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Article 2

*Military operations overseas: state
jurisdiction, attribution and procedural
obligations under Article 2 of the Convention*

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STUDY OF THE ECHR CASE-LAW
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SUMMARY

The “jurisdiction” of a State and the attribution or imputability of an action to that State are two different, albeit mutually connected, questions. In the context of military operations abroad, the basic criterion to establish whether the alleged violation is imputable to the respondent State is the question on who retains “ultimate authority and control” over the armed forces of the respondent State. Concerning extraterritorial jurisdiction of a State in the military context, it can primarily be established in one of the following two ways: (1) on the basis of the power (or control) actually exercised over the person of the applicant (*ratione personae*); or (2) on the basis of control actually exercised over the foreign territory in question (*ratione loci*), namely in a classical situation of a military occupation as defined by international humanitarian law. In any event, so far, the Court has not established a principle according to which an airstrike (or any kind of artillery strike) carried out by the army of a State would establish the jurisdiction of that State.

Concerning the obligations stemming from the procedural aspect of Article 2 of the Convention in the context of a military operation, the Court’s case-law seems to have followed a differentiated approach, accepting different standards of investigation depending on the type of the armed conflict at issue. Thus, conflicts to which the existing case-law on the procedural limb of Article 2 has been applied can, so far, be clearly divided in four categories: (1) internal conflicts, such as a civil war, an insurrection, or any kind of local armed conflict; (2) armed conflicts following the disintegration of previously existing States; (3) military operations carried out by Contracting States abroad; (4) armed conflicts having occurred in a distant past. As to the scope of the procedural obligation in the case of a military operation overseas, it appears from the Court’s relevant case-law to date that the investigation must meet minimum standards in terms of (1) independence; (2) adequacy; (3) promptness and expediency; (4) public scrutiny and the participation of the next-of-kin. In particular, the standard of adequacy seems to encompass at least five different elements: (a) collecting and securing evidence; (b) properly interrogating the soldiers *prima facie* involved in the incident; (c) a proper identification and interrogation of witnesses; (d) inspecting the scene of events and preserving evidence; and (e) an adequate autopsy of the body or bodies.

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INTRODUCTION

1. The present report provides an overview of the Court’s case-law with regard to the following matters in the context of alleged violations of Article 2 of the Convention occurred outside of the territory of the respondent State, in particular during military operations overseas: **(I)** the attribution of the alleged violations of the Convention to the respondent State; **(II)** extraterritorial jurisdiction; **(III)** the scope of the procedural obligation under Article 2 of the Convention to investigate death occurred in the context of a military operation.

I. ATTRIBUTION/IMPUTABILITY OF THE ALLEGED VIOLATIONS TO THE RESPONDENT STATE¹

2. Contracting Parties’ military operations overseas are often conducted under the command of the UN, and/or the NATO, or within *ad hoc* “coalitions” of States lead by the United States (Iraq, Libya, Syria). The Court has already dealt with the issue of whether military action conducted by the armed forces of a Contracting Party to the Convention in such context was attributable to that Contracting Party or to the third party in command of the operation **(A)**. The issue of attribution/imputability in some other contexts might also be of interest for the purpose of the present report **(B)**.

A. Attribution/imputability of alleged violations of the Convention resulting from military action

3. As regards alleged violations of human rights in the framework of international military operations, the Court has concentrated on identifying the entity responsible for the military operation or action in question, that is to say the entity which held ultimate authority and control. In the case of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC] (no. 71412/01 and no. 78166/01, 2 May 2007), the applicants had been victims of airstrikes and deprivation of liberty, respectively, in the framework of NATO military operations in Yugoslav territory in 1999. A UNSC Resolution had provided for the provision of a security presence (KFOR) by “Member States and relevant international

¹ This chapter is a shortened version of the corresponding chapter of the [Case-Law Guide on Article 1](#) (II-B, 1).

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institutions”, “under UN auspices”, with “substantial NATO participation” but “under unified command and control”. That Resolution had also provided for the deployment, under UN auspices, of an interim administration for Kosovo (MINUK).

4. In its decision, the Court considered whether the material facts had been attributable to the UN. It noted the delegation by the UNSC of its powers under Section VII of the UN Charter, and concluded that the decisive question was whether the UNSC had retained “ultimate authority and control” over the armed forces. Applying that criterion, the Court ruled that the UNSC had indeed retained “ultimate authority and control”. Having established that the acts and omissions of the MINUK and KFOR had been attributable to the UN, the Court declared the applications incompatible *ratione personae* with the Convention.

5. The case of *Al-Skeini and Others v. the United Kingdom* [GC] (no. 55721/07, ECHR 2011), concerned the deaths of six Iraqis who had been killed or fatally wounded by British troops during the invasion of Iraq, where the United Kingdom had held occupying power status. The Court conducted a traditional analysis under Article 1 of the Convention in order to determine whether the victims had been within the “jurisdiction” of the United Kingdom. It noted that at the material time the United Kingdom (together with the United States of America) had assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In such exceptional circumstances, there had been a “jurisdictional link” between the United Kingdom and the persons killed. As regards the UNSC, it had merely acknowledged the role and status of the occupying powers in Iraq.

6. In the *Al-Jedda v. the United Kingdom* [GC] (no. 27021/08, ECHR 2011) judgment delivered on the same day as *Al-Skeini and Others*, the Court adjudicated on an application lodged by an Iraqi civilian who had been interned for over three years in a detention centre run by the British forces in Iraq. The defendant Government submitted that that internment had been imputable to the UN rather than to the United Kingdom. The Court rejected that plea. It noted that there had been no UNSC resolution stipulating the distribution of powers in Iraq under the occupation regime. The only role assigned to the UN had been in the areas of humanitarian aid, support for reconstruction, etc., but not in the security field. However, since the UNSC had not exercised effective control or ultimate authority and control over the acts and omissions of the troops of the multinational force, the applicant’s internment was not deemed imputable to the UN.

7. The United Kingdom’s second argument in this case was that UNSC Resolution 1546 had required it to resort to internment in Iraq and that, pursuant to Article 103 of the UN Charter, the obligations laid down in that Resolution had taken precedence over those stemming from the Convention. Nevertheless, the Court noted that the UN had not been set up for the sole

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purpose of ensuring peace and security at the international level, but also in order to “achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms.” Article 24 § 2 of the Charter required the UNSC to act “in accordance with the Purposes and Principles of the Untitled Nations”. The Court concluded that in interpreting UNSC resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations.

8. Moreover, the Court has recently confirmed the *Al-Jedda* principles in its *Hassan v. the United Kingdom* [GC] (no. 29750/09, ECHR 2014), judgment concerning the capture of an Iraqi national by the British armed forces and his detention in a camp during the hostilities in 2003. This was the first case in which a respondent State had relied on international law to request the Court to find inapplicable its obligations under Article 5 of the Convention or, failing that, to interpret them in the light of the powers of detention conferred on it by international humanitarian law. The Court unanimously found that the victim had been within the United Kingdom’s jurisdiction rather than that of the United States, as contended by the British Government. The Court rejected the latter’s submissions denying the application of any jurisdiction during the active hostilities phase of an international armed conflict, when the agents of the Contracting State are acting within a territory of which the latter is not the occupying power and the conduct of the Contracting State is instead governed by the provisions of international humanitarian law. The Court considered that such a conclusion would be contrary to its previous case law. It also held that even after the area in question had been transferred from British to US authority, the United Kingdom had retained authority and control over all the aspects of the complaints raised by the applicant.

B. Attribution/imputability in other contexts

9. The Court’s case-law on attribution outside of the context of military action may be relevant by analogy. The general principle according to which the mere fact that a Contracting State executes a decision or an order given by an authority of a foreign State is not in itself sufficient to relieve a Contracting State of the obligations which it has taken upon itself under the Convention (*Jaloud v. the Netherlands* [GC], no. 47708/08, § 143, ECHR 2014) is not limited to the military context.

