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## 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

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# 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

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## **Abstract**

This Comment examines how the new doctrine of the procedural aspect of Article 2 of the European Convention can provide recourse for the travesty of justice inherent in failed investigations of alleged violations of the right to life, such as the contended failure of the Widgery Tribunal's investigation of Bloody Sunday in Northern Ireland.

PROSPECTS FOR JUSTICE: THE PROCEDURAL ASPECT  
OF THE RIGHT TO LIFE UNDER THE EUROPEAN  
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APPLICATIONS TO INVESTIGATIONS OF NORTHERN  
IRELAND'S BLOODY SUNDAY

*Kara E. Irwin\**

INTRODUCTION

On Sunday, January 30, 1972 ("Bloody Sunday"), British security force members opened fire on unarmed civil rights demonstrators in Derry/Londonderry,<sup>1</sup> Northern Ireland, killing thirteen civilians and wounding thirteen others.<sup>2</sup> The British Government's<sup>3</sup> subsequent investigation, a tribunal of inquiry conducted by British Lord Chief Justice Widgery,<sup>4</sup> absolved the British troops of any wrongdoing.<sup>5</sup> This finding has been widely

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\* J.D. Candidate, 2000, Fordham University School of Law. I would like to dedicate this Comment to the staff of the Committee on the Administration of Justice, Belfast. I would particularly like to thank the legal officer, Paul Mageean, for his tireless efforts to answer all of my questions. Thanks also to Professor Martin Flaherty for his guidance and comments.

1. See J. BOWYER BELL, *THE IRISH TROUBLES: A GENERATION OF VIOLENCE: 1967-1992*, at xv (1993) (describing differences in names used by Catholics and Protestants in Northern Ireland to refer to this city). The very name of this city itself is a symbol of the deep political divide in Northern Ireland. *Id.* This city is known as "Derry" among Nationalists, who would like Northern Ireland to be united with the Republic of Ireland, and who are predominantly Catholic. *Id.* The city is known by its official name "Londonderry" by Unionists, who are loyal to Britain and are predominantly Protestant. *Id.* See generally Jane Winter, *Preface* to *EYEWITNESS BLOODY SUNDAY, THE TRUTH* 12-13 (Don Mullan ed., 1997) (providing brief description of Northern Ireland conflict as political background to Bloody Sunday).

2. See BELL, *supra* note 1, at 267-70 (providing chronology of Bloody Sunday events in context of history of Northern Ireland's conflict).

3. See *id.* at 5 (discussing U.K. role in political history of Northern Ireland). Northern Ireland has been a part of the United Kingdom since its inception as a geopolitical entity in 1920, when the rest of the island of Ireland gained its independence from the United Kingdom. *Id.*

4. See generally The Rt. Hon. Lord Widgery, O.B.E., T.D., *Report of the Tribunal appointed to inquire into the events on Sunday, 30th January 1972, which led to loss of life in connection with the procession in Londonderry on that day*, Apr. 18, 1972, Her Majesty's Stationery Office, H.L. 101, H.C. 220 [hereinafter Widgery Report] (providing results of hearings conducted between February 21 and March 20, 1972 to investigate events of Bloody Sunday).

5. See *id.* at 38-39 (stating that soldiers fired in accordance with standing orders and that "there was no general breakdown in discipline").

condemned on many grounds as a failure to find the truth.<sup>6</sup> Perhaps more than any other event in the history of Northern Ireland's conflict, the legacy of Bloody Sunday and the Widgery Tribunal cemented the divide between those who want Northern Ireland to unite with the Republic of Ireland and those who want Northern Ireland to remain a part of the United Kingdom.<sup>7</sup>

In human rights terms, the Bloody Sunday incident constituted alleged violations of the victims' right to life.<sup>8</sup> Of all the rights that individuals have by virtue of existing as human beings, the right to life is the most fundamental.<sup>9</sup> Conditions of political, military, or paramilitary disturbances, when the government has an interest in using its security forces to control the conflict, may, as on Bloody Sunday, endanger the right to life for civilians.<sup>10</sup> It is a basic assumption in the human rights realm, however, that governments should at all times be accountable for the loss of life of citizens who have been killed by agents of the state.<sup>11</sup>

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6. See, e.g., EYEWITNESS BLOODY SUNDAY, THE TRUTH, *supra* note 1, at 44 (stating that Widgery Report betrayed people's faith in British political and legal system); THE BREGGIO REPORT (Don Mullan ed., 1997) (containing ballistics and medical expert opinions on matters not considered in Widgery Tribunal and referring to Widgery Report as official "whitewash").

7. See EYEWITNESS BLOODY SUNDAY, THE TRUTH, *supra* note 1, at 44 (describing "long shadow" cast by Bloody Sunday on political conflict in Northern Ireland).

8. See *McDaid and Others v. the United Kingdom*, App. No. 25681/94, Eur. Comm'n H.R., Apr. 9, 1996 (containing applicants' claim that deceased were intentionally and wrongfully deprived of their right to life and that British Government's failure to examine "thoroughly and impartially" circumstances of deaths was continuing breach of duty to protect right to life). The right to life, generally, is the right not to be intentionally or arbitrarily deprived of life. See generally B.G. Ramcharan, *The Concept and Dimensions of the Right to Life*, in THE RIGHT TO LIFE IN INTERNATIONAL LAW 3 (B.G. Ramcharan ed., 1985) (explaining that limited traditional definition of right to life in international law relates to protection against intentional or arbitrary deprivation of human life by government agents). The right to life, however, is a broad topic, which may encompass a wide range of other issues such as capital punishment, euthanasia, abortion, failure of due process, nuclear and environmental hazards, and gross violations of human rights, such as genocide and mass killings. *Id.* at 8.

9. See, e.g., Kurt Herndl, *Foreward* to THE RIGHT TO LIFE IN INTERNATIONAL LAW, *supra* note 8, at XI (discussing importance of right to life in international law and referring to it as "a primordial right which inspires and informs all other rights").

10. See, e.g., A. Redelbach, *Protection of the Right to Life by Law and by Other Means*, in THE RIGHT TO LIFE IN INTERNATIONAL LAW, *supra* note 8, at 193 (discussing governments' dual obligations to protect both human rights and integrity of state).

11. See generally David Weissbrodt, *Protecting the Right to Life: International Measures Against Arbitrary or Summary Killings by Governments*, in THE RIGHT TO LIFE IN INTERNA-

Recent judgments of the European Court of Human Rights<sup>12</sup> ("European Court" or "Court") interpreting the right to life under the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>13</sup> ("European Convention") have reinforced both this governmental obligation and individuals' corresponding right to life.<sup>14</sup> These cases hold that there is a procedural aspect to the right to life, which provides that a government's failure to conduct a proper investigation of an alleged violation of the right to life can itself be a violation of the right to life.<sup>15</sup> These decisions create an additional claim for applicants to the European Court who represent the interests of individuals allegedly killed unlawfully by their governments' agents.<sup>16</sup>

The availability of this new claim of a violation of the procedural aspect of the right to life counters governments' abilities to

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TIONAL LAW, *supra* note 8, at 297-307 (ensuring such accountability by encouraging use of certain measures, such as publicity or threat of embarrassment to persuade governments to comply with international human rights standards).

12. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 19, 213 U.N.T.S. 222, 234 [hereinafter European Convention] (establishing European Court of Human Rights ("European Court" or "Court")). The European Court's primary function is to interpret the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"). Rolv Rysdøl, *Forward by the President of the European Court of Human Rights* to PETER KEMPEES, A SYSTEMATIC GUIDE TO THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS: 1960-1994, at ix (1996). The European Court is located in Strasbourg and is therefore also known as the Strasbourg Court. *Id.*

13. European Convention, *supra* note 12.

14. *See, e.g.,* Kaya v. Turkey, Application No. 22729/93, Feb. 19, 1998, ¶ 52 (Eur. Ct. H.R. decision not yet published in Series A) (<<http://www.dhcour.coe.fr/eng/KAYA.ENG.html>> (on file with the *Fordham International Law Journal*) (holding that Turkish Government violated Article 2 of European Convention by inadequately investigating security force's killing of applicant's civilian brother); Ergi v. Turkey, Application No. 23818/94, July 28, 1998, ¶ 86 (Eur. Ct. H.R. decision not yet published in Series A) (<<http://www.dhcour.coe.fr/eng/ERGI.ENG.html>> (on file with the *Fordham International Law Journal*) (holding that lack of "adequate and effective" investigation into state agents' killing of applicant's sister constituted Article 2 violation); Yasa v. Turkey, Application No. 22495/93, Sept. 2, 1998, ¶ 107-08 (Eur. Ct. H.R. decision not yet published in Series A) (<<http://www.dhcour.coe.fr/eng/YASA.ENG.html>> (on file with the *Fordham International Law Journal*) (holding that Turkish Government's failure to conduct adequate investigation into death of applicant's uncle constituted Article 2 violation). Recent decisions of the European Court of Human Rights are not yet available in published form except on the Internet under the case name. *See* <<http://www.dhcour.coe.fr>>.

15. *See, e.g.,* Kaya, ¶ 52; Ergi, ¶ 86; Yasa, ¶ 107-08.

16. *See, e.g.,* Ergi, ¶ 73 (listing among applicant's arguments, claim of violation of procedural requirement of Article 2 of European Convention).

cover up unlawful uses of lethal force by their security forces.<sup>17</sup> To prevent claims of violations of the right to life, governments must train their security forces to avoid the excessive use of force.<sup>18</sup> And now, to prevent claims of violations of the procedural aspect of the right to life, governments must conduct effective official investigations into alleged violations of the right to life.<sup>19</sup>

This Comment examines how the new doctrine of the procedural aspect of Article 2 of the European Convention can provide recourse for the travesty of justice inherent in failed investigations of alleged violations of the right to life, such as the contended failure of the Widgery Tribunal's investigation of Bloody Sunday in Northern Ireland. Part I traces the events of Bloody Sunday and the subsequent investigations. Part I also provides background on the right to life principle and the European system for protecting human rights. Part II tracks the genesis and development of the procedural aspect doctrine through European Court's case law. Part III maintains that the procedural aspect doctrine would have provided a recourse for justice after the Widgery Tribunal. Part III also argues that although there are positive implications of the procedural aspect doctrine, the European Court has not yet created clear guidelines for its application.

### I. INVESTIGATIONS OF BLOODY SUNDAY AND THE RIGHT TO LIFE

The British Government established the Widgery Tribunal as a mechanism to investigate the killings of thirteen civilians by

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17. See *Gulec v. Turkey*, Application No. 21593/93, July 27, 1998, ¶ 78 (Eur. Ct. H.R. decision not yet published in Series A) (visited Mar. 10, 1999) <<http://www.dhcour.coe.fr/eng/GULEC.ENG.html>> (on file with the *Fordham International Law Journal*) (stating that "the procedural protection for the right to life in Article 2 of the Convention means that agents of the State must be accountable for their uses of lethal force").

18. See Redelbach, *supra* note 10, at 213 (discussing and recommending human rights training for law enforcement bodies as means of protecting right to life).

19. See *Assenov and Others v. Bulgaria*, Application No. 24760/94, Oct. 28, 1998, ¶ 102 (Eur. Ct. H.R. decision not yet published in Series A) (visited Mar. 10, 1999) <<http://www.dhcour.coe.fr/eng/ASSENOV.ENG.html>> (on file with the *Fordham International Law Journal*) (holding that obligation to conduct effective official investigation under both Articles 2 and 3 "should be capable of leading to the identification of those responsible").

