Kingdom*, House of Lords, *supra* note 42; *Regina v. Her Majesty's Coroner for the Western District of Somerset (Respondent) and Another (Appellant) ex Parte Middleton (FC) (Respondent)*, Appellate Committee of the House of Lords, [2004] UKHL 10; *Al-Skeini and Others (Respondents) v. Secretary of State for Defence (Appellant); Al-Skeini and Others (Appellants) v. Secretary of State for Defence (Respondent) (Consolidated Appeals)*, Appellate Committee of the House of Lords, [2007] UKHL 26 [Al-Skeini v. Secretary of State for Defence, House of Lords]; *Jordan v. Lord Chancellor*, *supra* note 27; *Hurst*, *supra* note 20; *R (on the application of Gentle (FC) and another (FC)) (Appellants) v. The Prime Minister and others (Respondents)*, Appellate Committee of the House of Lords, [2008] UKHL 20. *R (JL) v. Secretary of State for Justice*, *supra* note 20.

62 *R (on the application of Smith) (FC) (Respondent) v Secretary of State for Defence (Appellant) and another*, United Kingdom Supreme Court, [2010] UKSC 29, paras 63-64.

more correct and proper. It is not a dialogue between equals since, according to the *European Convention* and UK law the ECtHR is the final interpreter of Convention rights and its rulings are binding upon domestic courts.[63] As the House of Lords so eloquently phrased their role: "It has often been said that our role in interpreting the Convention is to keep in step with Strasbourg, neither lagging behind nor leaping ahead: no more, as Lord Bingham said […] but certainly no less: no less, as Lord Brown says […] but certainly no more."[64]

International law's influence even upon lower courts, either directly through the jurisprudence of the ECtHR or through the power of national precedent of the House of Lords, is also visible, for example, in a recent decision by the Court of Appeals in the case of *Zaki Mousa*.[65] In this case, an investigative mechanism established by the UK was struck down based on the ECtHR's interpretation of the principle of 'independence'.[66]

63 A judge at the Slovenian Constitutional Court went even further and suggested that domestic courts should consider, hypothetically, what would the ECtHR decide in a given case while assessing their own decision: "It can be predicted with great probability on the basis of ECrtHR judgments that the ECrtHR, had it decided on the merits of the present case, would have established a violation of Articles 2 or/and 3 of EConvHR. For me there is no doubt that the ECrtHR would have established that Slovenia has violated the aforementioned provisions of EConvHR, if such violation had not been established by the Constitutional Court in the present decision. The ECrtHR judgment in the Case of Lukenda v. Slovenia is a convincing illustration of the manner how a state which in its regulations and case–law is not willing to consistently respect the case-law of the ECrtHR is condemned for such [...]. It is important also from this point of view that the Constitutional Court granted the constitutional complaints in the present case." *Constitutional Complaint*, Concurring Opinion of Judge Dr. Ciril Ribičič, *supra* note 48.

64 *Al-Skeini v. Secretary of State for Defence*, House of Lords, *supra* note 61, para. 90, see also: "As there has been cross-fertilisation between the regulatory regimes applicable in Northern Ireland and England and Wales, so there has been cross-fertilisation between the lines of authority in the two jurisdictions. But both have also been strongly influenced by the impact of decisions made in Strasbourg." *Jordan v. Lord Chancellor*, *supra* note 27, para. 22.

65 *The Queen (oao) Mousa v Secretary of State for Defence & ANR*, Judgment, Court of Appeal (Civil Division), [2011] EWCA Civ 1334 [Zaki Mousa]. Ironically, *Zaki Mousa* doesn't deal with the right to life but with allegations of torture and inhumane treatment.