10. Thus, for example, the mere fact that a State exercises the right to vote in an inter-State entity is not sufficient for the persons affected by the

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decisions of that entity to be deemed to fall within the jurisdiction of that State for the purposes of Article 1 of the Convention. The first case in which the Commission had to consider this kind of situation was that of *Hess v. the United Kingdom* (Commission decision 28 May 1975, Decision and Report (DR) 2, p. 72). Rudolf Hess, the former head of the chancellery of the German National-Socialist Party, who had been sentenced to life imprisonment by the Nuremberg International Military Tribunal, was incarcerated in the Allied Military Prison in Berlin-Spandau. That prison was jointly administered by the four occupying powers (the United Kingdom, the United States, France and the Soviet Union), and all decisions concerning the administration of the prison could only be taken in agreement with the representatives of all four States. The United Kingdom had therefore been acting as a partner, sharing authority and responsibility with the other three powers. The Commission ruled that that shared authority could not be divided up into four separate jurisdictions and that, therefore, the United Kingdom's participation in the administration of the prison had not fallen under that State's jurisdiction.

II. STATE JURISDICTION IN THE CONTEXT OF ALLEGED VIOLATIONS OF ARTICLE 2 OCCURRED DURING MILITARY OPERATIONS OVERSEAS²

11. The general principle under article 1 of the Convention is that State jurisdiction is primarily territorial. However, the Court has recognised that in exceptional circumstances a Contracting State might exercise its jurisdiction outside of its own territory (A). That is particularly the case in the context of military operations overseas (B). As far as the procedural limb of Article 2 is concerned, the Court has found that the opening of criminal proceedings before the domestic courts of the respondent State establishes a "jurisdictional link" even if the events at the origin of the case occurred outside the territory of that State (C).

A. The exception of extraterritorial jurisdiction in the case of military operations overseas

12. A State's jurisdiction within the meaning of Article 1 is primarily territorial. Article 1 of the Convention must be considered to reflect this

² This chapter is a shortened version of the corresponding chapter of the [Case-Law Guide on Article 1](#) (I-B, 2-a).

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ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case (*Banković and Others v. Belgium and Others* (dec.) [GC], §§ 61, 67, 71, as well as *Catan and Others v. Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 104, ECHR 2012 (extracts), and the references therein).

13. As an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory (*Al-Skeini and Others v. the United Kingdom* [GC], cited above, § 133, and the references therein). The Court has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territory, which must be assessed on a case-by-case basis with reference to the particular facts (*Al-Skeini and Others* [GC], § 132).

14. In the case of *Banković and Others v. Belgium and Others* (dec.) [GC] (no. 52207/99, ECHR 2001-XII), the applicants complained about the deaths of members of their families (and the injuries sustained by one of the applicants who had survived) resulting from the bombing of the Serb radio and television premises in Belgrade by NATO armed forces, even though the Federal Republic of Yugoslavia was not a Contracting State. The Court rejected the applicants' argument that any person suffering the negative effects of an act attributable to a Contracting State came *ipso facto*, wherever the act was committed or wherever its consequences were felt, "under the jurisdiction" of that State for the purposes of Article 1 of the Convention. It reiterated that the Convention was a multilateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States, to which the Federal Republic of Yugoslavia did not belong. The Convention was not therefore designed to be applied throughout the world, even in respect of the conduct of Contracting States. The Court was not persuaded, in the instant case, that there was any jurisdictional link between the respondent States and the applicants, who had not demonstrated that they and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question (see also *Marković and Others v. Italy* [GC], no. 1398/03, ECHR 2006-XIV).

15. It is important to note that, so far, **the Court has never established a principle according to which an airstrike (or any kind of artillery strike) carried out by the army of a State would establish the "jurisdiction" of that State.**³

³ Apart from *Banković* (paragraph 15 above) and *Marković* (paragraphs 32 and 33 below), the Court has dealt with several cases concerning air strikes but which had been carried out on the respondent State's own territory.

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16. A State's jurisdiction outside its own borders can primarily be established in one of the following two ways: (1) on the basis of the power (or control) actually exercised over the person of the applicant (*ratione personae*); or (2) on the basis of control actually exercised over the foreign territory in question (*ratione loci*). Both are relevant when it comes to military operations conducted overseas.

(1) Power/control exercised over the person of the applicant

17. In some cases, the use of force by a State's agents operating outside its territory - whether lawfully or unlawfully - may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction (*Al-Skeini and Others v. the United Kingdom* [GC], cited above, § 136). A typical example of such a case is where an individual has been handed over to a State's agents outside its territory. The State's accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory (*Issa and Others v. Turkey*, no. 31821/96, § 71, 16 November 2004).

18. The Court thus acknowledged that the applicants were under the "jurisdiction" of the relevant respondent States in the following situations:

- the applicant, the leader of the PKK (the Kurdistan Workers' Party), who had been arrested by Turkish security agents in the international zone of Nairobi airport (Kenya) and flown back to Turkey. The Court noted - and the Turkish Government did not dispute - that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey (*Öcalan v. Turkey* [GC], no. 46221/99, § 91, ECHR 2005-IV);
- the alleged killing of the applicants' relatives as a result of an armed incursion of Turkish armed forces into the Iranian territory (*Pad and Others v. Turkey* (dec.), no. 60167/00, §§ 54-55, 28 June 2007);
- the applicants, two Iraqis who had been charged with involvement in the murder of two British soldiers shortly after the invasion of Iraq in 2003, been held in a British detention facility near Baghdad, and had complained that their imminent handover to the Iraqi authorities would expose them to a real risk of execution by hanging. The Court held that inasmuch as the control exercised by the United Kingdom over its military detention facilities in Iraq and the individuals held

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there had been absolute and exclusive *de facto and de jure*, the applicants should be deemed to have been within the respondent State's jurisdiction (*Al-Saadoon and Mufdhi v. the United Kingdom* (dec.), §§ 86-89, ECHR 2010);

- the applicants, crew members of a cargo ship registered in Cambodia and intercepted off the Cape Verde islands by the French navy under suspicion of transporting large quantities of drugs, were confined to their quarters under military guard until the ship's arrival in Brest. The Court found that as France had exercised full and exclusive control over the ship and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants had been effectively within France's jurisdiction for the purposes of Article 1 of the Convention (*Medvedyev and Others v. France* [GC], § 67);
- the applicants, a group of Somali and Eritrean nationals, who had been attempting to reach the Italian coast on board three vessels, were intercepted at sea by Italian Revenue Police and Coastguard ships, transferred on to Italian military ships and taken back to Libya, from whence they had departed. Reiterating the principle of international law stating that a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying, the Court rejected the designation “rescue on the high seas” used by the Government to describe the events, and attached no importance to the allegedly low level of control exercised over the applicants by the agents of the Italian State. Indeed, the whole series of events had occurred on board Italian military ships, with crews made up exclusively of national servicemen. From the time of their arrival on board those ships until their handover to the Libyan authorities the applicants had been under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities (*Hirsi Jamaa and Others v. Italy* [GC], §§ 76-82).

19. Whenever the State, through its agents, exercises control and authority, and thus jurisdiction, over an individual, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be “divided and tailored” (*Al-Skeini and Others v. the United Kingdom* [GC], cited above, § 137); *Hirsi Jamaa and Others v. Italy* [GC], cited above, § 74).

(2) Power exercised in a specific territory

20. One exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or

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unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (*Catan and Others v. the Republic of Moldova and Russia* [GC], cited above, § 106, and the references therein).

21. Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (*Cyprus v. Turkey* [GC], no. 25781/94, §§ 76-77, ECHR 2001-IV; *Al-Skeini and Others v. the United Kingdom* [GC], cited above, § 138; *Catan and Others* [GC], cited above, § 106). Furthermore, where a Contracting State exercises overall control over an area outside its national territory, its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support (*Cyprus v. Turkey* [GC], § 7; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 316, ECHR 2004-VII).

22. The question whether a Contracting State is genuinely exercising effective control over a territory outside its borders is one of fact. In seeking to answer that question the Court primarily has regard to the following two criteria:

- a) the number of soldiers deployed by the State in the territory in question; this is the criterion to which the Court had hitherto attached the greatest importance (*Loizidou v. Turkey* (merits), §§ 16 and 56; *Ilaşcu and Others v. Moldova and Russia* [GC], cited above, §387);
- b) the extent to which the State's military, economic and political support for the local subordinate administration provides it with influence and control over the region (*ibid.*, §§ 388-394; *Al-Skeini and Others v. the United Kingdom* [GC], cited above, § 139).