British soldiers, agents of the United Kingdom.<sup>20</sup> By many accounts, the Widgery Tribunal's exoneration of the British soldiers was a failure to find the truth.<sup>21</sup> Any individual in Europe who feels that a European government, including that of the United Kingdom, has failed to vindicate alleged human rights violations against him may seek recourse against that government in the European human rights regime.<sup>22</sup> The adjudication of allegations of violations of the right to life in the European human rights jurisdiction are governed by Article 2 of the European Convention and its attendant case law.<sup>23</sup>

### A. *Investigations of Bloody Sunday*

The course of Northern Ireland's thirty-year history of conflict, known as "the Troubles,"<sup>24</sup> has bred many disputed instances of the use of force by security forces that have resulted in the loss of civilian life.<sup>25</sup> Indeed, the deaths of approximately

20. See Widgery Report, *supra* note 4, at 1, ¶ 1 (referring to British Parliament resolution establishing tribunal for purpose of "inquiring into a definite matter of urgent public importance, namely the events on Sunday 30 January which led to loss of life").

21. See Winter, *supra* note 1, at 26 (referring to widespread criticism of Widgery Tribunal, particularly for its internal inconsistencies).

22. See European Convention, *supra* note 12, art. 25, at 236-38 (providing right of individual petitions against contracting parties who have submitted to such jurisdiction); see also DONNA GOMIEN ET AL., *LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER* 42 (1996) (noting that all parties to European Convention have recognized right of individual petition). The United Kingdom falls under the jurisdiction of the European human rights system. See European Convention, *supra* note 12, at 257 (listing United Kingdom as signatory). The United Kingdom ratified the European Convention in 1951, but unlike most other European states, never incorporated it into domestic law. See, e.g., Norton Rose, *The European Convention on Human Rights*, MONDAQ BUS. BRIEFING, Nov. 18, 1998 (stating that Human Rights Act 1998, incorporating European Convention into domestic U.K. law, received royal assent on November 9, 1998, and will probably be enacted in January 2000). Under the Human Rights Act 1998, the European Convention is directly enforceable in the U.K. courts. Human Rights Act, 1998, ch. 42 (Eng.); see Rose, *supra* (noting that European Convention was previously enforceable only by spending time and money necessary to bring case to European Court).

23. See generally GOMIEN ET AL., *supra* note 22, at 93-103 (discussing various interpretations and applications of Article 2). The types of intentional deprivation of life covered by Article 2 include the excessive use of force, abortion issues, death penalty, and euthanasia and suicide. *Id.*

24. See generally BELL, *supra* note 1 (describing three decades of violence in Northern Ireland, commonly known as "the Troubles," between Irish Catholics of Northern Ireland, who want to be united with Republic of Ireland, and British Protestants of Northern Ireland, who want to remain part of United Kingdom).

25. See generally MALCOLM SUTTON, *BEAR IN MIND THESE DEAD . . . AN INDEX OF*

359 civilians have been attributed to the British security forces.<sup>26</sup> Of these 359 instances, about thirty led to prosecutions of security force members within Northern Ireland's judicial system.<sup>27</sup> Only four of these prosecutions resulted in murder convictions, and all four of the soldiers convicted were released early.<sup>28</sup> The situation was sufficiently grave to warrant the attention of a U.N. Rapporteur, who expressed concern over allegations that the British Government failed to conduct thorough and proper investigations of killings that occurred in the course of the conflict in Northern Ireland.<sup>29</sup> Bloody Sunday, and the subsequent investigation conducted by the British Government, is probably the most salient of such alleged miscarriages of justice.<sup>30</sup>

On Sunday, January 30, 1972, demonstrators<sup>31</sup> gathered to conduct a civil rights march and demonstration in Derry/

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DEATHS FROM THE CONFLICT IN IRELAND, 1969-1993 (1994) (providing complete listing of all victims of Northern Ireland conflict).

26. Telephone Interview with Paul Mageean, Legal Officer of the Committee on the Administration of Justice (Dec. 16, 1998) [hereinafter Mageean Interview]. The exact number of civilians killed by British security forces is disputed, but one exhaustive compilation of all deaths in Northern Ireland during the Troubles counted the British security forces as the source of 357 civilian and paramilitary deaths. SUTTON, *supra* note 25, at 1. Since Sutton's compilation, two more civilians, Dermott McShane and Diarmuid O'Neill, were killed by British security forces in 1996, bringing the total to 359. Mageean Interview, *supra*.

27. Mageean Interview, *supra* note 26.

28. *Id.* Private Ian Thain was convicted of the August 9, 1983 murder of Thomas Reilly in November 1984 and released after serving two years and three months of his life sentence. *Id.* Private Lee Clegg was convicted of the September 30, 1990 murder of Karen Reilly on June 4, 1993, and was released after serving approximately three years of his life sentence. *Id.* His conviction was subsequently quashed and he is currently having a retrial. *Id.* Scots Guardsmen Wright and Fisher were convicted of the September 4, 1992 murder of Peter McBride on February 10, 1995, and were released earlier this year after serving more than five years of their life sentences. *Id.* All four of the soldiers were taken back into the army. *Id.*

29. See *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories. Extrajudicial, Summary or Arbitrary Executions. Report by the Special Rapporteur, Mr. Baacre Waly Ndiaye*, Submitted Pursuant to Comm'n on Human Rights Res. 1995/73, U.N. Commission on Human Rights, 52d Sess., Agenda Item 10, at ¶ 500, U.N. Doc. E/CN.4/1996/4, Jan. 25, 1996 [hereinafter *Special Rapporteur's Report*] (reporting on status of various governments regarding problem of such executions).

30. See, e.g., THE BREGLIO REPORT, *supra* note 6, at 12 (calling Bloody Sunday and its aftermath "a defining moment" in Northern Ireland's recent history and "a major factor in the rapid deterioration of the Northern Ireland conflict").

31. See Winter, *supra* note 1, at 17 (noting widely conflicting reports about number of demonstrators present on Bloody Sunday). Estimates of the number of people present vary from as low as 3,000 to as high as 30,000. *Id.*



Londonderry to protest the British Government's recently-implemented policy of internment without trial.<sup>32</sup> Large numbers of Northern Ireland's police force and the British army were present to control the demonstration.<sup>33</sup> Tensions ran very high<sup>34</sup> and when the marchers reached an army blockade, some scuffles broke out between demonstrators and soldiers.<sup>35</sup> In the ensuing riotous confusion, British soldiers shot and killed thirteen people and wounded thirteen others.<sup>36</sup>

In response to Bloody Sunday, the British Government immediately instituted an investigation led by British Lord Chief Justice Widgery.<sup>37</sup> The Widgery Tribunal conducted hearings throughout that spring and completed its work in April 1972.<sup>38</sup> The resulting Widgery Report found that all shootings by the soldiers were justified in reaction to perceived civilian shooting and failed to hold anyone accountable for the loss of life.<sup>39</sup>

32. *See id.* at 12-14 (discussing political background that prompted demonstration and government reaction on Bloody Sunday). The internment policy, implemented August 9, 1971, temporarily suspended the right to trial in Northern Ireland. *Id.* at 13. By the end of 1971, approximately 900 people, mostly Nationalists, had been imprisoned under this policy in violation of international standards on the right to a fair trial. *Id.*

33. *See id.* at 15-17 (describing plans for policing demonstration under central arrest force of 1st Battalion Parachute Regiment ("Paras")). The previous week, around 300 soldiers broke up a smaller anti-internment demonstration with "extreme violence." *Id.* at 14. Both demonstrations were illegal under recently-enacted British legislation providing for a six-month ban on public demonstration. *Id.* at 13.

34. *See id.* at 15 (observing that Bloody Sunday occurred against background of high political tension and in "an atmosphere of the apprehension of violence"); *see also* BELL, *supra* note 1, at 267 (noting contemporary rumor that police and army "wanted a hard confrontation" and that they expected trouble that day).

35. *See* Winter, *supra* note 1, at 17 (describing how about 200 marchers, mostly young men, broke away from rest of demonstrators and began throwing stones at soldiers manning barricades).

36. *See id.* at 11 (noting that civilians killed were Gerard Donaghy, 17; James Wray, 22; Gerard McKinney, 35; William McKinney, 26; John Young, 17; William Nash, 19; Michael McDaid, 20; Michael Kelly, 17; Kevin McElhinney, 17; Patrick Doherty, 31; Jack Duddy, 17; Hugh Gilmore, 17; and Bernard McGuigan, 41). Of the thirteen other wounded civilians, one died shortly thereafter, allegedly of related injuries. *Id.*

37. *See* Widgery Report, *supra* note 4, at 1, ¶ 1 (stating that British Government appointed Lord Widgery on January 31, 1972, day after Bloody Sunday, to conduct Tribunal of Inquiry to investigate events of Bloody Sunday). The next day, February 1, 1972, the British Houses of Parliament adopted a resolution providing for the establishment of the Widgery Tribunal. *Id.*

38. *Id.* at 2, ¶ 6.

39. *See id.* at 33-37, ¶¶ 89-104 (stating that initial firing was by civilians and that soldiers were able to give explanations justifying their actions). The Widgery Tribunal has been criticized for ignoring vast numbers of eyewitness statements asserting that

Over the course of the last twenty-eight years, a deluge of criticism has emerged that lambastes the Widgery Tribunal as a failed instrument of truth and justice.<sup>40</sup> Over time, and with the growing publicity of the political background, the Widgery Tribunal and resulting Widgery Report have come to be considered at best an inadequate investigation of the events, and at worst a government cover-up.<sup>41</sup> In 1994, British-Irish Rights Watch, a

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none of the killed or injured was armed or firing upon the soldiers. Winter, *supra* note 1, at 19. Indeed, in 1992, the then British Prime Minister issued a statement, affirmed by present Prime Minister Tony Blair, that the Bloody Sunday victims "should be regarded as innocent of any allegation that they were shot while handling firearms or explosives." The Prime Minister's Oral Statement and Terms of Reference, House of Commons, Official Report, Jan. 29, 1998, Parliamentary Debates (Hansard), cols. 501-03 (visited Mar. 11, 1999) <[http://www.parliament.the-stationery-office.co.uk/pa/cm/cmhansrd/cm980129/debtext/80129-06.htm#80129-06\\_spmi0](http://www.parliament.the-stationery-office.co.uk/pa/cm/cmhansrd/cm980129/debtext/80129-06.htm#80129-06_spmi0)> (on file with the *Fordham International Law Journal*) [hereinafter Prime Minister's Statement] (noting that original 1992 statement was part of letter to Member of Parliament Mr. John Hume).

40. See Winter, *supra* note 1, at 26 (summarizing criticisms from variety of sources). The summary states that

the report contained many internal inconsistencies; it failed to resolve the conflicting evidence and to give the evidence its due and proper weight; it failed to recognise the complete unreliability of the forensic evidence; it incorrectly applied the law on lethal force; and it failed to reach conclusions that were justified by the facts.

*Id.* Numerous other books, articles, and papers have been published criticizing the Widgery Report and Tribunal, starting almost immediately after the publication of the Widgery Report and continuing until recently. See, e.g., PROFESSOR DERMOTT WALSH, *THE BLOODY SUNDAY TRIBUNAL OF INQUIRY: A RESOUNDING DEFEAT FOR TRUTH, JUSTICE AND THE RULE OF LAW 9-14* (Jan. 1997) (attacking Widgery Tribunal for its bias and lack of independence, its "undue haste in conducting its investigation," its meager resulting Report, which "gives the appearance that the Inquiry did not fully discharge its task," and insufficient legal counsel and access to evidence and information for victims' families); SAMUEL DASH, *INTERNATIONAL LEAGUE FOR THE RIGHTS OF MAN, JUSTICE DENIED: A CHALLENGE TO LORD WIDGERY'S REPORT ON 'BLOODY SUNDAY'* (June 1972) (republished June 1998) (noting in "Summary of Findings" seventeen specific areas in which Widgery Tribunal and Report were deficient).

