

# CRITERIA FOR “EFFECTIVE INVESTIGATION” IN NORTHERN IRELAND CASES IN FRONT OF THE EUROPEAN COURT OF HUMAN RIGHTS

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**Abstract:** This paper aims to showcase how the European Court of Human Rights interpreted the criteria for an effective investigation under Article 2 of the European Convention on Human Rights. Through detail analysis of four landmark cases which occurred during the Northern Ireland Conflict, it evaluates how the European Court has shaped the standards for conducting investigations of the legality of use of lethal force by the law enforcement forces. The focus is thereby placed on the importance of independent, transparent, and prompt investigation that ensures public scrutiny and the participation of victims' families. By assessing the effectiveness of investigations involving the use of lethal force, the paper provides crucial insights into how the European Court has refined its guidelines, offering more precise standards for national courts across Member States. There is also a further exploration of the critical perspectives on the impact of these judgments there influence on the evolution of international legal standards in contexts affected by conflict.

**Keywords:** European Court of Human Rights, Northern Ireland, absolutely necessary, investigation, right to life

**Field:** Social Sciences and Humanities.

## 1. INTRODUCTION

In this paper, we will examine several cases involving fatalities during the Northern Ireland conflict. The ones suspected of using lethal force in an unlawful manner have been members of police forces or certain state agencies. In each instance, the court determined that the Member State Government did not act in accordance with its obligation under Article 2 of the European Convention on Human Rights (ECHR) to conduct proper investigations into deaths caused by the lethal actions of security forces or police officers. Analysis of this case law is extremely significant because the European Court made several important turns in its interpretation of the procedural obligation to perform an effective investigation in cases within the scope of Article 2 ECHR (Heydari, 2020: 129). Therefore, by employing the comparative method, we aim to identify essential criteria for effective investigation and illustrate how these standards were expanded and detailed by the European Court in cases regarding the conflict in Northern Ireland.

## 2. THE LANDMARK CASE OF KELLY AND OTHERS V. THE UNITED KINGDOM (2001)

A key case in this context is *Kelly and Others v. The United Kingdom* (2001). In 1987, nine individuals lost their lives in an ambush to catch suspected terrorists. One of the victims was not associated with the IRA, and two were unarmed IRA members.

In this case, the Court provided a dual rationale for the necessity of conducting inquiries. It emphasized that “the essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility” (*Kelly and Others v. The United Kingdom*, 2001, para: 94). Additionally, the Court considered the expansion of the investigative duty to encompass deaths caused by both private individuals and state personnel (Mowbray, 2002: 438).

This case was a landmark one because next to explaining why the investigations are important, the Court went into more detail about the criteria against which is the effectiveness of the investigation of potential violation of right to life measured.

Firstly, the investigating organs and their members must be not only hierarchically, institutionally, but also practically independent from the suspects of unlawful use of lethal force (Marić, 2019: 172). Secondly, the investigation must be structured in such a way that it can determine if the circumstances justify the use of lethal force. It also has to be capable of resulting in the identification and sanctioning of those responsible. In other words, it must be effective in the narrower sense of the word. The Court underlined that such obligation is one of means, not result (*Kelly and Others v. The United Kingdom*, 2001, para: 96). This means that the Government is responsible for doing everything in its power for the investigation to result in the guilty parties being identified and punished, but that it is not obliged to achieve

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that outcome in each case.

However, to comply with the second criteria, the authorities are required to take all reasonable measures at their disposal to collect evidence related to the incident (*Ibidem*). Once acquired, the appropriate evidence, such as forensic data, witness testimonies and whenever possible autopsied, must be secured. (Priori, 2021: 49). Therefore, despite numerous challenges in locating civilian witnesses during a conflict or in its immediate aftermath, the State has an obligation to employ all of its resources to have them found and involved in the investigative procedures. (Quenivet, 2019: 127).

An effective investigation also has to be prompt and expedient (Chevalier-Watts, 2010: 711). Despite potential obstacles or challenges that may hinder progress in an investigation, it is crucial for authorities to promptly investigate any use of lethal force. In this way, the public believes in the Government's adherence to the rule of law and its lack of complicity or tolerance towards unlawful actions of its officers (*Kellv and Others v. The United Kingdom*, 2001, para: 97).

Another criterion for overall effectiveness of investigation is public scrutiny, which may differ depending on the case's circumstances (Priori, 2021: 49). Also, the next-of kin of the victims have to be involved in the proceedings (Heydarli, 2020: 131), albeit to the extent necessary to protect their legitimate interests (Marić, 2019: 174).

In conclusion, the Court has established that to fulfill the positive obligation under Article 2 of the ECHR, an investigation must meet the demands of theoretical and practical independence, effectiveness in the narrower sense of the word, promptness and reasonable expedition, exposure to public scrutiny (Mowbray, 2005: 78).