23. Where the Court establishes that the facts of the case are within the respondent State's "jurisdiction", the latter has two main obligations:

- a) a negative obligation to refrain from actions incompatible with the Convention (*Ilaşcu and Others v. Moldova and Russia* [GC], cited above, §§ 320-321);

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- b) a positive obligation to guarantee respect for the rights and freedoms secured under the Convention - at least as set out in the Court's general case-law (ibid., § 322).

24. The cases considered by the Court in the light of the above-mentioned principles may be broken down into two sub-categories:

- a) cases concerning military "occupation" in the traditional sense as defined in Article 42 of the Hague Convention respecting the Laws and Customs of War on Land, which reads as follows: "territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised";
- b) cases concerning the creation, within the territory of a Contracting State, of an entity which is not recognised by the international community as a sovereign State, with the military, economic and political support of another Contracting State. This second type of situation is not relevant in the context of the *Hanan* case.

25. The question of the occupying power's responsibility in the framework of "traditional" military occupation arose in a number of cases concerning *Iraq*. On 20 March 2003 the armed forces of the United States, the United Kingdom and their allies entered Iraq with a view to overthrowing the Ba'athist regime in power at the time. On 1 May 2003 the allies declared that the primary combat operations were completed, and the United States and the United Kingdom became the occupying powers. They set up the Coalition Provisional Authority to "exercise powers of government temporarily", including restoring security in Iraq. The security role taken on by the occupying powers was recognised in Resolution 1483 of the United Nations Security Council, adopted on 22 May 2003, which called on the Authority "to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability ...". The occupation ended on 28 June 2004 with the dissolution of the Coalition Provisional Authority and the transfer of authority to the interim Iraqi government. During the period of occupation, the United Kingdom had been in command of the Multinational Division (South-East) (*Al-Skeini and Others v. the United Kingdom* [GC], cited above, §§ 9-23).

26. The case of *Al-Skeini and Others v. the United Kingdom* [GC], cited above, concerned the deaths of six of the applicants' relatives in Basra in 2003, when the United Kingdom had held occupying power status there. Three of them had been killed or fatally wounded by gunfire from British soldiers; another victim had been fatally injured during an exchange of fire between a British patrol and unidentified gunmen; another had been shot by British soldiers and then forced to jump into a river, where he had drowned; and 93 wounds had been found on the body of the last victim, who had died

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in a British military base. The Court noted that following the removal from power of the Ba'ath regime and until the accession of the interim Iraqi government, the United Kingdom (together with the United States of America) had assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom had assumed power and responsibility for maintaining security in the south-west of the country. In these exceptional circumstances, there was a jurisdictional link, for the purposes of Article 1 of the Convention, between the United Kingdom and the persons killed during security operations conducted by British troops between May 2003 and June 2004. In the light of that conclusion, the Court considered it unnecessary to assess whether the United Kingdom's jurisdiction was also established because that State had exercised effective military control over South-East Iraq during that period (§§ 143-150). That having been said, as the Court subsequently pointed out, the statement of facts in *Al-Skeini and Others* had included material which tended to demonstrate that the United Kingdom was far from being in effective control of the south-eastern area which it occupied, and this had also been the finding of the Court of Appeal, which had heard evidence on this question in the domestic proceedings (*Hassan v. the United Kingdom* [GC], cited above, § 75, referring to *Al-Skeini and Others v. the United Kingdom* [GC], cited above, §§ 20-23 and 80).

27. The Court delivered its judgment in the case of *Al-Jedda v. the United Kingdom* [GC], cited above, on the same day as the *Al-Skeini and Others* judgment. That case concerned the internment of an Iraqi civilian for over three years (2004-2007) in a detention centre run by the British forces in Basra. Unlike in *Al-Skeini and Others*, the facts of this case had taken place after the end of the occupation regime, when power had already been transferred to the interim government; however, the multinational force, including British forces, were still stationed in Iraq at the Government's request and with the authorisation of the United Nations Security Council. The respondent Government had denied that the detention at issue fell within the United Kingdom's jurisdiction, because the applicant had been interned at a time when the British forces had been operating as part of a Multinational Force authorised by the Security Council and subject to the ultimate authority of the United Nations; they had submitted that in detaining the applicant, the British troops had not been exercising the sovereign authority of the United Kingdom but the international authority of the Multinational Force, acting pursuant to the binding decision of the United Nations Security Council. The Court rejected that argument. It noted that at the time of the invasion of Iraq, no Security Council resolution had specified how the roles should be distributed in Iraq should the regime be overthrown. In May 2003 the United Kingdom and the United States, having removed the former regime, had taken control of security in Iraq; the

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UN had been assigned a role in the fields of humanitarian aid, supporting the reconstruction of Iraq and assistance in setting up an Iraqi provisional authority, but not in the security sphere. The Court took the view that the subsequent resolutions had not altered that situation. Since the Security Council had had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multinational Force, the applicant's detention was not attributable to the United Nations. The internment decision against the applicant had been taken by the British officer in command of the detention facility, and the applicant had been interned in a detention facility in Basra City, controlled exclusively by British forces. Although the decision to keep the applicant in internment had, at various points, been reviewed by committees including Iraqi officials and not by the United Kingdom representatives from the Multinational Force, the existence of these reviews had not operated to prevent the detention from being attributable to the United Kingdom. Mr Al-Jedda had therefore been under the authority and control of the United Kingdom for the duration of his detention. In conclusion, the Court found that the internment of the applicant had been attributable to the United Kingdom and that during his internment the applicant *had fallen within the jurisdiction of the United Kingdom* for the purposes of Article 1 of the Convention (§§ 76-86). The Court had thus concentrated on whether the applicant had been effectively subject to the power of the respondent State rather than assessing the extent and nature of the control exercised by the United Kingdom over the territory in question.

28. The same approach had been adopted in the case of *Hassan v. the United Kingdom* [GC], cited above, concerning the capture of the applicant's brother by the British armed forces and his detention in Camp Bucca in south-eastern Iraq during the hostilities in 2003. The applicant submitted that his brother had been under the control of the British forces and that his corpse, when subsequently found, had borne traces suggesting that he had been tortured and executed. As in the *Al-Skeini and Others* judgment, the Court did not deem it necessary to determine whether the United Kingdom had indeed been in control of the area in question during the relevant period because the direct victim had fallen under that country's jurisdiction for another reason. In that connection the Court rejected the Government's argument to the effect that no jurisdiction had applied because as regards the period subsequent to his admission to Camp Bucca, the applicant's brother had been transferred from the authority of the United Kingdom to that of the United States. Having regard to the arrangements operating at Camp Bucca, the Court held that the United Kingdom had retained authority and control over the direct victim. That authority and that control had extended from the admission of the applicant's brother to the Camp through the period following his admission, when he had been taken to the Joint Forward Interrogation Team compound, which was under the

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exclusive control of the British forces. Following the interrogation, British authorities had placed him on one of the categories set out in international humanitarian law, deciding that he was a “civilian” who did not pose a threat to security, and ordered that he should be released as soon as practicable. Finally, it was clear that when he had been taken to the civilian holding area with a view to his release, the applicant’s brother had remained in the custody of armed military personnel and under the authority and control of the United Kingdom until the moment he was let off the bus that took him from the Camp. He *had therefore been within the jurisdiction of the United Kingdom* throughout the period in question (§§ 75-80).

29. In the case of *Jaloud v. the Netherlands* [GC], cited above, the Court broadened the concept of extraterritorial jurisdiction as compared with *Al-Skeini and Others*, and *Al-Jedda*, explicitly stating that the “occupying power” status mentioned in Article 42 of the Hague Convention respecting the Laws and Customs of War on Land was not in itself decisive *vis-à-vis* the question of jurisdiction for the purposes of Article 1 of the Convention (§ 142). Following the Iraq invasion, the Netherlands Government had provided troops which had been based in south-east Iraq between July 2003 and March 2005, as part of a multinational division under the command of an officer of the British armed forces. In the instant case the applicant’s son had been fatally wounded by gunfire in April 2004, when he had been attempting to pass a checkpoint which was controlled by the Iraqi Civil Defence Corps (ICDC) but which also involved members of the Netherlands Royal Army operating under the command and direct supervision of a Royal Army officer; the shots had been fired by a Dutch lieutenant. The Court noted that the Netherlands had not forfeited jurisdiction by the mere fact of accepting the overall operational control of a British officer. As the evidence on file demonstrated, not only had the Netherlands retained full command of their military personnel in Iraq, but also the establishment of separate rules on the use of force in Iraq remained the reserved domain of individual sending States. The Court therefore concluded, in the circumstances of the case, that the Netherlands forces had not been placed at the disposal of any other State, be it Iraq or the United Kingdom, and that the death of the applicant’s brother *had occurred under the jurisdiction of the Netherlands* (§ 142).