41. See *THE BREGGIO REPORT*, *supra* note 6, at 12 (referring to Bloody Sunday and Widgery Tribunal as "an obscene cover-up"); see also BELL, *supra* note 1, at 312 (describing release of Widgery Report as immediately "accepted by many, including many in Britain, as a cover-up"). Bell also notes that the Widgery Report only served to strengthen the opinion of many that the Paras were guilty of "government-condoned murder." *Id.* at 270. Furthermore, almost everyone outside the British establishment believed that, at the least, the Paras "may not have acted wisely." *Id.* This belief was further compounded by the controversial 1995 discovery and publication of a confidential British Government memorandum recording a conversation dated February 1, 1972 between then Prime Minister Edward Heath and Lord Widgery. See Eamon McCann & Owen Bowcott, *Memo Reveals "Propaganda War" in Ulster*, *GUARDIAN* (London), Nov. 10, 1995, at 1 (noting that it is rare for such records to be released earlier than 30 years after creation). In the course of their conversation, Prime Minister Heath reminded Lord Widgery that Britain was fighting "not only a military war but a propaganda war"

London-based non-governmental organization<sup>42</sup> ("NGO"), brought a case against the United Kingdom to the European Commission of Human Rights<sup>43</sup> ("European Commission" or "Commission") on behalf of the families of the Bloody Sunday victims.<sup>44</sup> The Commission denied admissibility of the case, ruling that the Bloody Sunday issue was beyond the statute of limitations.<sup>45</sup> In June 1997, the Irish Government issued its own report assessing recent new material regarding Bloody Sunday, including recent news publications, books, and previously-unpublished eyewitness accounts.<sup>46</sup> This report concluded that justice required a new independent inquiry.<sup>47</sup>

In January 1998, in the spirit of progress of the peace talks in Northern Ireland, and in response both to the extensive criti-

in Northern Ireland and urging him to reach a "speedy outcome." *Id.*; see Winter, *supra* note 1, at 26-27 (noting that memorandum also revealed Lord Widgery's statement that "[i]t would help" if inquiry's terms of reference were restricted to few minutes when men shot in order to "enable the Tribunal to confine evidence to eyewitnesses," thereby also precluding any investigation of planning for operation).

42. See Paula Rhodes & Eileen McCarthy-Arnolds, *Expanding NGO Participation in International Decision-Making*, in *WORLD DEBT AND THE HUMAN CONDITION* 153, 158 (Ved P. Nanda et al. eds., 1993) (defining non-governmental organization ("NGO") as entity distinct from government and which may be organized to advance humanitarian, commercial, or political purposes).

43. See European Convention, *supra* note 12, art. 19, at 234 (establishing European Commission of Human Rights ("European Commission" or "Commission") to enforce European Convention).

44. See *McDaid and Others v. the United Kingdom*, App. No. 25681/94, Eur. Comm'n H.R., Apr. 9, 1996 (assessing application contending that individuals killed on Bloody Sunday were intentionally and wrongfully deprived of their right to life and that British Government's failure to conduct thorough investigation of deaths was continuing breach of duty to protect right to life).

45. *Id.* (containing European Commission's ruling that application was "out of time" because it was made more than 20 years after inquest and finding no special circumstances to extend six-month deadline for filing applications). The European Convention requires that all applications are filed within six months of the domestic adjudication of the case. European Convention, *supra* note 12, art. 26, at 238. As of November 1, 1998, this requirement is under Article 35(1) of Protocol 11 to the Convention. Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, art. 35(1), Europ. T.S. No. 155 [hereinafter Protocol 11].

46. IRISH GOVERNMENT, *BLOODY SUNDAY AND THE REPORT OF THE WIDGERY TRIBUNAL: THE IRISH GOVERNMENT'S ASSESSMENT OF THE NEW MATERIAL* 3-5 (June 1997) (citing Don Mullan's compilation of previously unpublished eyewitness accounts of Bloody Sunday, Prof. Dermot Walsh's book, Channel Four News broadcast containing interviews with soldiers present at Bloody Sunday, Dublin *Sunday Business Post* extracts of another soldier's disturbing account, and eyewitness statements contemporaneously collected by Irish Government).

47. *Id.* at 178.

cism of the Widgery Tribunal and to repeated calls for a new inquiry, British Prime Minister Tony Blair announced that the British Government would institute a new inquiry into the events of Bloody Sunday.<sup>48</sup> The tribunal is comprised of three members, led by British Lord Saville of Newdigate, and sits in the Guildhall in Derry/Londonderry ("Saville Tribunal").<sup>49</sup> The Saville Tribunal conducted a preliminary hearing on July 20 and 21, 1998, to resolve issues such as legal representation, compilation of evidence, and possible use of anonymity or immunity.<sup>50</sup> In addition to providing rulings regarding the issues raised at the preliminary hearing,<sup>51</sup> the Saville Tribunal has also since issued periodic updates and rulings on issues raised in correspondence among the parties.<sup>52</sup> Although inquiry hearings were originally set to commence in February 1999, according to the

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48. See Prime Minister's Statement, *supra* note 39 (discussing establishment of full-scale judicial inquiry that will take account of all evidence, including new information that has emerged since Widgery Tribunal); see also Warren Hoge, *Britain to Reopen Its Inquiry of '72 in Ulster Killings*, N.Y. TIMES, Jan. 30, 1998, at A1 (calling Blair's decision to open new inquiry representative of British Government's "confidence-building moves" to accompany political progress in Northern Ireland peace talks). Prime Minister Blair stated that "the concern now is simply to establish the truth, and to close this painful chapter once and for all." Prime Minister's Statement, *supra* note 39.

49. See Bloody Sunday Inquiry, *The Opening Statement Delivered by Lord Saville: 3 April 1998* (visited Feb. 21, 1999) <<http://www.bloody-sunday-inquiry.org.uk/opening.htm>> (on file with the *Fordham International Law Journal*) (explaining history, establishment, and intent of Saville Inquiry to conduct inquiry with fairness, thoroughness, and impartiality); see also Kara Irwin, *Preliminary Hearing for the Bloody Sunday Inquiry*, JUST NEWS (Committee on the Administration of Justice, Belfast), July/Aug. 1998, at 5 (providing summary of preliminary hearing proceedings and discussing members of and participants to tribunal). The new inquiry into Bloody Sunday is also known as the "Saville Inquiry" or "Saville Tribunal" after Lord Saville of Newdigate, the lead panelist of the three-man Tribunal conducting the inquiry. *Id.* The other members of the Saville Tribunal are Sir Edward Somers of New Zealand and Mr. Justice Hoyt of Canada. *Id.*

50. See *id.* (discussing parties' arguments and providing summary of decisions and rulings regarding issues raised).

51. See Bloody Sunday Inquiry, *Rulings and Observations of the Tribunal on the Matters raised at the Preliminary Hearing on 20th and 21st July 1998* (visited Mar. 10, 1999) <<http://www.bloody-sunday-inquiry.org.uk>> (on file with the *Fordham International Law Journal*) [hereinafter *Rulings and Observations*] (assessing merits of parties' arguments and observing importance of notion that "justice should not only be done but manifestly be seen to be done").

52. See generally Bloody Sunday Inquiry, *The Bloody Sunday Inquiry Website* (visited Feb. 15, 1999) <<http://www.bloody-sunday-inquiry.org.uk>> (on file with the *Fordham International Law Journal*) (providing all documents, evidence, transcripts, and rulings pertaining to Saville Inquiry in interest of making all aspects of inquiry publicly available).

most recent update the inquiry is now set to commence September 27, 1999.<sup>53</sup>

### B. *The Right to Life*

The primary purpose of the European system of human rights is to protect the rights of all individuals within its jurisdiction.<sup>54</sup> The most fundamental of those rights is the right to life.<sup>55</sup> The United Nations provides recommendations and guidelines on many aspects of the right to life, including methods of conducting investigations of alleged violations of the right to life.<sup>56</sup> As instruments of international law, U.N. materials are an important reference for the development of law regarding the right to life in the European system of human rights.<sup>57</sup>

#### 1. The European System of Human Rights

The European system of human rights is one of three regional human rights regimes in the world, including the Inter-American and African systems of human rights.<sup>58</sup> Of the three

53. See *Bloody Sunday Inquiry, 30th November 1998 – General Update* (visited Feb. 15, 1999) <[http://www.bloody-sunday-inquiry.org.uk/updates/update\\_nov98.htm](http://www.bloody-sunday-inquiry.org.uk/updates/update_nov98.htm)> (on file with the *Fordham International Law Journal*) (delaying timetable to account for new information from British Government and for large number of witnesses coming forward from Northern Ireland).

54. See European Convention, *supra* note 12, pmbl., at 222-24 (noting that aim of government parties is collective enforcement of human rights).

55. See Herndl, *supra* note 9, at XI (referring to right to life as basis for all other rights).

56. See United Nations High Commissioner for Human Rights, *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, E.S.C. Res. 1989/65, Annex, U.N. ESCOR, Supp. No. 1, at 53, U.N. Doc. E/1989/89 (1989) [hereinafter *U.N. Principles*] (promulgating general principles (“U.N. Principles”) on conducting such investigations, including qualities of thoroughness, promptness, and impartiality); see also 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, U.N. Doc. ST/CSDHA/12, U.N. Sales No. 91.IV.1 (1991) [hereinafter *U.N. MANUAL*] (expanding on U.N. Principles by providing precise and explicit guidelines for conducting such investigations in accordance with U.N. Principles).

57. See J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 203 (1993) (discussing importance of international law as legal background for European Convention and as “vital reference” for European Court’s judgments).

58. See INTERNATIONAL HUMAN RIGHTS, at vii (Richard B. Lillich & Hurst Hannum eds., 1995) (providing texts of three regional human rights treaties). The Inter-American system is governed by the American Convention on Human Rights, operating through the Inter-American Commission and Court of Human Rights. American Con-

regimes, the European system is the oldest, has the most case law, and is the most advanced and comprehensive regional system of human rights.<sup>59</sup> Within the European system, the right to life has evolved in the European Court's developing case law governed by the European Convention.<sup>60</sup>

#### a. The European Convention, Commission, and Court of Human Rights

In 1950, the Council of Europe<sup>61</sup> adopted the European Convention as a step toward the unification of Europe and the establishment of standards of democracy.<sup>62</sup> The European Convention entered into force September 3, 1953,<sup>63</sup> and is presently in force in all forty of the member states of the Council of Europe.<sup>64</sup> The European Convention is at the forefront of the de-

vention on Human Rights, *opened for signature* Nov. 22, 1969, ch. VI, art. 33, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. rev. 2, 9 I.L.M. 673 (1970) (entered into force July 18, 1978). The third established regional human rights regime is in Africa, organized under the African (Banjul) Charter on Human and People's Rights. African (Banjul) Charter on Human and People's Rights, *opened for signature* Jun. 26, 1981, O.A.U. Doc. CAB/LEG/67/3/rev. 5, 21 I.L.M. 59 (1982) (entered into force Oct. 21, 1986). This charter establishes an African Commission on Human and People's Rights ("African Commission") under Article 30. *Id.* art. 30. The mandate of the African Commission, however, extends only to research, and promotional, interpretive, and recommendation-writing duties, and not to any juridical functions for individual cases. *See id.* art. 45.

59. *See* MERRILLS, *supra* note 57, at 18 (stating that European system is "the most highly developed scheme of international human rights protection" and also noting that European Court's influence is seen in Inter-American Court); *see also* Ryssdal, *supra* note 12, at ix (noting that European Court has grown from "a peripheral phenomenon known only to a few specialists" to attain role of constitutional court with sufficient volume and authority of case law to create European "common law" of human rights).

60. *See* GOMIEN ET AL., *supra* note 22, at 94-95 (discussing case law affecting interpretation of Article 2).

61. *See id.* at 11-12 (explaining that Council of Europe is regional international organization that promotes cooperation among member states regarding various political, economic, social, cultural, scientific, and legal concerns, including human rights). The Council of Europe is comprised of 40 member states of both Western and Eastern Europe, including, most recently, the Russian Federation. *See* Council of Europe, *The 40 Member States of the Council of Europe* (visited Jan. 23, 1999) <<http://www.coe.fr/eng/std/states.htm>> (on file with the *Fordham International Law Journal*) (listing member states).

62. *See* RALPH BEDDARD, *HUMAN RIGHTS AND EUROPE* 19 (3d ed. 1993) (discussing history of European Convention within context of goal of European unity following World War II, based on principles of human rights and democracy).