66 "The law on independent investigations – [...] it is appropriate to set out some of the legal principles, although they are not significantly in dispute [...] In Jordan v United Kingdom, it was stated by the ECtHR [...] in these terms: '[...] it may generally be regarded as necessary for the persons responsible for and carrying out the investigations to be independent from those implicated in the events. This means not

It is noteworthy that the court begins its description of 'the law' with the standard set by the ECtHR, despite precedent set by previous House of Lords cases mentioned here previously. The Court explicitly states that the principles articulated by the ECtHR are not disputed. This is quite remarkable in light of the position taken by the UK government in *McCann* just 15 years earlier.[67]

The fact that a large number of cases that deal with the duty to investigate and the procedures of such investigations continue to be discussed before the ECtHR, and the reliance on that jurisprudence by UK national courts, is an interesting matter to explore. What does it reveal about the dialogue between this international tribunal and national courts? Is it an indication that there are discrepancies between the content given to the principles by national courts and law enforcement authorities and the ECtHR Is it an indication that the ECtHR constantly develops and refines its procedural demands so that it keeps 'raising the bar' for national courts? Or, is it an indication that the process of internalization of the duty to investigate has yet to be finalized? Arguably, it may be that the answer lies, to a certain extent, in a combination of all those factors.

E. Conclusion

The procedural aspect of the duty to investigate certain human rights violations symbolizes the reach of international law into new and widening areas of national law, which, until recently, was exclusively reserved for States' discretion. It is noteworthy in this context that States have given their consent, explicitly in the form of a treaty, to regulate and restrict their national laws with regards to the *substantial* protection of the right to life *vis-a-vis* their own population. Some 30 years after this contractual agreement, due to developments in international law and judicial

only a lack of hierarchical or institutional connection but also a practical independence.'" *Id.*, para. 12.

67 "The Government submitted that the inquest more than satisfied any procedural requirement *which might be read* into Article 2 para. 1 of the Convention. In particular, they maintained that it would not be appropriate for the Court to seek to identify a single set of standards by which all investigations […] should be assessed. Finally, they invited the Court to reject the contention [...] that a violation of Article 2 para. 1 will have occurred whenever the Court finds serious differences between the UN Principles on Extra-Legal Executions and the investigation conducted" (emphasis added). *McCann*, *supra* note 1, para. 158.

interpretation, this substantial duty was construed by the ECtHR, and by other international judicial and semi-judicial bodies before it, to imply a *procedural* duty to investigate cases of death, and, later on, of various allegations not involving death.[68] This procedural duty is not mentioned in this contractual agreement or in almost any other contractual agreement into which States have voluntarily entered. Ironically, the only treaty that does mention a duty to investigate predates the ECtHR's recognition of the duty to investigate alleged violations of the right to life and does not deal with that right at all but with the prohibition against torture and inhumane treatment.

Apart from being a different kind of duty, procedural instead of substantial, implied as opposed to explicit, the duty to investigate is, of course, broader than the State's duty to protect the right to life, or any other human right for that matter. While not every death by a law enforcement agent constitutes a violation of the right to life, it appears that every death that bears some minimal connection to the State, either by causation or by failing to prevent it, and even cases not resulting in death, triggers the obligation to investigate.

However, as we have seen, the expansion of international law's reach into national law has not been limited to the mere imposition of the duty to investigate. It was developed to regulate the specifics of national criminal procedure and internal regulation used to investigate certain alleged human rights violations. From that moment on, international law has had an influence over detailed questions relating to the conduct of an investigation, such as the timing of witness statement collection, whether and when to conduct an autopsy, what is the proper organ to investigate law enforcement agents, etc.

In a very short time frame, international law's requirements were diffused down to national courts. Within a few years after *McCann*, we can see complete reliance by the UK's national courts on the ECtHR when discussing the law relevant for conducting an investigation where there was an alleged violation of human rights.

In my view, this expanded influence of international jurisprudence on national law exemplifies the spread of international law's reach into areas once considered to be completely beyond its sphere of influence. The process of dialogue between international tribunals and national courts is

[68] As mentioned above, the order was reversed in the case law of the Inter-American Court and the Human Rights Committee.

mutually beneficial and contributes to both two bodies of law, and in this specific case, to a better protection of human rights.