30. The Court reached a different conclusion in the case of *Issa and Others v. Turkey*, cited above, which concerned Iraqi Kurdish shepherds who had allegedly been arrested by Turkish soldiers during a Turkish military operation in northern Iraq in 1995, and then been taken to a cave and killed. In the Court’s view, notwithstanding the large number of soldiers involved in that operation, it did not appear that Turkey had exercised effective overall control of the entire area in question. Moreover, it had not been sufficiently established by the evidence on file that the Turkish armed forces had been conducting operations in the geographical area in question

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when the victims had been present there. Consequently, the direct victims *could not be considered to have been within the jurisdiction of the Turkish State* (§§ 71-82).

B. The “jurisdictional link” established by the opening of criminal or civil proceedings at domestic level⁴

31. The Court has consistently found that the **commencement of criminal or civil proceedings before the domestic courts of a Contracting State creates an undeniable “jurisdictional link”** between that State and the events at the origin of the case, even if such events occurred outside the territory of that State (*Marković and Others v. Italy* [GC], cited above, § 54; see also *Chagos Islanders v. the United Kingdom* (dec.), no. 35622/04, § 66, 11 December 2012). If the domestic law recognises a right to bring an action and if the right claimed is one which *prima facie* possesses the characteristics required by Article 6 of the Convention, the Court sees no reason why such domestic proceedings should not be subjected to the same level of scrutiny as any other proceedings brought at the national level. Even though the extraterritorial nature of the events alleged to have been at the origin of an action may have an effect on the applicability of Article 6 and the final outcome of the proceedings, it cannot under any circumstances affect the jurisdiction *ratione loci* and *ratione personae* of the State concerned. If civil proceedings are brought in the domestic courts, the State is required by Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6 (*Marković and Others* [GC], cited above, §§ 53-54).

32. In *Marković and Others v. Italy* [GC], cited above, the Court had examined the objection as to incompatibility *ratione loci* raised by the respondent Government, to the effect that the civil action brought by the applicants before the Italian courts had concerned events of an extraterritorial nature similar to those at the origin of the *Hanan* case (an air strike by NATO forces in the Federal Republic of Yugoslavia).

33. Similarly, if the investigative or judicial authorities of a Contracting State institute their own criminal investigation or proceedings concerning a death which has occurred outside the jurisdiction of that State, by virtue of their domestic law (e.g. under provisions on universal jurisdiction or on the basis of the active or passive personality principle), the institution of that investigation or those proceedings is sufficient to establish a jurisdictional link for the purposes of Article 1 between that State and the victim’s relatives who later bring proceedings before the Court (*Güzelyurtlu and*

⁴ More information on situations that establish a jurisdictional link in other types of contexts can be found in the [Case-Law Guide on Article 1](#) (I-A, 3).

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Others v. Cyprus and Turkey [GC], no. 36925/07, § 188, 29 January 2019). This approach is also in line with the nature of the procedural obligation to carry out an effective investigation under Article 2, which has evolved into a separate and autonomous obligation, albeit triggered by acts in relation to the substantive aspects of that provision. In this sense it can be considered to be a detachable obligation arising out of Article 2 and capable of binding the State even when the death occurred outside its jurisdiction (*ibid.*, § 189, and the references therein).

34. On the other hand, where no investigation or proceedings have been instituted in a Contracting State, according to its domestic law, in respect of a death which has occurred outside its jurisdiction, the Court will have to determine whether a jurisdictional link can, in any event, be established for the procedural obligation imposed by Article 2 to come into effect in respect of that State. Although the procedural obligation under Article 2 will in principle only be triggered for the Contracting State under whose jurisdiction the deceased was to be found at the time of death, “special features” in a given case will justify departure from this approach, according to the principles developed in *Rantsev v. Cyprus and Russia* (no. 25965/04, §§ 243-44, ECHR 2010 (extracts)). However, the Court does not consider that it has to define *in abstracto* which “special features” trigger the existence of a jurisdictional link in relation to the procedural obligation to investigate under Article 2, since these features will necessarily depend on the particular circumstances of each case and may vary considerably from one case to the other (*Güzelyurtlu and Others v. Cyprus and Turkey* [GC], cited above, § 190).

35. In the case of *Aliyeva and Aliyev v. Azerbaijan* (no. 35587/08, 31 July 2014), the Court had before it an application from the parents of an Azerbaijani national who had been killed in Ukraine under circumstances implicating two other Azerbaijani nationals. Pursuant to a legal mutual assistance agreement between Ukraine and Azerbaijan, the case had been transmitted to Azerbaijan, but in the absence of evidence the Azerbaijani authorities had discontinued the proceedings against the suspects. The Court raised *ex officio* the issue of its jurisdiction *ratione loci*, considering that insofar as Azerbaijan had accepted the obligation to conduct an investigation under the 1993 Minsk Convention to continue the criminal investigation commenced by the Ukrainian authorities, it was bound to conduct such an investigation in compliance with the procedural obligation under Article 2 and had undertaken to continue the criminal investigation commenced by the Ukrainian authorities, it was bound to conduct such an investigation in compliance with the procedural obligation under Article 2, regardless of where the death had occurred. Therefore, the jurisdiction of Azerbaijan within the meaning of Article 1 came into play only to the extent that the Azerbaijani authorities had decided to take over the proceedings

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previously opened by Ukraine, under the applicable international treaty and domestic law (§§ 55-57).

36. In the case of *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], cited above, concerning the murders of several former residents of the “Turkish Republic of Northern Cyprus” (“TRNC”) in the territory of the Republic of Cyprus, the TRNC authorities had initiated their own investigation into those murders, thus creating a “jurisdictional link” between the applicants and Turkey, which incurred the latter’s responsibility *vis-à-vis* the acts and omissions of the “TRNC” authorities. Moreover, there were “special features” related to the situation in Cyprus. First of all, the international community regards Turkey as being in occupation of the northern part of Cyprus, and does not recognise the “TRNC” as a State under international law. Northern Cyprus is under the effective control of Turkey for the purposes of the Convention. Secondly, the murder suspects had fled to the “TRNC” and as a consequence, the Republic of Cyprus had been prevented from pursuing its own criminal investigation in respect of those suspects and thus from fulfilling its Convention obligations. Having regard to those “specific features”, as well as the initiation of the investigation by the “TRNC” authorities, the Court considered that Turkey’s jurisdiction under Article 1 of the Convention was established in the instant case (*ibid.*, §§ 191-197).

III. SCOPE OF THE PROCEDURAL OBLIGATION, UNDER ARTICLE 2 OF THE CONVENTION, TO INVESTIGATE DEATH OCCURRED IN THE CONTEXT OF A MILITARY OPERATION/ARMED CONFLICT

A. The general outline of the positive procedural obligation to investigate in the context of different armed conflicts

37. Regarding the positive procedural obligation of the State to investigate cases of *prima facie* violent death occurred in the context of an armed conflict, the general principle remains the same as defined in *Al-Skeini and Others v. the United Kingdom* [GC], cited above, § 164, and in *Mocanu and Others v. Romania* [GC] (nos. 10865/09 and 2 others, § 319, ECHR 2014 (extracts)), that is:

“The Court has already held that the procedural obligation under Articles 2 and 3 continues to apply in difficult security conditions, including in a context of armed conflict. Even where the events leading to the duty to investigate occur in a context of generalised violence and investigators are confronted with obstacles and constraints which compel the use of less effective measures of investigation

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or cause an investigation to be delayed, the fact remains that Articles 2 and 3 entail that all reasonable steps must be taken to ensure that an effective and independent investigation is conducted ...”

38. In other words, the Court has never absolved a Contracting Party of its duties under **the procedural limb of Article 2 of the Convention, which remains applicable in any circumstances**. This means that the general requirements established by the Court’s case-law⁵ must in principle apply:

39. Nevertheless, when applying these requirements to various concrete situations, the Court’s case-law has followed a nuanced and differentiated approach, accepting different standards of investigation depending on the type of armed conflict at issue. Thus, all such conflicts covered by the existing case-law on the procedural limb of Article 2 can be clearly divided in four categories: (1) internal conflicts, such as a civil war, an insurrection, or any kind of local armed conflict, within the internationally recognised boundaries of a State; (2) armed conflicts following the disintegration of previously existing States; (3) military operations carried out by Contracting States abroad, and (4) armed conflicts having occurred in a more distant past.