63. *Id.*

64. *See* Council of Europe, *Chart of Signatures and Ratifications of Protocol 11 to the European Convention* (visited Feb. 9, 1999) <<http://www.coe.fr/tablconv/155t.htm>> (on

velopment of human rights legal norms both regionally and globally.<sup>65</sup>

The framers of the European Convention devoted the eighteen articles of Section I of the Convention to promulgating the rights and freedoms that state signatories must protect.<sup>66</sup> In the Convention's original format, Sections II and III then established and provided rules for the operation of both the European Commission and the European Court to ensure the signatory states' compliance with all provisions.<sup>67</sup> The Commission acts as a filter for the cases, sending to the Court only those cases in which the parties are unable to reach a friendly settlement and that are serious enough to warrant the Court's attention.<sup>68</sup> The European Commission issues reports on the individual cases.<sup>69</sup> These reports are not binding, but they have strong persuasive authority and the European Court frequently follows the findings and decisions of the Commission.<sup>70</sup> The judgments of

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file with the *Fordham International Law Journal*) (showing that entire European Convention, including most recent protocol, is in force in all forty signatory states, which are also Council of Europe member states); see also *The 40 Member States of the Council of Europe*, *supra* note 61 (listing member states); GOMIEN ET AL., *supra* note 22, at 11-12 (describing fundamental nature of human rights to operation of Council of Europe). Failure to conform with international human rights standards (including those of the European Convention) may be grounds for expulsion from the Council of Europe. *Id.*

65. See BEDDARD, *supra* note 62, at 1 (describing European Convention as "a major contributor" to international human rights law).

66. European Convention, *supra* note 12, arts. 1-18, at 224-34. Other rights protected by the European Convention include the right to liberty and security of person, the right to a fair and public hearing, the right to respect for private and family life, and the rights to freedom of expression, thought, religion, and conscience. *Id.*

67. *Id.* art. 19, at 234. The full text of Section II, Article 19 of the European Convention is as follows:

To ensure the observance of engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up:

- (1) a European Commission of Human Rights, hereinafter referred to as "the Commission";
- (2) a European Court of Human Rights, hereinafter referred to as "the Court".

*Id.*; see *id.* arts. 20-66, at 234-54 (promulgating rules for conduct of European Commission and European Court).

68. See *id.* arts. 27-32, at 238-42 (establishing procedural mechanics of Commission's work).

69. *Id.* art. 31, at 240.

70. See MERRILLS, *supra* note 57, at 15-16 (stating that European Court has duty to make independent decisions and need not follow decisions of European Commission, but frequently adopts Commission's approach); see also *Gulec v. Turkey*, Application No. 21593/93, July 27, 1998, ¶ 69 (Eur. Ct. H.R. decision not yet published in Series A) (visited Mar. 10, 1990) <<http://www.dhcour.coe.fr/eng/GULEC.ENG.html>> (on file

the European Court are final,<sup>71</sup> and state parties are bound to abide by the decisions under the European Convention.<sup>72</sup>

As of November 1, 1998, Protocol 11 to the European Convention<sup>73</sup> ("Protocol 11"), which substantially changed Sections II and III, entered into force.<sup>74</sup> Under Protocol 11, the operation of the Commission is being phased out and all new matters are now handled directly in the newly-organized Court's various committees and chambers.<sup>75</sup> The goal of this reform is to streamline the handling of cases by avoiding the duplicative efforts of two separate bodies adjudicating the same cases.<sup>76</sup>

#### b. Article 2 of the European Convention—The Right to Life

The most important right that anyone has, a right that is due merely by virtue of existing as a human being, is the right to that existence, the right to life.<sup>77</sup> The right to life is the first enumerated right established in the European Convention.<sup>78</sup> The atrocious lack of respect for life during World War II contributed to the decision of the Convention's framers to grant preeminent placement for the right to life.<sup>79</sup> The right to life as

with the *Fordham International Law Journal*) (providing Court's own frequently-stated principle that while it is not bound by Commission's findings of fact, "it is only in exceptional circumstances" that it will conclude contrary to Commission's findings).

71. European Convention, *supra* note 12, art. 52, at 248.

72. *Id.* art. 53, at 248. Executions of judgments are supervised by the Committee of Ministers of the Council of Europe. *Id.* art. 54, at 248; *see also* GOMIEN ET AL., *supra* note 22, at 13 (describing Committee of Ministers as decision-making body of Council of Europe and supervisory mechanism for European Convention).

73. Protocol 11, *supra* note 45.

74. *Id.*; European Court of Human Rights, *Press Release of the Registrar of the European Court of Human Rights and the Secretary to the European Commission of Human Rights*, May 7, 1998 (visited Dec. 7, 1998) <<http://www.dhcour.coe.fr/eng/PRESS/1st%20meeting%20of%20new%20ECHR.html>> (on file with the *Fordham International Law Journal*).

75. *Id.* The European Commission will continue to operate for one year, processing cases that it has already declared admissible. *Id.*

76. *Id.*

77. *See, e.g.*, GOMIEN ET AL., *supra* note 22, at 93 (calling right to life "a logical prerequisite for all other rights").

78. European Convention, *supra* note 12, art. 2, at 224. Article 1 of the Convention is a general provision that establishes that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention." *Id.* art. 1, at 224.

79. *See* GOMIEN ET AL., *supra* note 22, at 93 (discussing historic development of right to life under European Convention and framers' goal of preventing reoccurrence of World War II human rights violations).



articulated in the European Convention significantly expands on the wording of its predecessor, Article 3 of the Universal Declaration of Human Rights, which simply guarantees the right to life, liberty, and security of person.<sup>80</sup> Article 2 of the European Convention requires that signatory states protect the right to life by law.<sup>81</sup> Article 2 allows for the deprivation of life only in the limited circumstances of the legal imposition of a criminal death penalty or as the result of the lawful use of lethal force.<sup>82</sup> The fundamental goal of Article 2 is to protect individuals from the arbitrary deprivation of life by the state.<sup>83</sup>

In most cases regarding Article 2, the European Court begins its discussion of the right to life by emphasizing the importance of Article 2 both within the European Convention and as a safeguard of the democratic values of Council of Europe states.<sup>84</sup> Until recently, claims and findings of Article 2 violations in the European system were comparatively rare in relation to the use of other articles.<sup>85</sup> Then in 1995, in *McCann and Others v. the United Kingdom*, the European Court held for the first time that a

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80. See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., art. 3, at 136, U.N. Doc. A/810 (1948) (stating in full that “[e]veryone has the right to life, liberty, and security of person”); see also GOMIEN ET AL., *supra* note 22, at 93 (contemplating wording of right to life as articulated in European Convention as antecedent to articulation of Universal Declaration of Human Rights).

81. European Convention, *supra* note 12, art. 2, at 224.

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

*Id.*

82. *Id.*

83. See GOMIEN ET AL., *supra* note 22, at 94 (“The main principle of Article 2, taken as a whole, is to protect the individual against any arbitrary deprivation of life by the state.”).

84. See, e.g., *Andronicou and Constantinou v. Cyprus*, Oct. 9, 1997, 25 Eur. H.R. Rep. 491, at 544, ¶ 171 (1998) (stating that Article 2 is fundamental provision of European Convention and that it reflects basic value of democratic societies).

85. See, e.g., KEMPEES, *supra* note 12, at 11-12 (citing only two noteworthy Article 2 cases between 1960 and 1994, as compared to many more cases regarding other articles).

country had violated the right to life under Article 2.<sup>86</sup> The volume of Article 2 cases has grown since then, and the Court has thereby begun to establish more substantive case law interpreting the provisions of Article 2.<sup>87</sup>

The European Court and Commission have interpreted Article 2 not only to create a negative individual right, but also to impose upon states certain positive duties to satisfy the requirement that they protect the right to life by law.<sup>88</sup> The European Commission and Court have interpreted this protection of the right to life to both prohibit the intentional deprivation of life by states and to require states to undertake measures to protect life.<sup>89</sup> Article 2 therefore not only obliges states to create and to maintain legal and practical mechanisms to prevent the taking of life by any actor, but also imposes upon states the responsibility to ensure that its agents, including its security forces, do not violate the right to life of its nationals.<sup>90</sup> One way in which the European Court has developed such safeguards for life is to ex-

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86. *McCann and Others v. the United Kingdom*, 324 Eur. Ct. H.R. (ser. A) (1995) (holding that United Kingdom violated Article 2 when its security forces used excessive force in killing suspected terrorists).

87. See, e.g., *Kaya v. Turkey*, Application No. 22729/93, Feb. 19, 1998, ¶ 52 (Eur. Ct. H.R. decision not yet published in Series A) (visited Mar. 10, 1999) <<http://www.dhcour.coe.fr/eng/KAYA.ENG.html>> (on file with the *Fordham International Law Journal*) (finding that inadequacy of investigation into security force killing of applicant's civilian brother constituted violation of Article 2 by Turkish Government); *Ergi v. Turkey*, Application No. 23818/94, July 28, 1998, ¶ 86 (Eur. Ct. H.R. decision not yet published in Series A) (visited Mar. 10, 1999) <<http://www.dhcour.coe.fr/eng/ERGI.ENG.html>> (on file with the *Fordham International Law Journal*) (holding that Turkish Government violated Article 2 both in regard to planning and conduct of security forces' operation and in regard to failure to conduct effective investigation into death of applicant's sister).

88. See *BEDDARD*, *supra* note 62, at 75 (discussing European Commission's "opinion that a state's obligations under Article 2 should not be viewed in a wholly negative light, but that they include positive aspects"). As between governments and their citizens, citizens' positive rights imply a corresponding governmental duty to act in some way to fulfill those rights, whereas citizens' negative rights imply a corresponding governmental duty to refrain from acting in some way that would violate those rights. See ANNALENA SVENSSON-MCCARTHY, *THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION* 723 (1998) (discussing positive and negative rights with respect to right to life and right not to be subjected to torture).

89. See *X v. the United Kingdom*, App. No. 7154/75, 14 Eur. Comm'n H.R. Dec. & Rep. 31, 32-33 (1978) (stating that idea that everyone's right to life shall be protected by law means state not only must refrain from taking life intentionally, but also must "take appropriate steps to safeguard life").

90. See *GOMIEN ET AL.*, *supra* note 22, at 94 (stating that Article 2 clearly extends to deprivations of life by state itself).

tend its consideration of governmental responsibility to the planning and control of governmental operations involving the use of force.<sup>91</sup> For example, in *Andronicou and Constantinou v. Cyprus*, in which government security forces had killed two civilians in the course of a hostage rescue operation, the European Court held that state agents must conduct security operations with a minimum risk to life.<sup>92</sup>

Additionally, and most recently, the European Commission and European Court have developed the idea of a procedural requirement under Article 2 as an additional protection of the right to life that seeks to ensure the administration of justice following an alleged violation of the right to life.<sup>93</sup> The European Commission and European Court have recognized in recent reports and judgments that, in addition to the right to an effective remedy under Article 13 of the European Convention,<sup>94</sup> there is a procedural aspect of the right to life under Article 2.<sup>95</sup> This procedural aspect of the right to life requires states to conduct an effective official investigation into alleged violations of the right to life.<sup>96</sup> A government's failure to conduct a proper investigation into an alleged violation of the right to life can therefore itself constitute a violation of the right to life.<sup>97</sup>

91. See, e.g., *Andronicou and Constantinou v. Cyprus*, Oct. 9, 1997, 25 Eur. H.R. Rep. 491, at 544, ¶ 171 (1998) (asserting that all circumstances of deprivations of life must be subjected to "the most careful scrutiny," including planning and control of security force operations) (citing *McCann*, ¶ 150 (Court decision)).

92. *Id.* ¶ 186. In *Andronicou*, the authorities intervened in a domestic dispute in which a man was holding his fiancée at gunpoint. *Id.* ¶¶ 69-87. In the course of trying to rescue both, the authorities shot and killed the couple. *Id.* Although the Court held five to four that no violation of Article 2 had occurred, it criticized the planning and organization of the rescue operation because it failed to "minimise[ ] to the greatest extent possible" the risk to the couple's lives. *Id.* ¶ 186.