In this particular case the Court found that available procedures did not balance the necessary safeguards on one hand and other legitimate interests such as national security or the protection of the material relevant to other investigations on the other (*Kellv and Others v. The United Kingdom*, 2001, para: 137). However, it commended some aspects of the investigation: its quick initiation, adherence to all required procedures at the scene of the incident, securing of the evidence, conducting of proper forensic examinations as well as prompt examination of soldiers with no sign of collusion (*Ibidem*, para: 113).

The Court further observed that although the investigating officers have not been in any direct way connected with the soldiers who were being investigated, there was an indirect association between the officers conducting the investigation and the operation under scrutiny, since the local police force and RUC performed it jointly (*Ibidem*, para: 114). Consequently, the Court determined that the criterion for institutional independence was not met in this specific case due to the lack of practical independence in the process of gathering and assessing the evidence (Mowbray, 2002: 440).

Public scrutiny criterion has not been complied with as well. Namely, the applicants have not been informed why there were no criminal charges against the accused officers (Marić, 2019: 176) Also, they were not allowed to read witness statements before their appearance at the inquest (*Ibidem*: 177). The soldiers were allowed to submit written statements or transcripts instead of appearing in person at the inquest, which made it to assess how reliable and credible were their accounts on crucial factual questions (*Kellv and Others v. The United Kingdom*, 2001, para: 119-122).

The European Court deemed the inquest incapable of identifying or sanctioning potential criminal offences. Therefore, the requirement of effectiveness in the narrower sense of the word had not been met (Marić, 2019: 177).

The investigation also lacked promptness – there were a number of delays, so the inquest started eight years after the shootings took place. It was not reasonably expedited since it ended in a mere few days. This is why the Court concluded that the United Kingdom did not fulfill its obligation under Article 2 of the ECHR in this regard (*Kellv and Others v. The United Kingdom*, 2001, para: 134).

*Kelly and Others v. The United Kingdom* case was pivotal, since it was one of the cases in which the European Court of Human Rights further developed its criteria for States' procedural obligations under Article 2 of the ECHR. In this case, it was explained in more detail what the obligation to conduct an effective investigation when there was a use of lethal force encompasses which is why it was a steppingstone for further evolution of the Court's interpretation of this obligation.

### 3. MCKERR V. THE UNITED KINGDOM (2001)

*McKerr v. The United Kingdom* case (2001) is another one in which the Court answered the question if the investigation into use of lethal force by law enforcement officials had been adequate. This case regarded three unarmed people who died because of police officers discharging over 190 shots at their vehicle. The applicants argued, among other things, that the investigation by the state authorities had not been in accordance with Article 2 ECHR requirements. The United Kingdom was accused of showing

official tolerance of their state agents using unnecessarily disproportionate force (Marić, 2019: 179). The UK Government on the other hand maintained that even if certain aspects of the procedure lacked specific safeguards, the overall system still ensured police accountability for any unlawful actions.

In its judgement, the Court reiterated that the duty to conduct an effective investigation into the killings is “not an obligation of result, but of means”. Therefore, for it not to be found in breach of ECHR, it is sufficient for the Member State to allocate adequate resources to make the investigative procedure as effective as possible. In other words, it is not mandatory that the investigation results in the identification and/or sanctioning of those responsible for unlawful killings in order to be complied with the right to life as guaranteed by the ECHR (Mowbray, 2005: 78). However, the Court determined that there were significant deficiencies in the investigative process, which amounted to violation of Article 2 ECHR. The court highlighted the lack of independence among the officers conducting the investigation (McKerr v. the United Kingdom, 2001, para: 128), as well as the absence of transparency and communication with the family members of the victims. For example, adequate explanations hadn’t been given to the family regarding the decision not to prosecute any of the policemen for obstruction of justice or its intent. Furthermore, the inquest procedure failed to produce verdicts or findings that could effectively contribute to initiating criminal proceedings for any potential offenses revealed during the investigation (Ibidem, paras: 138-145).

Another deficiency which the Court highlighted was that the applicant’s family hadn’t been acquainted with the statements of the witnesses prior to their appearance at the inquest, which not only unfairly disadvantaged the applicant’s family in their participation in the proceedings, but also led to prolonged adjournments. It is worth noting that the Court in its judgment emphasized the importance of procedures that safeguard the interests of applicants, particularly when those interests may be opposite to those of the accused (Ibidem, paras: 147-148). Only such actions may result in an impartial and independent investigation in the true sense. The Court deemed that since the accused police officers have not been questioned in person, that detracted from the inquest’s ability to ascertain the pertinent facts surrounding the death. (Ibidem, para: 140).