(1) Internal armed conflicts

40. Regarding purely internal armed conflicts taking or having taken place within the internationally recognised boundaries of the respondent State, the Court has never recognised the specific military and political context of the events as a grounds for nuancing or lowering the standard of investigation required by Article 2 of the Convention, - even if it has acknowledged the existence of practical difficulties in this respect. In other words, the Court **applies the same ordinary standards as in any case concerning the use of lethal force by police or other State agents**.

41. It seems that the underlying logic of this approach proceeds, at least partly, from a fundamental principle that the Court has firmly reiterated on several occasions, that is: regarding its Convention obligations and the procedure before the Court, any Contracting State is always considered as an indivisible whole and cannot rely on its internal dissensions (institutional or territorial) as an excuse for a breach of the Convention right. For example, in *Kornakovs v. Latvia* (no. 61005/00, 15 June 2006), concerning the length of criminal proceedings, the Court stated:

“128. (...) En effet, la Cour a toujours jugé que, dans toutes les affaires pendantes devant elle, seule la responsabilité internationale de l’État entre en jeu. En ratifiant la Convention, un État assume au regard de celle-ci la responsabilité objective de la conduite de toutes ses autorités et de leurs subordonnés ; il a donc le devoir de leur imposer sa volonté et ne saurait se retrancher derrière son impuissance à la faire respecter (voir, par exemple, *Irlande c. Royaume-Uni*, arrêt du 18 janvier 1978, série

⁵ For a detailed analysis, see Part IV of the case-law [Guide on Article 2](#).

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A no 25, p. 64, § 159). Ce principe s'applique pleinement aux autorités judiciaires (voir *Loukanov c. Bulgarie*, arrêt du 20 mars 1997, Recueil 1997-II, p. 543, § 40, et, *mutatis mutandis*, *Kalachnikov c. Russie*, no 47095/99, § 120, CEDH 2002-VI).”

42. In *Assanidze v. Georgia* [GC] (no. 71503/01, ECHR 2004-II), the Court emphasised the same principle in the context of territorial dissensions within the respondent State:

“146. ... [I]t must be reiterated that, for the purposes of the Convention, the sole issue of relevance is the State's international responsibility, irrespective of the national authority to which the breach of the Convention in the domestic system is imputable (see, *mutatis mutandis*, *Foti and Others v. Italy*, judgment of 10 December 1982, Series A no. 56, p. 21, § 63; *Zimmermann and Steiner v. Switzerland*, judgment of 13 July 1983, Series A no. 66, p. 13, § 32; and *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 28, § 46).

Even though it is not inconceivable that States will encounter difficulties in securing compliance with the rights guaranteed by the Convention in all parts of their territory, each State Party to the Convention nonetheless remains responsible for events occurring anywhere within its national territory.

Further, the Convention does not merely oblige the higher authorities of the Contracting States themselves to respect the rights and freedoms it embodies; it also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 90-91, § 239). The higher authorities of the State are under a duty to require their subordinates to comply with the Convention and cannot shelter behind their inability to ensure that it is respected (*ibid.*, p. 64, § 159).”

43. According to that same logic, there is hardly any excuse for the State not conducting an effective investigation in a situation which is, in principle, entirely internal to it. One might say that this is a particular application of the general maxim “*Nemo auditur propriam turpitudinem allegans*”. The Court has followed this approach in cases concerning (1) Northern Ireland, (2) South-East Turkey, and (3) Chechnya.

(a) NORTHERN IRELAND

44. In the case of *Brecknell v. the United Kingdom* (no. 32457/04, 27 November 2007), concerning the lack of an effective investigation into new allegations of security force collusion in the death of the applicant's husband in Northern Ireland in 1975, the Court found a violation of Article 2 because of the lack of an appropriate level of independence of the investigation. The Court did not mention the special circumstances in Northern Ireland as a factor substantially affecting the extent of State obligations. It simply stated:

“65. The obligation to carry out an effective investigation into unlawful or suspicious deaths is well-established in the Court's case-law (for a full statement of principles by the Grand Chamber, see, most recently, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, §§ 110-113, ECHR 2005-VII). When considering

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the requirements flowing from the obligation, it must be remembered that the essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. Furthermore, **even where there may be obstacles or difficulties which prevent progress in an investigation in a particular situation**, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *McKerr v. the United Kingdom*, no. 28883/95, §§ 111 and 114, ECHR 2001-III).”

45. Likewise, in *McCaughey and Others v. the United Kingdom* (no. 43098/09, ECHR 2013), concerning the excessive delay in the investigation into the deaths of the applicants’ relatives, the Court made no mention of the specific situation in Northern Ireland at the time when the victim had died. It simply said:

“130. ... Article 2 **requires investigations to begin promptly and to proceed with reasonable expedition** ..., and this is required quite apart from any question of whether the delay actually impacted on the effectiveness of the investigation. While **there may be obstacles or difficulties which prevent progress in an investigation in a particular situation**, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *Hugh Jordan*, cited above, §§ 108 and 136-40).

(b) SOUTH-EAST TURKEY

46. In the case of *Kaya v. Turkey* (19 February 1998, *Reports of Judgments and Decisions* 1998-I), the Court stated:

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

47. In the case of *Karataş and Others v. Turkey* (no. 46820/09, 12 September 2017), where the applicants complained about the failure to conduct an effective investigation into the killing of the relatives by Turkish soldiers in the South Eastern part of Turkey, the Court did not refer to the specific situation in that specific region as a factor in determining the State’s compliance with its procedural obligations under Article 2. The Court said, *inter alia*:

“77. Having reviewed its case-law, the Court observes that **one of the common features of investigations conducted by prosecutors in Turkey into killings by members of the security forces is the failure to question the perpetrators in a timely manner or to question them at all** (see, most recently, *Cangöz and Others*, cited above, § 127; *Makbule Kaymaz and Others v. Turkey*, no. 651/10, § 142, 25 February 2014; *Benzer and Others v. Turkey*, no. 23502/06, § 188, 12 November

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2013; *Gülbahar Özer and Others*, cited above, § 69; and *Özcan and Others v. Turkey*, no. 18893/05, § 67, 20 April 2010).

...

86. The Court has already had occasion to examine the practice of classifying investigation files as confidential in cases concerning killings by law enforcement officials in Turkey (see, *inter alia*, *Cangöz and Others*, cited above, §§ 145-146, 26 April 2016; *Benzer and Others*, cited above, § 193; and *Anık and Others v. Turkey*, no. 63758/00, §§ 75-79, 5 June 2007). As it has done in those judgements, the Court reiterates that **for an investigation to be effective, it must be accessible to the victim’s family to the extent necessary to safeguard their legitimate interests and there must also be a sufficient element of public scrutiny of the investigation.**”

48. The Court followed the same approach in other cases concerning the same region – such as, for example, *Meryem Çelik and Others v. Turkey* (no. 3598/03, 16 April 2013 - where the applicants complained of the lack of an effective investigation into the disappearance and killing of their relatives during a raid on their village conducted by security forces), or *Benzer and Others v. Turkey* (no. 23502/06, 12 November 2013 - alleged failure to conduct an effective investigation in the bombing of villages by military aircraft). In particular, in *Meryem Çelik and Others v. Turkey*, cited above, the Court mentioned “the general context of the situation in south-east Turkey at the time of [the victims’] disappearance”, but only as a factual element taken into account regarding the *substantive* limb of Article 2.