93. See *McCann and Others v. the United Kingdom*, App. No. 18984/91, Eur. Comm'n. H.R. (Mar. 4, 1994), ¶ 191 (noting that "a mechanism of review" is essential component of general prohibition of violations of right to life).

94. European Convention, *supra* note 12, art. 13, at 232 (stating in full that "[e]veryone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity").

95. See *McCann*, ¶¶ 191-93 (Commission report) (recognizing for first time that Article 2 "may include a procedural aspect" requiring "public and independent scrutiny" of deprivations of life by state agents).

96. See *McCann and Others v. the United Kingdom*, 324 Eur. Ct. H.R. (ser. A), ¶ 161 (1995) (stating that European Convention requires by implication that governments conduct effective investigations into deaths of individuals killed by state agents).

97. See *Kaya v. Turkey*, Application No. 22729/93, Feb. 19, 1998, ¶ 92 (Eur. Ct.

## 2. Investigations of Alleged Violations of the Right to Life

In 1982, the United Nations, alarmed at increasing incidences of violations of the right to life in various parts of the world, established the position of the United Nations Special Rapporteur on Arbitrary and Summary Executions<sup>98</sup> ("Special Rapporteur"), to investigate, monitor, and report on world-wide incidences of such executions.<sup>99</sup> The Special Rapporteur has stated that governments have an obligation to conduct exhaustive and impartial investigations of alleged violations of the right to life, to identify and prosecute perpetrators,<sup>100</sup> to compensate victims' families, and to prevent future violations.<sup>101</sup> The Special Rapporteur also maintained that governments' obligations extend to conducting effective and independent investigations into alleged deaths due to abuse of power by law enforcement officials, whom the government must then hold accountable for vio-

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H.R. decision not yet published in Series A) (visited Mar. 10, 1999) <<http://www.dhcour.coe.fr/eng/KAYA.ENG.html>> (on file with the *Fordham International Law Journal*) (holding that Turkish authorities' failure to conduct effective investigation into death of applicant's brother constituted violation of Article 2 of European Convention).

98. See E.S.C. Res. 1982/35, U.N. ESCOR, 1st Sess., Supp. No. 1, at 27, U.N. Doc. E/1982/82 (1982) (requesting Chairman of the Commission on Human Rights to appoint someone to position of U.N. Special Rapporteur on Arbitrary and Summary Executions ("Special Rapporteur")). Arbitrary execution is a U.N. term used in reference both to the use of capital punishment without due process of law and to extrajudicial or extra-legal executions by state agents using excessive force. See United Nations Human Rights Fact Sheet No. 11, at 3, published in UNITED NATIONS CENTRE FOR HUMAN RIGHTS, UNITED NATIONS REFERENCE GUIDE IN THE FIELD OF HUMAN RIGHTS, U.N. Doc. ST/HR/6, U.N. Sales No. E.93.XIV.4 (1993) (defining arbitrary execution as "the deprivation of life as a result of killings carried out by the order of a Government or with its complicity, tolerance or acquiescence, without any judicial or legal process; [or] the deprivation of life as a result of abuse or excessive use of force by law enforcement officials"). The concept of arbitrary or summary executions is a type of violation of the right to life. See Ramcharan, *supra* note 8, at 22 (referring to arbitrary or summary executions as particularly acute type of right to life problem).

99. See *id.* at 5 (discussing U.N. contributions to development of understanding about right to life).

100. See *Special Rapporteur's Report*, *supra* note 29, ¶ 565 (stating that governments have duty to prosecute not only those who planned and carried out alleged arbitrary or summary executions, but also "those in positions of authority who failed to prevent them").

101. *Id.* ¶ 559 (noting that obligation to investigate alleged right to life violations exists under international law). This Report also observes that there is a "clear relationship" between the effective investigation of human rights violations and the prevention of future violations. *Id.* ¶ 570.

lations of the right to life.<sup>102</sup>

In addition to establishing the position of Special Rapporteur to monitor incidences of arbitrary deprivations of life, the United Nations has also promulgated the U.N. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions<sup>103</sup> ("U.N. Principles"), and the U.N. Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions ("U.N. Manual").<sup>104</sup>

The U.N. Principles call for thorough, prompt, and impartial investigations of alleged violations of the right to life by competent investigators with adequate authority to conduct an effective investigation that will result in a written report.<sup>105</sup> Additionally, the U.N. Principles call on governments to follow up investigations with prosecution of the perpetrators, regardless of the location of the killing and the identity or nationality of the perpetrator or victim.<sup>106</sup> Other principles are exemplified by the requirements that governments provide the investigative body with the necessary financial and administrative resources to complete its duties<sup>107</sup> and provide for the involvement of the families of the deceased and their legal counsel.<sup>108</sup> The U.N. Principles also prohibit the use of blanket immunity, as well as defenses of superior orders or command responsibility, by which a commanding officer blames his troops for any violations.<sup>109</sup>

The U.N. Manual expands upon the concepts set forth in the U.N. Principles by providing specific guidelines on conducting investigations into deprivations of life.<sup>110</sup> Specifically, the U.N. Manual promulgates the Model Protocol for a Legal

102. *See id.* ¶ 585.

103. *See U.N. Principles, supra* note 56 (promulgating general principles on conducting such investigations, including qualities of thoroughness, promptness and impartiality).

104. U.N. MANUAL, *supra* note 56. The U.N. Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions ("U.N. Manual") was created to supplement the U.N. Principles by providing additional guidance on both the prevention and investigation of such executions. *Id.* at 3.

105. *U.N. Principles, supra* note 56, ¶¶ 9-17.

106. *Id.* ¶ 18.

107. *Id.* ¶ 10.

108. *Id.* ¶ 16.

109. *Id.* ¶ 19.

110. *See U.N. MANUAL, supra* note 56, at 3 (offering technical advice on "the meaningful implementation" of U.N. Principles).

Investigation of Extra-legal, Arbitrary and Summary Executions ("Minnesota Protocol").<sup>111</sup> The Minnesota Protocol provides model methods of investigation, purposes, and procedures of an inquiry and processing of the evidence.<sup>112</sup> The Minnesota Protocol requires that all investigations be characterized by competence, thoroughness, promptness, and impartiality.<sup>113</sup> Regarding the scope of the inquiry, the terms of reference should be framed neutrally to avoid suggesting a predetermined outcome.<sup>114</sup> In cases involving an allegation of government involvement, the Minnesota Protocol recommends the establishment of a commission of inquiry.<sup>115</sup> Such commissions require extensive publicity, public hearings, and the involvement of the victims' families,<sup>116</sup> as well as extra protections including impartial and expert counsel that is insulated from political influence.<sup>117</sup>

## II. THE GENESIS AND DEVELOPMENT OF THE PROCEDURAL ASPECT OF THE RIGHT TO LIFE IN THE EUROPEAN COURT OF HUMAN RIGHTS

The European Commission and European Court first pro-

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111. *Id.* ch. III, at 15. The Model Protocol for a Legal Investigation of Extra-legal, Arbitrary and Summary Executions ("Minnesota Protocol") was created by an international group of experts in forensic science, lawyers, and human rights experts in conjunction with the Minnesota Lawyers International Human Rights Committee. *Id.* at 3. In addition to the Minnesota Protocol, the U.N. Manual also provides a model autopsy protocol and a model protocol for disinternment and analysis of skeletal remains. *Id.* at 24-39.

112. *See id.* at 16-18. The Minnesota Protocol provides extremely detailed guidelines on conducting an investigation into the cause of death, including specific forensic techniques. *Id.* It states, however, that its methods are not binding because "investigative techniques vary from country to country and these cannot be standardized in the form of internationally adopted principles." *Id.* at 15.

113. *See id.* at 16 (calling these qualities "[t]he fundamental principles of any viable investigation into the causes of death").

114. *Id.* at 19. In order to be neutral, terms of reference "must not limit investigations in areas that might uncover government responsibility." *Id.*

115. *See id.* at 18 (recognizing that "an objective and impartial investigation may not be possible unless a special commission of inquiry is established").

116. *Id.* at 21-22. The Minnesota Protocol states that hearings should be publicly conducted unless *in camera* proceedings are necessary for a witness's protection. *Id.* at 21. It also prescribes that the establishment of a commission and the subject of the inquiry require wide notice, including an invitation to submit relevant information in writing or through oral testimony. *Id.* at 22. The Minnesota Protocol further provides that commissions must ensure that victims' families and their legal representatives are informed of, and have access to, all hearings and relevant information, and that they may present evidence. *Id.*

117. *Id.* at 21.

posed and discussed the idea of a procedural aspect of the right to life under Article 2 of the European Convention in the course of their adjudication of *McCann*.<sup>118</sup> Both bodies ultimately held that the facts of the instant case did not constitute a violation of the new requirement, but their report and judgment nevertheless established the concept of the procedural aspect of the right to life.<sup>119</sup> The European Commission and European Court have since solidified the procedural requirement doctrine by use, further definition, and extension in several recent reports and judgments in cases involving allegations of improper use of lethal force by security forces.<sup>120</sup>

A. *McCann and Others v. the United Kingdom:*  
*Genesis of the Procedural Aspect Doctrine*

The concept of a procedural aspect of the right to life originated in the European Commission's and European Court's adjudication of *McCann*.<sup>121</sup> On March 6, 1988, members of the British security force known as the Special Air Services<sup>122</sup> ("SAS") shot and killed three unarmed Irish Republican Army<sup>123</sup> ("IRA") members whom the SAS thought were about to

118. *McCann and Others v. the United Kingdom*, 324 Eur. Ct. H.R. (ser. A), ¶ 161 (1995); *McCann and Others v. the United Kingdom*, App. No. 18984/91, Eur. Comm'n. H.R. (Mar. 4, 1994), ¶¶ 191-93.

119. *McCann*, ¶¶ 163-64 (Court decision); *McCann*, ¶¶ 200-01 (Commission report).

120. *See, e.g., Yasa v. Turkey*, Application No. 22495/93, Sept. 2, 1998, ¶¶ 107-08 (Eur. Ct. H.R. decision not yet published in Series A) (visited Mar. 10, 1999) <<http://www.dhcour.coe.fr/eng/YASA.ENG.html>> (on file with the *Fordham International Law Journal*) (holding that Turkish Government violated procedural requirement of Article 2 by failing to conduct adequate investigation of killing of applicant's uncle); *Assenov and Others v. Bulgaria*, Application No. 24760/94, Oct. 28, 1998, ¶ 102 (Eur. Ct. H.R. decision not yet published in Series A) (visited Mar. 10, 1999) <<http://www.dhcour.coe.fr/eng/ASSENOV.ENG.html>> (on file with the *Fordham International Law Journal*) (extending use of procedural protection to Article 3 of European Convention).

121. *McCann*, ¶ 161 (Court decision); *McCann*, ¶¶ 191-93 (Commission report).

122. *See* TIM P. COOGAN, *THE IRA: A HISTORY* 433 (1993) (calling Special Air Services ("SAS") "the British Army's elite hit-unit"). The SAS are a well paid and highly trained special operations force. *Id.* They are accused of operating on the basis of a shoot-to-kill policy. *Id.*

123. *See generally id.* (describing history of Irish Republican Army ("IRA") from its origins up until 1969, then its activities between 1969 and 1993). The IRA is internationally well-known as a "major guerilla organisation." *Id.* at 259. Although the history of the IRA is riddled with periodic lulls and splinterings, its general objective has always been to free all of Ireland from British rule. *Id.* at 3-28.

detonate a car bomb on the rock island of Gibraltar.<sup>124</sup> In reviewing the application filed on behalf of the three dead IRA members against the British Government, the European Commission considered the issue of investigations into security force involvement in alleged violations of the right to life.<sup>125</sup> The European Commission observed that procedural protection is a critical component of the protection of the right to life because the proscription of arbitrary killings by state agents would not be effective without a practical means of investigating such killings.<sup>126</sup> Next, the European Commission asserted that in order to maintain public confidence in the administration of justice and rule of law, states must conduct some review of instances of the use of lethal force against individuals.<sup>127</sup> The Commission noted that one reason why the state must bear this burden is that the state is likely to be in sole possession of the factual and motivational circumstances of the killing, and is therefore in a better position than the victim's family to assess whether the use of force was justified.<sup>128</sup>

As a result of the foregoing, and because of the fundamental importance of the right to life, the European Commission found that states' obligations to protect the right to life may include a procedural aspect.<sup>129</sup> The Commission observed that this procedural aspect includes a minimum requirement of a

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124. Heather Mills, *Sudden Death and the Long Quest for Answers; The Gibraltar Shootings*, INDEPENDENT (London), Sept. 28, 1995, at 3. The European Court provides an exhaustive account of the particular circumstances of the case, detailing each witness's version of the events at every stage. *McCann and Others v. the United Kingdom*, 324 Eur. Ct. H.R. (ser. A), ¶¶ 13-102 (1995).