The Court further determined that issuing the second Public Interest Immunity (PII) Certificate effectively hindered the inquest from examining pertinent aspects of the unresolved issues. Specifically, the Court found substantial indications that the reports whose disclosure had been prohibited contained information relevant to the inquiry into the existence of any shoot-to-kill policy and certainly addressed evidence of obstruction of justice. Consequently, the issuance of the PII certificate in this case impeded the inquest from accessing potentially crucial material and made the investigation less thorough and effective (Ibidem, para: 149-151).

Moreover, the expectation for prompt action was not fulfilled in this instance. Not only did the independent police investigation run behind schedule, but the inquest proceedings also suffered from delays in starting and were not carried out with the necessary urgency. The Court underscored that the frequent and prolonged interruptions cast doubt on whether the inquest system, at that point, was adequately designed to guarantee both prompt action and meaningful access for the family of the victim, along with the essential documentation required for the coroner to thoroughly examine the matters at hand (Ibidem, para: 155).

The Court asserted that even when the tasks of fact-finding, criminal investigation, and prosecution are undertaken by or divided among multiple authorities, such as in Northern Ireland, there can still be compliance with the standards outlined in ECHR. This is contingent upon these procedures incorporating adequate safeguards in an accessible and effective manner, while also considering other legitimate concerns like national security or safeguarding material pertinent to other investigations. However, the appropriate equilibrium was not attained in McKerr v. The United Kingdom case.

#### **4. HUGH JORDAN V. THE UNITED KINGDOM (2001)**

In the case of Hugh Jordan v. The United Kingdom, the applicant’s unarmed son was lethally shot by an officer of the Royal Ulster Constabulary (the RUC), after a short pursuit of the car he was in ((Hugh Jordan v. The United Kingdom, 2001, paras: 12-14).

This case is somewhat different since the police investigation adhered to Article 2 of the ECHR and most of the applicant’s complaints were unfounded (Ibidem, paras: 118-119). However, the Court still identified multiple deficiencies in the investigation into the police officer’s use of lethal force. There was a lack of impartiality in the investigating officers, who were not independent of those involved in the incident. The Court also outlined the lack of public oversight and the failure to inform the victim’s family about the reasons for the DPP’s decision not to prosecute any officers. Moreover, the victim’s family couldn’t legally

compel the officer who shot their son to testify at the inquest; instead, he was allowed to submit written transcripts of his previous statements when questioned by the police (*Ibidem*, paras: 120-127).

Other issues included the inquest procedure’s inability to render any verdict or findings that could facilitate prosecution for any disclosed criminal offense, the lack of legal aid for the victim’s family’s representation, and the non-disclosure of witness statements before they appeared at the inquest. This hindered the applicant’s participation and caused significant delays. The Court also observed that the inquest did not start in a prompt manner, nor has it been pursued with reasonable expedition (*Ibidem*, paras: 129-140).

In this ruling, the Court reiterated that the obligation of conducting an effective investigation into lethal use of force is a duty of means rather than result. However, this perspective has been criticized by authors like Bell and Keenan, who argue that its outcome “merely perpetuates the cycle of litigation, forum hopping, and the refusal to properly investigate” (Bell & Keenan, 2005: 85).

## 5. FINUCANE V. THE UNITED KINGDOM (2003)

In early 1989, two masked individuals forcibly entered the Finucane residence and fatally shot solicitor Patrick Finucane in the presence of his wife and children. Finucane’s wife sustained injuries, as well. Despite a claim of responsibility for the killing from the illegal loyalist paramilitary group (Simpson, 2022: 425), the applicant accused the Royal Ulster Constabulary (RUC) for the involvement in his murder. Additionally, the late victim had received numerous death threats allegedly from law enforcement agents (*Finucane v. The United Kingdom*, 2003, paras: 10-11).

The European Court commended the fact that the Royal Ulster Constabulary (RUC) promptly initiated an investigation. It found that the law enforcement officers took requisite measures to preserve evidence at the scene. They located both the vehicle and firearm employed in the incident. The investigation revealed that the murder weapon had reportedly been acquired by the loyalist faction through channels associated with the security forces. Furthermore, they interrogated several potential suspects. However, none of questioned people were found to have connections to the security forces. Moreover, due to a perceived lack of evidence, no one has been prosecuted for the fatal shooting (*Ibidem*, paras: 74-75).

The following inquest both commenced and concluded on the same day. Regrettably, its sole focus were the immediate circumstances surrounding the killing of the applicant’s husband. Claims of the victim’s family members that security forces have been involved in the shooting had been completely ignored, as well as accounts of death threats the victim received before the attack happened (*Ibidem*, paras: 76-78).

Subsequent developments indicated that certain branches of the security forces were aware of or involved in the shooting, which made the claims that authorities were either aware of or complicit in the murder more plausible. The Court concluded that due to the above-listed shortcomings, the inquest cannot be deemed effective, nor can it be viewed as capable of identifying or properly sanctioning the murderers. Since it failed to take account of legitimate concerns of members of the family, but also the public, the inquest was not adequate or effective (*Ibidem*, paras: 76-78).