(c) CHECHNYA

49. Likewise, as to the obligation of the Russian authorities to carry out an effective investigation into deaths occurring in the context of the conflict in Chechnya, the Court has taken into account the specific circumstances of the conflict, without considering them as a factor diminishing or nuancing the State’s positive obligations under Article 2. For example, in *Kerimova and Others v. Russia* (nos. 17170/04 and 5 others, 3 May 2011, concerning the investigation into the bombing of residential buildings by Russian military aircraft during the Chechen War), it stated:

“269. In so far as the Government may be understood to be arguing that, prior to 23 September 2000, the authorities were unaware of the incident of 2 October 1999, the Court finds such an argument implausible. In the Court’s opinion, the results of a large-scale attack involving federal aircraft should normally become known to the authorities immediately after such an attack. **It falls to the State to ensure that State agents who participated in the attack duly report on it, and that the competent authorities, including those in charge of it, ascertain its results without delay. The Court does not overlook the Government’s argument that at the relevant time active warfare was ongoing and that on the date of the incident in question Urus-Martan was occupied by illegal fighters.** However, it notes that, as pointed out by the Government, the town had been overtaken by the federal forces no later than on 7 and 8 December 1999, and therefore the authorities could and should have become aware of the results of the attack of 2 October 1999 at that time. The Government did not advance any explanation as to why the authorities had remained

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passive, and had left without investigation an incident that resulted in multiple deaths and the destruction of property, from the time when they had regained control over the town of Urus-Martan until 20 October 2000. Such a considerable delay between the incident and the beginning of the investigation into it cannot but significantly undermine the effectiveness of the investigation.

(...)

277. ... In line with its finding in paragraph 269 above with regard to the investigation into the strike of 2 October 1999, the Court considers that, **even if the authorities did not have a realistic opportunity to commence the investigation into the attack of 19 October 1999 immediately after that incident, once they had taken over the town of Urus-Martan on 7 and 8 December 1999, they were under an obligation to enquire about the results of that attack and to institute criminal proceedings in that connection.** The Court also finds that the authorities' failure to act for such a prolonged period significantly undermined the effectiveness of the investigation.”

50. The Court followed a substantially similar approach, for example, in *Kadirova and Others v. Russia* (no. 5432/07, 27 March 2012, abduction of the applicants' relatives, allegedly by Russian servicemen), and *Aslakhanova and Others v. Russia* (nos. 2944/06 and 4 others, 18 December 2012, allegedly forced disappearances). In none of these cases are there any more lenient or different standards for an effective investigation under Article 2.

51. At the same time it can be noted that, in cases concerning hostilities in South-East Turkey and in Chechnya, the Court has not applied the law of armed conflict, despite the fact that, for instance, in *Isayeva and Others v. Russia* (nos. 57947/00 and 2 others, 24 February 2005) and *Isayeva v. Russia* (no. no. 57950/00, 24 February 2005), it used the term “conflict” to refer to the events in Chechnya.

(2) Armed conflicts following the disintegration of a State

52. The Court's attitude is much more nuanced if the deaths have occurred in the context of an armed conflict following the disintegration of a formerly existing State - namely, **Yugoslavia**. It seems that the general criterion applied by the Court in such cases is that the procedural limb of Article 2 “must be interpreted in a way which does not impose an **impossible or disproportionate burden** on the authorities”, with reference to *Osman v. the United Kingdom* (28 October 1998, § 116, *Reports of Judgments and Decisions* 1998-VIII). Unlike in the previous category of cases, the Court has placed great emphasis on the specific situation in the former Yugoslav region and the struggle of States to investigate human rights violations in post-conflict settings.

53. Thus, in *Palić v. Bosnia and Herzegovina* (no. 4704/04, 15 February 2011), where the applicant criticised the investigation into her husband's disappearance during the 1992-95 war in Bosnia and

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Herzegovina, the Court found no violation of the procedural aspect of Article 2. It held:

“64. In the present case, the Court first needs to examine whether the investigation could be regarded as effective. It notes that notwithstanding initial delays ... the investigation finally led to the identification of the mortal remains of Mr Palić. Given that almost 30,000 people went missing as a result of the war in Bosnia and Herzegovina ..., **this is in itself a significant achievement.** ...

...

70. ... It should also be reiterated that the obligations under Article 2 must be interpreted in a way which **does not impose an impossible or disproportionate burden on the authorities** (see, although in a different context, *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports of Judgments and Decisions* 1998-VIII). **The Court takes into account the complex situation in Bosnia and Herzegovina, notably in the first ten years following the war. In such a post-conflict situation, what amounts to an impossible and/or disproportionate burden must be measured by the very particular facts and context.** In this connection, the Court notes that more than 100,000 people were killed, almost 30,000 people went missing and more than two million people were displaced during the war in Bosnia and Herzegovina. **Inevitably choices had to be made in terms of post-war priorities and resources.** Furthermore, **after a long and brutal war**, Bosnia and Herzegovina underwent fundamental overhaul of its internal structure and political system: Entities and Cantons were set up pursuant to the Dayton Peace Agreement, power-sharing arrangements were introduced in order to ensure effective equality between the “constituent peoples” in the post-conflict society (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009-...), new institutions had to be created and the existing ones had to be restructured. Some reluctance on the part of the former warring parties to work with those new institutions could be expected in the post-war period, as evidenced in the present case. While it is difficult to pinpoint when exactly this process ended, the Court considers that the domestic legal system should have become capable of dealing effectively with disappearances and other serious violations of international humanitarian law by 2005, following comprehensive vetting of the appointment of police and judiciary and the establishment of the War Crimes Sections within the Court of Bosnia and Herzegovina All this considered and since there has been no substantial period of inactivity post-2005 on the part of the domestic authorities in the present case, the Court concludes that, in the circumstances obtaining at the material time, the domestic criminal investigation can be considered to have been conducted with reasonable promptness and expedition.”

54. Likewise, in *Mujkanović and Others v. Bosnia and Herzegovina* (dec.) (no. 47063/08 and 4 other applications, 3 June 2014), the Court expressly relied on the *Osman* criterion to declare the applicants’ complaints manifestly ill-founded:

“40. ... [I]n this connection, the Court underlines that the procedural obligation under Article 2 **must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities** (*Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports* 1998-VIII, and *Palić*, cited above, § 70).

41. Insofar as the applicants make reference to a lack of expedition and to the lapse of time since their relatives disappeared, the Court will take into consideration merely the period since 2005 when the domestic legal system became capable of dealing with

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disappearance cases (see *Palić*, cited above, § 70, about the situation in post-war Bosnia and Herzegovina, notably in the first ten years following the war; see also paragraph 5 above concerning the relationship between domestic authorities and the ICTY during that period). It should be noted, in this connection, that **the standard of expedition in such historical cases is much different from the standard applicable in recent incidents where time is often of the essence in preserving vital evidence at a scene and questioning witnesses while their memories are fresh and detailed** (see *Varnava and Others*, cited above, §§ 191-92, and *Gürtekin and Others*, cited above, §§ 21-22). In this connection, the Court notes that there has been no substantial period of inactivity post-2005 on the part of local authorities in the present case. ...

42. The Court finds that, taking into account **the special circumstances prevailing in Bosnia and Herzegovina up until 2005 and the large number of war crimes cases pending before local courts**, the investigation has not been shown to have infringed the minimum standard required under Article 2”

55. In the case of *Jelić v. Croatia* (no. 57856/11, 12 June 2014), the Court found a violation of Article 2 of the Convention under its procedural aspect, notably due to delays in the investigation into the death of the applicant’s husband in 1991. Nevertheless, the Court conceded:

“79. In this connection the Court notes that Croatia declared its independence on 8 October 1991 and all military operations ended in August 1995. In January 1998 the UNTAES mandate ceased and the peaceful transfer of power to the Croatian authorities began.... **The Court accepts that certain delays in the investigation into the killing of Serbian civilians during the war and post-war recovery were attributable to the overall situation in Croatia, a newly-independent and post-war State which needed certain time to organize its apparatus and for its officials to gain experience.** ...

(...)

94. The Court does not underestimate the undeniable complexity of the present case, which concerns not only the isolated event of the killing of the applicant’s husband, but also concerns the investigation and prosecution of those responsible for the killing of a number of other individuals in the Sisak area ..., nor **the number of war crime cases the Croatian authorities are prosecuting simultaneously** However, the Court considers that the political and social stakes relied on by the Government cannot by themselves justify the manner in which the investigation was conducted where leads given to the prosecuting authorities concerning the identification of direct perpetrators have not been thoroughly followed. On the contrary, its importance for Croatian society, which consisted in the right of the numerous victims and the society at large to know what had happened ought to have prompted the domestic authorities to conduct an effective investigation that would cover not only those having the command responsibility but direct perpetrators as well in order to prevent any appearance of tolerance of or collusion in unlawful acts....”