125. *McCann and Others v. the United Kingdom*, App. No. 18984/91, Eur. Comm'n. H.R. (Mar. 4, 1994), ¶ 191-93.

126. *Id.* ¶ 191. In *McCann*, the European Commission explains that procedural protection, to the extent that it may be relevant under Article 2, must be regarded as an aspect of the criterion 'protected by law.' A general legal prohibition of arbitrary killing by the state authorities would be rendered nugatory if, in practice, there was no mechanism for reviewing the action of the State agents.

*Id.*

127. *See id.* ¶ 192 (calling for "some form of open and objective oversight" of state killings as essential for public confidence in legal and justice systems).

128. *See id.* (stating that when government agents use lethal force against individual, "the factual circumstances and the motivation for the killing lie largely, if not wholly, within the knowledge of the State authorities" and that "the victim's families are unlikely to be in a position to assess whether the use of force was in fact justified").

129. *Id.* ¶ 193 (Commission report).



mechanism for public and independent scrutiny to review the alleged violation of the right to life by state agents.<sup>130</sup> The Commission was purposely vague about specific standards for conducting investigations, finding that the nature and degree of the minimal scrutiny necessary to satisfy this requirement depends upon the circumstances of the case.<sup>131</sup> Indeed, the Commission stated that such scrutiny may well be no more than a mere formality if the circumstances so dictate by clear and undisputed facts.<sup>132</sup> In situations where the circumstances of the death are unclear, however, the European Commission created the basis for a new type of claim by asserting that a failure to conduct an effective investigation could by itself raise an issue under Article 2.<sup>133</sup>

The European Commission ultimately decided that the British Government had not violated Article 2.<sup>134</sup> Despite establishing the new procedural requirement under Article 2(1), the Commission opined that the British Government's actions did not constitute a violation on the basis of these standards because the domestic inquest proceeding was adequate to meet the procedural requirement of Article 2.<sup>135</sup> The Commission also decided against finding a violation of Article 2(2) because it found that the use of lethal force against the applicants was within the boundaries of Article 2(2)'s provision that lethal force may be used where absolutely necessary.<sup>136</sup>

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130. *Id.*

131. *See id.* (stating that investigation may be "minimum formality" when facts are clear and undisputed, but that effective investigation is essential when facts are unclear or disputed).

132. *Id.*

133. *Id.* (stating that "there may be other cases, where a victim dies in circumstances which are unclear, in which event the lack of any effective procedure to investigate the cause of the deprivation of life *could by itself raise an issue* under Article 2 of the Convention") (emphasis added).

134. *McCann and Others v. the United Kingdom*, App. No. 18984/91, Eur. Comm'n. H.R. (Mar. 4, 1994), ¶ 251. The Commission's decision stood at eleven votes to six. *Id.*

135. *See id.* ¶ 200 (Commission report) (stating that inquest "provided sufficient procedural safeguards for the purposes of Article 2"). Factors considered by the European Commission in finding that the inquest was sufficiently thorough included the fact that the hearing lasted 19 days, 79 witnesses, including members of the security forces, were subjected to public examination, and there was no evidence that the jurors were biased. *Id.* ¶¶ 197-99 (Commission report).

136. *See id.* ¶ 250 (Commission report) (finding that use of lethal force in this instance was "no more than 'absolutely necessary'").

The case was then forwarded to the European Court for its decision on the merits.<sup>137</sup> In its landmark September 27, 1995 judgment in *McCann*, the European Court held by a slim majority that the United Kingdom had violated Article 2 of the European Convention.<sup>138</sup> The Court held that the killings were not premeditated,<sup>139</sup> but that the Court was not convinced that the use of force was no more than absolutely necessary in defense of persons from unlawful violence under Article 2(2)(a) of the European Convention.<sup>140</sup> The Court recognized the general need for domestic investigative mechanisms, asserting that the Convention implied the need for investigations of alleged violations of the right to life by state agents.<sup>141</sup> The Court reasoned that a lack of investigations would negate the effect of prohibiting arbitrary

137. *McCann and Others v. the United Kingdom*, 324 Eur. Ct. H.R. (ser. A) (1995); see European Convention, *supra* note 12, art. 48, at 246 (providing procedure for case to be forwarded from European Commission to European Court).

138. See *McCann*, ¶ 214 (Court decision) (holding by only ten votes to nine that United Kingdom had violated Article 2 of European Convention). The European Court's decision in *McCann*, holding that the United Kingdom had violated Article 2 of the Convention, produced outrage in the British Government to the point that it considered withdrawing from the Court's jurisdiction. See, e.g., Stephen Bates, *UK Fury at SAS Verdict*, *GUARDIAN* (London), Sept. 28, 1995, at 1; Philip Webster, *Outrage over Death on the Rock Verdict by Euro court*, *TIMES* (London), Sept. 28, 1995. The decision also sparked further heated political debate over Northern Ireland and the many instances of the use of lethal force by the British security forces. See, e.g., Thierry Leveque, *Eurocourt Condemns Britain for IRA Killings*, *THE REUTER EUROPEAN COMMUNITY REPORT*, Sept. 27, 1998 (citing Gerry Adams, president of Sinn Féin, as saying, "There is now a clear need for a full, independent and internationally-based judicial investigation into all disputed killings by British forces."). The European Commission was flooded with applications claiming violations of the right to life by British security forces in Northern Ireland, but most did not meet the European Court's six-month statute of limitations requirement. See *McCann & Bowcott*, *supra* note 41 (describing "flood" of applications brought against United Kingdom alleging right to life violations stemming from Northern Ireland conflict); see also European Convention, *supra* note 12, art. 26, at 238 (providing rule that applications must be filed with European Commission within six months of final domestic adjudication). As of November 1, 1998, the six-month statute of limitations for applications to the European Court is under Article 35(1) of Protocol 11 to the Convention. Protocol 11, *supra* note 45, art. 35(1).

139. *McCann*, ¶ 184 (Court decision).

140. *Id.* ¶¶ 213-14 (Court decision).

141. *Id.* ¶ 161 (Court decision).

[A] general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention' requires by implication that there should be some form of effective official

trary killings by state agents.<sup>142</sup> Nevertheless, in the instant case, the European Court upheld the Commission's findings that the inquest proceeding was sufficient to meet the requirement of the procedural aspect of the right to life under Article 2(1).<sup>143</sup> The European Court therefore found it unnecessary, for the purposes of adjudicating *McCann*, to formulate any standards for what constituted an effective investigation.<sup>144</sup>

B. *Kaya v Turkey: First Holding of a Violation of the Procedural Requirement of Article 2*

In its February 19, 1998 decision in *Kaya v. Turkey*, the European Court held for the first time that a government had violated the procedural aspect of Article 2.<sup>145</sup> In *Kaya*, Turkish security forces had killed a civilian in disputed circumstances in an area of Turkey fraught with violence and political disturbances.<sup>146</sup> In its October 24, 1996 report, the Commission found that because the circumstances of the killing were unclear, the authorities should have conducted a thorough investi-

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investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.

*Id.*

142. *Id.*

143. *Id.* ¶¶ 163-64 (Court decision).

144. *Id.* ¶ 162 (Court decision) (declining to decide upon "form" or "conditions" for investigations of alleged right to life violations). The European Court has since established some guidelines on a case-by-case basis, but the most specific expression of such guidelines came in the European Commission's report in *Tanrikulu v. Turkey*. *Tanrikulu v. Turkey*, App. No. 23763/94, Eur. Comm'n H.R. (Apr. 15, 1998), ¶ 247. In *Tanrikulu*, the Commission stated that for an investigation to be effective, "it must as a minimum involve an examination of the immediate factual circumstances of the killing, including the obtaining of relevant eye-witness testimony and forensic evidence clarifying the cause of death." *Id.* The European Court has not yet issued a decision in this case.

145. See *Kaya v. Turkey*, Application No. 22729/93, Feb. 19, 1998, ¶ 92 (Eur. Ct. H.R. decision not yet published in Series A) (visited Mar. 10, 1999) <<http://www.dhcour.coe.fr/eng/KAYA.ENG.html>> (on file with the *Fordham International Law Journal*) (holding that failure to conduct effective investigation of death of applicant's brother constituted violation of Article 2 of European Convention); E-mail Interview with Aisling Reidy, Barrister-at-Law, Counsel for the applicant in *Kaya*, Dec. 16, 1998 [hereinafter Reidy Interview] (confirming that *Kaya* was European Court's first holding of violation of procedural aspect of right to life under European Convention).

146. See *Kaya*, ¶ 8. The applicant contended that Turkish security forces deliberately shot and killed his brother, while the Turkish Government maintained that the brother was killed in the course of attacking the security forces in a gun battle between the security forces and terrorists. *Id.*

gation to determine the factual events.<sup>147</sup> On the basis of the investigation's inadequacy,<sup>148</sup> the Commission found that Turkey had violated Article 2.<sup>149</sup>

In addition to adopting the Commission's criticisms of the inadequacies of the investigation,<sup>150</sup> the European Court further maintained that frequent incidences of political disturbances and violence do not waive a state's obligation to conduct an effective investigation into alleged violations of the right to life in the course of clashes with security forces.<sup>151</sup> The European Court also observed that the procedural requirement of Article 2 ensures accountability of state agents for their use of lethal force.<sup>152</sup> Thus, the failure of the Turkish authorities to conduct an effective official investigation led the European Court to hold that Turkey had violated Article 2.<sup>153</sup>

*C. Gulec v. Turkey: Application of the Procedural Aspect Doctrine in Case Regarding Killing During Demonstration*

In *Gulec v. Turkey*, the applicant's fifteen-year-old son had been shot and killed while walking home through an unauthorized street demonstration.<sup>154</sup> In holding that Turkey had vio-

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147. *See id.* ¶ 84 (stating that "the circumstances surrounding the killing of the applicant's brother were unclear and such as to require the authorities to carry out a thorough investigation").

148. *See id.* (finding that investigation was "seriously deficient" in respect to conduct of autopsy, forensic examination of body and scene of killing, and prosecutor's unquestioned assumption that deceased was terrorist).

149. *See id.* ¶ 52 (finding Article 2 violation by twenty-seven votes to three).

150. *Id.* ¶ 84.

151. *Id.* ¶ 91. The European Court states that neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted 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.*

152. *See id.* ¶ 87 (observing that accountability of agents is secured "by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination on whether the force used was or was not justified in a particular set of circumstances").

153. *Id.* ¶ 92. The European Court criticized the investigating official for failing to collect evidence at the scene, failing to make his own independent reconstruction of the events, and failing to come to verify whether the victim was in fact a terrorist as alleged by the security forces. *Id.* ¶ 89.