The Court also commented on the subsequent police inquiries, which lasted for a year (first one) and two years (the second). Although they were overseen by a senior officer who was not from Northern Ireland and they did yield important information, the evidence was not sufficient that these investigations were conducted with the aim of pursuing prosecutions. Furthermore, the applicant never received any information regarding their findings, nor were the reports made accessible to the public. Therefore, the Court observed that the essential elements of public scrutiny and accessibility were absent, given the lack of disclosure of the investigation’s findings and the non-publication of the reports. There were no indications that any of the issues listed would be fixed in the ongoing, third police investigation (*Ibidem*, paras: 79-80). One person who has been criminally charged for the murder, was not found guilty (*Ibidem*, para: 72).

The Court also scrutinized the applicant’s claims regarding the lack of independence displayed by the Director of Public Prosecutions (DPP), whose job was to determine if criminal ought to be initiated. However, he was not obligated to provide reasons for his decision. Having that in mind, the Court reminded that, particularly in cases where there are doubts about the independence of the police investigation procedure and where it is not subject to public scrutiny, it is crucial for the decision-maker to demonstrate an appearance of independence in their decision-making (*Ibidem*, para: 82). In the *Finucane v. The United Kingdom* case, such reasons were not provided. Moreover, the information which could have offered reassurance of the legality of the investigation had not been made available to either the applicant or the public. In conclusion, such lack of transparency was deemed wholly incompatible with the requirements outlined in Article 2 of the European Convention (*Ibidem*, paras: 82-83).

## 6. CONCLUSIONS

From the cases examined, we can notice that the European Court focused on several recurring shortcomings in police investigations. These include the lack of independence of law enforcement officials involved, the absence of public scrutiny, lack of initiation promptness and failure to conduct these proceedings with due expedition. The Court also noted that not obliging suspects to physically attend the inquest, instead of submitting written statements, constituted a breach of Article 2.

Another possible breach of procedural obligation under Article 2 of the European Convention comes from restrictive role of the Coroner, since his investigation must be exclusively limited to circumstances directly contributing to the death, as well from the fact that the its outcome doesn't have to be identification or criminal prosecution (Weekes, 2005: 26). In many of the analyzed cases the Court has found a violation of procedural aspect of right to life since the reasons for the Director of Public Prosecutions' decisions regarding prosecutions to the victim's family have not been properly communicated nor explained.

There has been some criticism about the manner in which the European Court of Human Rights dealt with the Northern Ireland cases. Firstly, the impact of these judgments has been diminished by the fact that each case has been assessed individually, in an approach that has been seen as inadequate and insufficient (Chevalier-Watts, 2010: 711).

Furthermore, given the limitations of the Court's ability to administer or mandate changes in a liberal democracy, there have been doubts about the effective impact the Court's requirements for an effective investigation (Bell & Keenan, 2005: 88). Additionally, the procedural obligation imposed by Article 2 of the European Convention on Human Rights is subject to a certain degree of discretion, which could result in states only being required to provide declaratory relief or being able to withstand sizeable legal difficulties. This captious perspective stems from the observation that in instances such as Northern Ireland, when conflicts erupt, major Western states are often able to shape the context in a manner that serves their own interests (Campbell, 2005: 353).

There are alternative views, as well. Some authors argue, and this author agrees, that the obligation to carry out an effective investigation into lethal use of force has granted victims and their family members a degree of influence over state actors, thus striking a balance between the state's legitimate interests in maintaining "ordre publique" and the human rights of the victims. Simultaneously, in establishing this aspect of the right to life, the Court evidently considered the importance of rebuilding public trust (Chevalier-Watts, 2010: 715). The importance of the evolution of the obligation to conduct effective investigations into cases involving the use of lethal force should not be underestimated. The Strasbourg Court's refinement of the procedural obligation should enable other courts and tribunals to more precisely and successfully determine violations of the substantive obligations that put right to life on such an essential place among the Convention rights (Weekes, 2005: 26).

Lastly, regarding additional implications of these judgments, one ought to keep in mind that international legal standards can wield significant influence during transitions. Aligning domestic laws with international norms can enhance the legitimacy of domestic legal systems within communities that have experienced conflict. In this context, the judgments we have examined have supported such processes as reform of the police forces, independent investigations into misconduct of its officials, and effectiveness of police inquests, all in areas deeply affected by Northern Ireland conflict. Therefore, it is our view as well that the by pointing out the criteria for effectiveness of investigation into possible illegal use of lethal force by the members of the law enforcement, the European Court made important turns in its practice and enabled more precise guidelines for national courts in Member states for defining what this standard encompasses.

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