(3) Military operations overseas

56. In cases concerning military operations conducted by the armed forces of the respondent State abroad, the standard of application of the procedural limb of Article 2 of the Convention seems to be more flexible than in other contexts. The attitude of the Court towards State obligations in

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the case of foreign military operations mainly appears in two judgments: *Al-Skeini and Others v. the United Kingdom* [GC] cited above, and *Jaloud v. the Netherlands* [GC], cited above, where the Court was “**prepared to make reasonable allowances** for the relatively difficult conditions” when assessing the compliance with the procedural obligations under Article 2. In other words, **the procedural duty under Article 2 must be applied realistically to take account of the practical problems faced by investigators in a foreign and hostile region in the immediate aftermath of invasion and war.**

57. The case of *Al-Skeini and Others v. the United Kingdom* [GC], cited above, concerned the deaths of six of the applicants’ relatives in Basra in 2003, when the United Kingdom had held occupying power status there. Three of them had been killed or fatally wounded by gunfire from British soldiers; another victim had been fatally injured during an exchange of fire between a British patrol and unidentified gunmen; another had been shot by British soldiers and then forced to jump into a river, where he had drowned; and 93 wounds had been found on the body of the last victim, who had died in a British military base. The Court found a violation of the procedural aspect of Article 2, declaring at the same time:

“164. The Court has held that the procedural obligation under Article 2 **continues to apply in difficult security conditions**, including in a context of armed conflict (see, among other examples, *Güleç v. Turkey*, 27 July 1998, § 81, *Reports* 1998-IV; *Ergi v. Turkey*, 28 July 1998, §§ 79 and 82, *Reports* 1998-IV; *Ahmet Özkan and Others v. Turkey*, no. 21689/93, §§ 85-90, 309-20 and 326-30, 6 April 2004; *Isayeva v. Russia*, no. 57950/00, §§ 180 and 210, 24 February 2005; and *Kanlibaş v. Turkey*, no. 32444/96, §§ 39-51, 8 December 2005). It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and, as the United Nations Special Rapporteur has also observed ..., **concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed** (see, for example, *Bazorkina v. Russia*, no. 69481/01, § 121, 27 July 2006). Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life (see, among many other examples, *Kaya v. Turkey*, 19 February 1998, §§ 86-92, *Reports* 1998-I; *Ergi*, cited above, §§ 82-85; *Tanrikulu v. Turkey* [GC], no. 23763/94, §§ 101-10, ECHR 1999-IV; *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, §§ 156-66, 24 February 2005; *Isayeva*, cited above, §§ 215-24; and *Musayev and Others v. Russia*, nos. 57941/00, 58699/00 and 60403/00, §§ 158-65, 26 July 2007).

165. What form of investigation will achieve the purposes of Article 2 **may vary depending on the circumstances**. However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see *Ahmet Özkan and Others*, cited above, § 310, and *Isayeva*, cited above, § 210). Civil proceedings, which are undertaken on the initiative of the next of kin, not the authorities, and which do not involve the identification or punishment of any alleged

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perpetrator, cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention (see, for example, *Hugh Jordan*, cited above, § 141). Moreover, the procedural obligation of the State under Article 2 cannot be satisfied merely by awarding damages (see *McKerr*, cited above, § 121, and *Bazorkina*, cited above, § 117).

166. As stated above, the investigation must be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must take the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard (see *Ahmet Özkan and Others*, cited above, § 312, and *Isayeva*, cited above, § 212 and the cases cited therein).

(...)

168. The Court takes as its starting-point **the practical problems** caused to the investigating authorities by the fact that the United Kingdom was an Occupying Power in a **foreign and hostile region** in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading, *inter alia*, to **shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time**. As stated above, the Court considers that in circumstances such as these the procedural duty under Article 2 **must be applied realistically**, to take account of specific problems faced by investigators.

169. Nonetheless, the fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command.”

58. It is noteworthy that, while the Court has not applied international humanitarian law standards in the *Al-Skeini and Others v. the United Kingdom* [GC] case, cited above, it did list relevant provisions from the Geneva Conventions providing for similar obligations of investigation.

59. In the case of *Jaloud v. the Netherlands* [GC], cited above, the applicant's son had been fatally wounded by a Dutch lieutenant firing shots at him in April 2004, when the victim was attempting to pass a checkpoint which was controlled by the Iraqi Civil Defence Corps (ICDC) but which also involved members of the Netherlands Royal Army operating under the command and direct supervision of a Royal Army officer. The Court said:

“226. The Court is prepared to **make reasonable allowances for the relatively difficult conditions** under which the Netherlands military and investigators had to work. In particular, it must be recognised that they were engaged in a foreign country which had yet to be rebuilt in the aftermath of hostilities, whose language and culture were alien to them, and whose population ... clearly included armed hostile elements.”

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60. Nevertheless, even with these “reasonable allowances”, the Court concluded that the investigation into the circumstances surrounding the victim’s death had failed to meet the standards required by Article 2 of the Convention (documents not made available to the judicial authorities and the applicant; no precautions taken to prevent the suspect from colluding with witnesses; no attempt to carry out the autopsy properly; important material evidence mislaid in unknown circumstances). Since these failings were not inevitable even in the particularly difficult conditions prevailing in Iraq at the relevant time, there had been a violation of the procedural aspect of Article 2.

(4) Past armed conflicts

61. Finally, regarding deaths that occurred in the context of armed conflicts that took place a long time ago (e.g., several decades before the investigation started), the standard stemming from Article 2 seems to be the least stringent. Although an obligation to investigate arises when evidence is discovered, the scope of this investigation may be different; for example, the level of urgency may be much lower. In *Mujkanović and Others v. Bosnia and Herzegovina* (dec.), cited above, the Court said:

“41. ... It should be noted, in this connection, that **the standard of expedition in such historical cases is much different from the standard applicable in recent incidents where time is often of the essence in preserving vital evidence at a scene and questioning witnesses while their memories are fresh and detailed** (see *Varnava and Others*, cited above, §§ 191-92, and *Gürtekin and Others*, cited above, §§ 21-22). ...”

62. In *Gürtekin and Others v. Cyprus*, (dec.) (nos. 60441/13, 68206/13 and 68667/13, 11 March 2014), the applicants, relatives of men who had disappeared during intercommunal conflicts in Cyprus in 1963-64, complained about the alleged shortcomings of the investigations opened after the discovery of these men’s bodies. The Court concluded that the investigation had not been shown to have infringed the minimum standard required under Article 2 of the Convention. The Court declared:

“21. Even where events took place far in the past, it is possible that new developments occur such that a fresh obligation to investigate arises, for example, newly-discovered evidence comes to light (*Brecknell v. the United Kingdom* (no. 32457/04, §§ 73-75, 27 November 2007; *Hackett v United Kingdom* (no. 4698/04, (dec.) May 10, 2005; *Gasyak and Others v. Turkey* (no. 27872/03, 13 October 2009). **The scope of the fresh obligation to investigate will vary according to the nature of the purported new evidence or information. It may be restricted to verifying the reliability of the new evidence.** The authorities can legitimately take into account the prospects of launching a new prosecution at such a late stage. Due to the lapse of time, **the level of urgency may have diminished; the immediacy of required investigative steps in the aftermath of an incident is likely to be absent** (e.g. *Brecknell*, cited above, paras. 79-81. **The standard of expedition in such historical cases is much different** from the standard applicable in recent incidents where time is often of the essence in preserving vital evidence at a scene and

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questioning witnesses when their memories are fresh and detailed (see *Emin and Others v Cyprus*, no. 59623/08 et al, (dec.) 3 April 2012; see also *Palić v. Bosnia and Herzegovina*, no. 4704/04, § 70, 15 February 2011 concerning complex post-conflict situations).

22. The extent to which the other requirements of an adequate investigation - effectiveness, independence, accessibility to the family and sufficient public scrutiny- apply will again depend on the particular circumstances of the case (for a general statement of principle on the requirements of Article 2 under its procedural head, see, for example, *Al-Skeini v. the United Kingdom*, [GC] no. 55721/07 § 166-167 ECHR 2011). While what reasonably can be expected by way of investigative measures may well be influenced by the passage of time as stated above, the criterion of independence will, generally, remain unchanged (see, for the importance of this criterion from the very earliest stage of the procedure, *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, §§. 325, 333-341, ECHR 2007-...). Finally, it must be noted in general that with a considerable lapse of time since an incident, memories of witnesses fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, and the prospects of any effective investigation leading to the prosecution of suspects will increasingly diminish (see, *mutatis mutandis*, *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, §§ 161, 192, ECHR 2009; *Palić v. Bosnia and Herzegovina*, cited above, no. 4704/04, § 49, 15 February 2011)."