154. *Gulec v. Turkey*, Application No. 21593/93, July 27, 1998, ¶ 7 (Eur. Ct. H.R. decision not yet published in Series A) (visited Mar. 10, 1999) <http://

lated the procedural aspect of Article 2 of the European Convention,<sup>155</sup> the Court stated that the procedural aspect doctrine requires governments to hold their agents accountable for the use of lethal force.<sup>156</sup> The European Court criticized the Turkish authorities' investigation in *Gulec* for its lack of thoroughness, for the authorities' lack of independence, and for the failure to allow for the participation of the complainant.<sup>157</sup>

*D. Ergi v. Turkey and Yasa v. Turkey: The Procedural Aspect  
Doctrine Becomes Settled in European Case Law*

In *Ergi v. Turkey* and *Yasa v. Turkey*, the alleged inadequacy of an investigation into a possible security force killing became settled grounds for a claim and subsequent finding of a violation of the right to life under Article 2 of the European Convention.<sup>158</sup> The applicants in both of these cases claimed that Turkish security forces were involved in the killing of their relatives in violation of Article 2 of the European Convention.<sup>159</sup> In *Ergi*, state security forces had killed the applicant's sister by gunfire in an ambush purportedly staged to capture members of a paramilitary group, but it was not established that the security

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[www.dhcour.coe.fr/eng/GULEC.ENG.html](http://www.dhcour.coe.fr/eng/GULEC.ENG.html) (on file with the *Fordham International Law Journal*). The Turkish Government maintained that the applicant's son was killed by a bullet fired by armed demonstrators, while the applicant alleged that the bullet was fired by the security forces who were attempting to disperse the demonstration. *Id.* ¶ 9.

155. *Id.* ¶ 83. The Court also held that, although some use of force may have been warranted by the violence of the demonstration, the Turkish security forces had used excessive force in dispersing the demonstrators. *Id.* ¶¶ 70-73.

156. *See id.* ¶ 78 (stating that use of lethal force should be subjected to "some form of independent and public scrutiny capable of determining whether the force used was or was not justified in a particular set of circumstances").

157. *Id.* ¶ 82. The Court noted in particular that the investigating officer interviewed only a few people and failed to interview two witnesses "of fundamental importance." *Id.* ¶ 79.

158. *See Ergi v. Turkey*, Application No. 23818/94, July 28, 1998, ¶ 86 (Eur. Ct. H.R. decision not yet published in Series A) (visited Mar. 10, 1999) <<http://www.dhcour.coe.fr/eng/ERGI.ENG.html>> (on file with the *Fordham International Law Journal*) (holding that lack of "adequate and effective" investigation into state agents' killing of applicant's sister constituted Article 2 violation); *Yasa v. Turkey*, Application No. 22495/93, Sept. 2, 1998, ¶¶ 107-08 (Eur. Ct. H.R. decision not yet published in Series A) (visited Mar. 10, 1999) <<http://www.dhcour.coe.fr/eng/YASA.ENG.html>> (on file with the *Fordham International Law Journal*) (holding that investigation into death of applicant's uncle failed to consider security force involvement in attack and failed to show "concrete and credible progress," and therefore constituted Article 2 violation).

159. *Ergi*, ¶¶ 9-15; *Yasa*, ¶¶ 8-28.

forces were necessarily at fault for the killing.<sup>160</sup> The Court found a violation of Article 2, however, regarding both the planning and conduct of the security force's operation and the failure to conduct an effective investigation into the death of the applicant's sister.<sup>161</sup> Similarly, in *Yasa*, the European Court held that even though the applicant was unable to prove the security force's involvement in the killing of his uncle,<sup>162</sup> Turkey had violated Article 2 by failing to conduct an effective investigation into the murder of the applicant's uncle.<sup>163</sup>

The European Court found in both cases that the Turkish authorities' knowledge of the killing was itself sufficient to create an *ipso facto* obligation under Article 2 to conduct an effective investigation.<sup>164</sup> The Court stated further that this obligation arises regardless of whether it has been established that a state agent is implicated in the killing and regardless of whether the family of the deceased has lodged an official complaint.<sup>165</sup> Furthermore, as in *Kaya*, the Court asserted in both *Ergi* and *Yasa* that the existence of political turmoil and violence in that region of Turkey was not a sufficient excuse to relieve the authorities of their duty under Article 2 to conduct such an investigation.<sup>166</sup>

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160. See *Ergi*, ¶ 79 (noting that it was not established whether security forces or paramilitaries fired actual bullet that killed applicant's sister). The security forces conducted their ambush operation against the paramilitaries near a village, resulting in death of applicant's sister, a civilian, and damage to some homes in the village. *Id.* at ¶¶ 16-17. The European Court also held that the Turkish Government violated Article 2 because of the defects in the planning and conduct of the security forces' operation. *Id.* at ¶ 86.

161. See *id.* ¶¶ 83-86 (criticizing public prosecutor's summary conclusion that paramilitaries were at fault, without taking any statements from witnesses or considering security forces' planning and conduct of operation). In *Ergi*, the family of the deceased claimed that they received no communication from public prosecutor after autopsy and that they "remained in the dark" regarding the official view of the incident and whether there was any subsequent investigation or prosecution. *Id.* ¶ 15.

162. See *Yasa*, ¶ 97 (asserting inability to determine whether applicant's uncle was killed by security forces). The applicant's uncle was shot and killed by an unknown assailant while walking down the street. *Id.* at ¶ 18. The applicant claimed that the security forces had attacked both himself and his uncle as part of a campaign against them for selling pro-Kurdish newspapers. *Id.* at ¶ 7.

163. See *Yasa*, ¶ 128(3) (holding eight votes to one that Turkish Government had violated Article 2).

164. *Ergi*, ¶ 82; see *Yasa*, ¶ 100 (stating that "the mere fact that the authorities were informed of the murder . . . gave rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation").

165. *Ergi*, ¶ 82; *Yasa*, ¶ 100.

166. See *Ergi*, ¶ 85 (stating that "neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure

The Court explained that to waive such obligation would in fact only serve to worsen the political disturbances.<sup>167</sup>

*E. Assenov and Others v. Bulgaria: Extension of the Procedural Aspect Doctrine to Cover Allegations of Torture*

The European Court's recent application of the procedural aspect doctrine to another of the most fundamental human rights protected by the European Convention further illustrates how settled the doctrine has become in the Court's case law.<sup>168</sup> In its October 28, 1998 decision in *Assenov and Others v. Bulgaria*, the European Court extended the use of the procedural aspect to Article 3,<sup>169</sup> which prohibits torture and inhuman or degrading treatment or punishment.<sup>170</sup> In *Assenov*, Turkish authorities had arrested the fourteen-year-old applicant for gambling and had allegedly beaten and tortured him both at the site of the arrest and subsequently in prison.<sup>171</sup> The applicant claimed that Turkey had violated Article 3 of the European Convention both by torturing him and by failing to conduct an effective investigation into his allegations of torture.<sup>172</sup>

The European Court, citing *McCann, Kaya, and Yasa*, held that Article 3, in conjunction with Article 1, requires the state to conduct an effective investigation whenever an individual initi-

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that an effective, independent investigation is conducted into the deaths arising out of clashes involving security forces, more so in cases such as the present where the circumstances are in many respects unclear"); *Yasa*, ¶ 104 (using language similar to that used by European Court in *Ergi*); see also *Gulec v. Turkey*, Application No. 21593/93, July 27, 1998, ¶ 81 (Eur. Ct. H.R. decision not yet published in Series A) (visited Mar. 10, 1999) <<http://www.dhcour.coe.fr/eng/GULEC.ENG.html>> (on file with the *Fordham International Law Journal*) (using language identical to that used by European Court in *Ergi*). The Court also observed in *Ergi* that "loss of life is a tragic and frequent occurrence in the security situation in south-east Turkey." *Ergi*, ¶ 85.

167. See *Yasa*, ¶ 104 (asserting that such waiver would "exacerbate still further the climate of impunity and insecurity in the region and thus create a vicious circle").

168. See *Assenov and Others v. Bulgaria*, App. No. 24760/94, Oct. 28, 1998, ¶ 102 (Eur. Ct. H.R. decision not yet published in Series A) (visited Mar. 10, 1999) <<http://www.dhcour.coe.fr/eng/ASSENOV.ENG.html>> (on file with the *Fordham International Law Journal*) (establishing procedural aspect of Article 3 using similar language to that used by Court in *McCann* to establish procedural aspect of Article 2).

169. *Id.*

170. European Convention, *supra* note 12, art. 3, at 224 (stating in full that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment").

171. *Assenov*, ¶¶ 8-9.

172. *Id.* ¶ 90.

ates a potentially meritorious<sup>173</sup> claim alleging either torture or a violation of the right to life.<sup>174</sup> Similar to the law under Article 2, the Court noted in *Assenov* that the absence of such a procedural aspect in relation to the prohibition of torture would mean that the prohibition itself would be ineffective in practice, potentially creating a climate in which state agents could abuse their power with impunity.<sup>175</sup> The Court maintained that investigations of alleged violations of both Articles 2 and 3 must be capable of identifying the perpetrator for appropriate punishment.<sup>176</sup> The European Court ultimately held in *Assenov* that the evidence was insufficient to prove that the applicant's injuries were in fact caused by the police,<sup>177</sup> but that Turkey had violated Article 3 by failing to conduct a thorough and effective investigation into the applicant's allegations.<sup>178</sup>

III. THE BLOODY SUNDAY INVESTIGATIONS  
ILLUSTRATE THE PROCEDURAL ASPECT DOCTRINE,  
WHICH IS A POSITIVE LEGAL DEVELOPMENT  
BUT NEEDS MORE SPECIFIC STANDARDS

When the Widgery Tribunal investigated the events of Bloody Sunday in 1972, the European Court had not yet developed the idea of a procedural protection for the right to life. Twenty-two years later, an application to the European Commission claiming that the British Government had violated the procedural aspect of the right to life was beyond the statute of limitations.<sup>179</sup> Pressure on the British Government has yielded a second chance at justice, the Saville Tribunal,<sup>180</sup> which must be mindful of the development of the procedural aspect doctrine in

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173. *See id.* ¶ 102 (requiring investigations into claims that are at least "arguable").

174. *See id.* (requiring "by implication that there should be an effective official investigation . . . capable of leading to the identification and punishment of those responsible").

175. *Id.*

176. *Id.*

177. *Id.* ¶ 100.

178. *Id.* ¶ 106. The Court found that the investigation was deficient because "no attempt appears to have been made to ascertain the truth" by interviewing the witnesses and because investigators assumed that initial beatings were administered by the boy's father and subsequent beatings were warranted and necessary to correct the boy's disobedience. *Id.* ¶ 103-04.

179. *See supra* note 44 and accompanying text (discussing *McDaid* application).

180. *See supra* notes 40-48 and accompanying text (detailing criticism of Widgery Tribunal and subsequent establishment of Saville Inquiry).



the European Court's case law.<sup>181</sup> The procedural aspect doctrine is a valuable protection for the right to life, but the European Court should create more specific standards for its application.

A. *The Bloody Sunday Investigations Provide an Illustration of the Importance of the Procedural Aspect Doctrine*

Evaluating the operation of both the Widgery Tribunal and the Saville Tribunal with respect to their compliance with international standards for conducting investigations into alleged right to life violations is illustrative of the importance of the development of the procedural aspect of the right to life in the European Court. Had the events of Bloody Sunday and its aftermath occurred today, the victims' families would have a strong case against the British Government in the European Court. The applicants would be likely to prevail not only on an Article 2 claim based on the excessive use of force of the British soldiers<sup>182</sup> and inadequate planning and control of the operation, but also on a claim that the British Government's failure to conduct a proper investigation of Bloody Sunday constituted a violation of the procedural aspect of the right to life under Article 2. In the course of reaching a conclusion regarding the procedural aspect of Article 2, the European Court would probably be extremely critical of the Widgery Tribunal as a purportedly independent, thorough, and effective investigation.<sup>183</sup> In 1972, however, the victims of Bloody Sunday and their families were without the protection of the European Court's case law on the procedural aspect of the right to life and therefore had no recourse for justice in that respect. The Saville Tribunal now purports to offer another chance to establish the truth concerning the events of Bloody Sunday.<sup>184</sup>

The British Government's willingness to open the Saville

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181. See *supra* Part II, notes 118-78 and accompanying text (providing history of European Court's case law regarding procedural aspect doctrine).

182. See *supra* note 155 (discussing Court's holding in *Gulec*, case with facts similar to those of Bloody Sunday, that Turkish security forces used excessive force in dispersing demonstrators).

183. See *supra* notes 40-41 and accompanying text (outlining criticisms of Widgery Tribunal and Widgery Report); see also *supra* notes 127, 135, 144, 147-53, 156-60, 174-78 and accompanying text (providing details of Court's criticisms of investigations in each of cases discussed).

184. See *supra* notes 48-51 and accompanying text (describing establishment of Sa-

Tribunal as a renewed inquiry into Bloody Sunday amounts to an admission that its original investigation was insufficient to meet the requirements demanded by justice. It is important that the Saville Tribunal learns from the mistakes of Widgery and does not repeat them. If the Saville Tribunal fails in its objective to conduct a fair and impartial investigation into the Bloody Sunday killings, then the original applicants may be able to bring the entire Bloody Sunday issue before the European Court on the basis of a claim that the Saville Tribunal was an inadequate investigation that violated the procedural aspect of the right to life under Article 2 of the European Convention.

Although the Saville Tribunal will not commence hearings until September 27, 1999, its work to date provides some basis for evaluation.<sup>185</sup> The Saville Tribunal has expressed a commitment to some of the standards expressed in both the European Court's case law and the U.N. Manual as essential to conducting an effective investigation. For example, in his Opening Statement on April 3, 1998, Lord Saville emphasized the need for fairness, thoroughness, and impartiality.<sup>186</sup> The Saville Tribunal has also stated that all hearings shall be conducted publicly, open to any who wish to observe, and that the transcripts of all proceedings and all rulings of the Saville Tribunal will be made available as quickly as possible on its website.<sup>187</sup> Furthermore, the Saville Tribunal recognizes the importance of not only justice itself, but also the perception that justice is done.<sup>188</sup>

Considering the Saville Tribunal's apparent intent to comport with international standards on investigating alleged violations of the right to life, theorizing about the application of a legal claim that may be brought on the occasion of failure may be at best a pessimistic and unnecessary academic venture. At worst, it may be a signal of distrust that could itself undermine the effectiveness of the investigation. Exploration of the rele-

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ville Tribunal and expressions of its intent to conduct fair, thorough, and impartial investigation).

185. See *supra* notes 49-53 and accompanying text (discussing preliminary hearings and Saville Tribunal's other work since its inception in April 1998).

186. See *supra* note 49 and accompanying text (discussing establishment of Saville Tribunal).

187. See *supra* note 52 (providing information regarding Saville Tribunal's website and its contents).

188. See *supra* note 51 and accompanying text (discussing Saville Tribunal's rulings and observations made following preliminary hearing).

vant international legal standards is nevertheless valuable in order to bring inadequacies in the investigation to the immediate attention of the Saville Tribunal so that they may remedy such inadequacies in time to ensure that they conduct the inquiry in legally fair and just manner in compliance with the international standards.

With the increasing cognizance of the importance of the European Convention in British domestic law,<sup>189</sup> it will be particularly important for the Saville Tribunal to ensure that its conduct is consistent with the standards promulgated in the European Court. Even though the original events of January 30, 1972 are now outside the remit of the European Court for statute of limitations reasons,<sup>190</sup> if the Saville Tribunal does not conduct the inquiry in accordance with the relevant standards of the European Court regarding the procedural aspect of the right to life, then the families of the deceased and wounded could bring a case against the British Government in the European Court, alleging a violation of the right to life on the basis of the Saville Tribunal's failure to constitute an adequate investigation of killings by British security forces. This case would provide the necessary means for the European Court to consider the events of Bloody Sunday in light of the alleged violation of the procedural protections of the right to life.

*B. The Procedural Aspect Doctrine Is a Positive Development  
in International Human Rights Law, but the  
European Court Should Create More  
Specific Standards for Its Use*

The European Court's development of the procedural aspect doctrine is an advancement in human rights law because of the extra protection that it offers for the right to life. The main weakness of the doctrine is that the Court has not provided specific guidelines on how to conduct effective investigations in compliance with the doctrine. The European Court should look to the U.N. Principles and U.N. Manual as a source of specific

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189. *See supra* note 22 and accompanying text (discussing United Kingdom's recent Human Rights Act 1998, incorporating European Convention into domestic U.K. law).

190. *See supra* note 45 and accompanying text (discussing requirement that application be filed to European Court within six months of exhaustion of domestic remedies).

standards for conducting investigations into alleged violations of the right to life.

1. The Procedural Aspect Doctrine Is a Positive Development in International Human Rights Law

The European Court's development of the procedural aspect doctrine provides legal and judicial recourse for individuals suffering under the political strife endemic in some areas under the jurisdiction of the European Court. Most notably in Turkey and Northern Ireland, political conflicts have resulted in more extensive use of security forces, increased and often hostile interaction between civilians and security forces, and a resulting greater loss of civilian life at the hands of the states' security forces.<sup>191</sup> In the wake of such events, it is often very difficult for families of victims to ascertain whether the lethal use of force against the victims was justified and lawful.<sup>192</sup> Moreover, due to domestic political considerations related to the conflicts, the families may be unable to obtain an effective remedy or adjudication in the domestic judicial system.<sup>193</sup> The procedural aspect doctrine acts as a response to these situations by imposing responsibility upon those who have failed, either purposely or by lack of effort, to vindicate the rights of those killed by security forces.

The procedural aspect doctrine constitutes an additional safeguard to the right to life in two ways. First, it imposes an obligation on states to maintain adequate mechanisms for conducting effective official investigations into alleged violations of the right to life. Second, the prospect of an effective official investigation may deter individual security force members who may be too quick to shoot. The threat of a claim based on the

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191. *See supra* note 166 (noting frequency of loss of life in relation to security situation in Turkey); *see also supra* note 25 and accompanying text (discussing civilian deaths in Northern Ireland).

192. *See supra* note 161 and accompanying text (noting applicant's complaint that authorities failed to provide any information regarding any pending investigation); *see also supra* note 128 (observing that state is frequently in sole possession of this information).

193. *See supra* Part II, notes 118-78 and accompanying text (discussing cases in which European Court held that respondent governments had failed to provide effective investigations); *see also* *Aksoy v. Turkey*, 23 Eur. H.R. Rep 553, ¶ 52 (1997) (stating that there is no obligation to have recourse to remedies that are inadequate or ineffective).

procedural aspect of Article 2 of the European Convention should also prompt states to ensure their security forces' knowledge of and compliance with Article 2. On the individual and state levels alike, then, this new legal development creates an extra safeguard of the right to life both by ensuring compliance with the requirements of Article 2 and by ensuring that security force members are subjected to strong supervision in the form of effective domestic investigations into their actions.

Finally, the procedural aspect doctrine is a positive development because it serves as a paradigm that other international human rights jurisdictions may use to further protect the right to life. This recent development reflects the growing prominence of the European Court and its expanding case law both within the European Union and within the international human rights regime.<sup>194</sup> In light of the European Court's position in the fore of global human rights law developments, the development of new legal theories is particularly important. As courts in other human rights jurisdictions increasingly observe and follow the European Court's decisions and legal initiatives,<sup>195</sup> this new expansion of the right to life may, and hopefully will, have implications well beyond the European jurisdiction.

## 2. The European Court Should Develop More Specific Guidelines on How Investigations of Alleged Violations of the Right to Life May Meet the Requirements of the Procedural Aspect Doctrine

The major weakness of the procedural aspect doctrine is that the European Court has remained vague as to what constitutes an effective investigation of an alleged violation of the right to life. In its decisions to date, the European Court has not imposed upon the member states any specific guidelines on conducting investigations. The European Court was initially deliberately vague on this issue, stating in *McCann* that the requirements of a proper investigation will vary among states and according to the circumstances of the alleged violation.<sup>196</sup> Since

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194. See *supra* note 59 and accompanying text (discussing increasing status of European Court due to increasing volume and authority of case law).

195. *Id.*

196. See *supra* note 144 and accompanying text (explaining that Court in *McCann* declined to decide upon form or conditions of investigations of alleged violations of right to life)

then, the European Court has been deciding on the effectiveness of investigations on a case-by-case basis. The resulting requirements established by the Court are vague, limited, and not integrated.<sup>197</sup>

One theory explaining the European Court's vagueness regarding specific requirements and standards for investigations into alleged violations of the right to life is that the Court is still hesitant in its power and is reluctant to impose upon the member states. The European Court has traditionally held a certain amount of deference for the authority of its constituent states.<sup>198</sup> The Court's reluctance to create more specific and stringent requirements for the sufficiency of an investigation stems from its sensitivity to the differences in the legal systems of its member states under the margin of appreciation doctrine.<sup>199</sup> The European Court may be especially wary of imposing guidelines and regulations on states that have been slow to recognize and accept the jurisdiction of the Court.

With time, however, the Court's power and influence have increased as its reputation and position have solidified.<sup>200</sup> The success of the European Court, combined with the increase in global regard for the sanctity of human rights, should prompt the Court to further exercise its jurisdiction and prescribe guidelines for conducting investigations into alleged violations of the right to life. The Court now seems to be in a position in which it has the authority to impose on its states in this manner.

The promulgation of more specific guidelines for such investigations is important for several reasons. First, specificity generally allows for better enforcement of a standard by establishing strict measures with which compliance is necessary in order to avoid falling short of the broad requirement of an effective investigation. It is easier and more fair for a court to gauge

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197. See *supra* notes 127, 135, 144, 147-53, 156-60, 174-78 and accompanying text (supplying Court's criticisms of investigations in each of cases discussed).

198. Reidy Interview, *supra* note 145; see Rudolf Berhardt, *Human Rights and Judicial Review: The European Court of Human Rights*, in *HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE* 319 (David M. Beatty ed., 1994) (noting, however, that reduced or limited national sovereignty is now accepted in exchange for protection of human rights offered by European Convention).

199. See *id.* at 308 (explaining European Court's use of "margin of appreciation" doctrine).

200. See *supra* note 59 and accompanying text (describing preeminence of European system of human rights).

compliance with specific established requirements than for it to engage in case-by-case assessments of what constitutes “effective.” It is also easier for governments to comply with specific, rather than vague, requirements. Second, uniform guidelines tend to depoliticize the processes of both conducting the investigation and assessing its effectiveness. Depoliticization is critical because of the inherently political nature of alleged violations of the right to life both within a state and in bringing a case to the European Court.

The U.N. Principles and U.N. Manual provide a source of such specific guidelines.<sup>201</sup> They do not have the legal force of a treaty, but they represent the consensus of experts in international law and human rights on guidelines that are in keeping with customary international law as well as the relevant treaties. The European Court, and other courts that may recognize the procedural aspect of the right to life, should adopt the U.N. Manual’s Minnesota Protocol, or some variation of it, as a set of standards that states must meet in their investigations of alleged violations of the right to life. Establishing a set of standards is important to promote uniformity and to encourage a minimum level of effort required for an investigation to meet the general requirement that investigations be “effective.”

### CONCLUSION

A human’s most precious asset—life—deserves the most strenuous protection under the law. The European Court of Human Rights, the leading regional human rights body, has been in recent years at the fore in developing new legal safeguards for the right to life. Despite the relative civil and political stability of most European countries, the European Court’s recent decisions have further defined the right to life in terms of the duty of governments to protect that right both in the planning and control of security force operations and in subsequent investigations into uses of lethal force. The procedural aspect of the right to life is an important development both within the European system of human rights and as a precedent for other human rights bodies around the world. The European Court must continue to improve and define the protections that it of-

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201. *See supra* notes 98-117 and accompanying text (providing detailed discussion of guidelines promulgated in U.N. Principles and U.N. Manual).

fers regarding the right to life. The U.N. Manual's specific guidelines for conducting investigations into deprivations of life offers the European Court a resource for developing the Court's own requirements. The improvements in legal standards regarding the right to life offered by the European Court of Human Rights benefits not only the citizens of Northern Ireland and elsewhere within Europe, but also citizens world-wide.