B. Specific procedural obligations which could therefore arise in the context of a military operation overseas⁶

63. In *Hassan v. the United Kingdom* (cited, above, § 104), the Court considered that, even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of International Humanitarian Law.

64. The interplay between International humanitarian law and human rights law has been addressed in detail in the report prepared by the Research Division in the context of the pending interstate case *Georgia v. Russia* (II) [GC] (no. 38263/08).

65. To date, the Court has not yet had a real opportunity to address the interrelationship between international humanitarian law and human rights law regarding the procedural aspects of Article 2 of the Convention.

66. Its case-law so far leaves a certain amount of discretion as to how the investigation is run (*Acar v. Turkey*, no. 26307/95, § 221, 8 April 2004). provided that minimum standards are respected in terms of: (1) independence; (2) adequacy; (3) promptness and reasonable expedition; and (4) public scrutiny and the participation of the next-of-kin.

⁶ This subchapter is largely based on a study by Noëlle QUÉNIVET, "The obligation to investigate after a potential breach of Article 2 ECHR in an extra-territorial context: mission impossible for the armed forces?", published in *Netherlands Quarterly of Human Rights*, Vol. 37, no. 2 (June 2019), p. 119-138, 2019.

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67. The Court has clearly stated that these elements are **inter-related** and each of them, taken separately, does not amount to an end in itself (*Sarbyanova-Pashaliyska and Pashaliyska v. Bulgaria*, no. 3524/14, § 37, 12 January 2017; *Mazepa and Others v. Russia*, no. 15086/07, § 70, 17 July 2018). These are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed (*Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 225, 14 April 2015 see also *Lovyginy v. Ukraine*, no. 22323/08, § 103, 23 June 2016; *Sarbyanova-Pashaliyska and Pashaliyska v. Bulgaria*, cited above, § 37; *Sinin v. Turkey*, no. 9441/10, § 65, 6 June 2017; *Mazepa and Others v. Russia*, cited above, § 70). In other words, not every failure to meet the principles and the individual elements thereof will automatically lead to a violation of the procedural limb of Article 2.

68. The obligation to launch an investigation begins as soon as State authorities are informed or become aware of facts that potentially constitute a violation of Article 2 (e.g., *Çakici v. Turkey*, no. 23657/94, §§ 80, 87, 106, 8 July 1999; *Tanrikulu v. Turkey*, no. 23763/94, § 109, 8 July 1999). In other words, the obligation starts from the moment the State has been made aware of the potential breach, that is, when plausible or credible allegations are made (*Brecknell v. the United Kingdom*, cited above, § 71). A duty to conduct an investigation does not arise until an allegation or information which discloses an arguable breach of Article 2 of the Convention has come to the attention” of the state authorities (*Yaşa v. Turkey*, 2 September 1998, § 100, *Reports of Judgments and Decisions* 1998-VI). The mere knowledge of the killing gives rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death (*Ergi v. Turkey*, 28 July 1998, § 82, *Reports of Judgments and Decisions* 1998-IV). Once aware, the authorities must act of their own motion and should not leave it to the next of kin or victim to lodge a formal complaint (*Isayeva v. Russia*, cited above, § 210; *Isayeva and Others v. Russia*, cited above, § 209; *Estamirov and Others v. Russia*, no. 60272/00, § 85, 12 January 2007; *Khamzayev and Others v. Russia*, no. 1503/02, 202, 3 May 2011). By bringing the matter to the attention of the authorities, the relatives are simply notifying the authorities that an individual might have been killed in unlawful circumstances, and the State must then act promptly thereafter (e.g., *Damayev v. Russia*, no. 36150/04, § 85, 29 May 2012).

69. In the context of military operations, the Court’s case-law defines two categories of events that can trigger an investigation: (1) the death of a civilian; and (2) death in circumstances where the State has failed to take “all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising, incidental loss of civilian life” (*Isayeva v. Turkey*, cited above, § 176; *Damayev*, cited above, § 60; *Ergi v. Turkey*, cited above, § 79).

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70. In the military context, a death can be “suspicious” because of the circumstances in which it happened, that is, if the means and methods deployed were prima facie unlawful (*Khashiyev and Akayeva*, nos. 57942/00 and 57945/00, §141, 24 February 2005).

71. In circumstances where the State has **exclusive control over an area**, it is deemed that it had knowledge of such events, as they “lie wholly, or in large part, within the exclusive knowledge of the authorities” (*Akkum and Others v. Turkey*, no. 21894/93, § 211, 24 March 2005). Such a duty is also applicable to situations where there is uncertainty about the lethality of the attack, as Article 2 of the Convention applies to situations of attempted killing as well (*Yaşa v. Turkey*, cited above, § 100).

72. **All these principles were originally spelled out in cases relating to law-enforcement situations on the territory of a State party and later extended and somehow tailored, on a case-by-case basis, to armed conflict situations**, the Court stressing and maintaining since the judgments in *Ergi* and *Kaya* , both cited above, that the obligation also applies “despite the prevalence of violent armed clashes [and] the high incidence of fatalities” (*Ergi v. Turkey*, cited above, § 85; *Kaya v. Turkey*, cited above, § 91), and “in difficult security conditions, including in a context of armed conflict” (*Al-Skeini and Others*, cited above, § 164, reiterated in *Jaloud v. the Netherlands* [GC], cited above, § 186).

(1) Independence

73. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence. What is at stake here is nothing less than public confidence in the State’s monopoly on the use of force (see, e.g., *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 232, 30 March 2016).

74. An additional requirement is that those investigating the incident must be independent from those implicated in the events (*Isayeva v. Russia*, § 211; *Isayeva and Others v. Russia*, § 210, both cited above; *Güleç*, 27 July 1998, §§ 81-82, *Reports of Judgments and Decisions* 1998-IV). However, the principle of independence is interrelated with other principles (*McKerr v. the United Kingdom*, no. 28883/95, § 160, ECHR 2001-III, cited above). Article 2 does not require that the persons and bodies responsible for the investigation enjoy absolute independence, but rather that they are sufficiently independent of the persons and structures whose responsibility is likely to be engaged. The adequacy of the degree of independence is assessed in the light of all the circumstances, which are necessarily specific

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to each case (*Mustafa Tunç and Fecire Tunç v. Turkey* [GC], cited above, § 223).

75. On the other hand, where the statutory or institutional independence is open to question, such a situation, although not decisive, will call for a stricter scrutiny on the part of the Court of whether the investigation has been carried out in an independent manner. Where an issue arises concerning the independence and impartiality of an investigation, the correct approach consists in examining whether and to what extent the disputed circumstance has compromised the investigation's effectiveness and its ability to shed light on the circumstances of the death and to punish those responsible (*ibid.*, § 224).

76. The Court has stressed that, irrespective of the form of the investigation, "the independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms" (*Isayeva v. Russia*, § 211; *Isayeva and Others v. Russia*, § 210; *Ergi v. Turkey*, §§ 83-84; *McKerr v. the United Kingdom*, § 128; all cited above). This element also applies in a military context (*Al-Skeini and Others v. Turkey*, § 169; *Isayeva v. Turkey*, §§ 210-211, both cited above).

77. In particular, in the case of *Al-Skeini and Others v. the United Kingdom* [GC], cited above, investigations undertaken by the Special Investigation Branch of the Royal Military Police of the United Kingdom were deemed to fall short of the required standards namely because, though the Royal Military Police has a separate chain of command, the investigations could be triggered either by the Commanding Officer of the units concerned or by the Special Investigation Branch *proprio motu* whenever it became aware of an incident (*ibid.*, § 171). However, the Provost Marshal or the Commanding Officer of the unit involved could instruct the Special Investigation Branch to terminate the investigation, thereby interfering in the investigation process and calling into question the independence of the investigation (*ibid.*, §§ 28-29). The investigating authority must be and must be seen to be operationally independent of the military chain of command (*ibid.*, § 169) and its members must not come from the same unit or chain of command.

78. In the case of *Jaloud v. the Netherlands* [GC], the Court stressed that the independence and therefore the effectiveness of an investigation might "be called into question if the investigators and the investigated maintain close relations with one another" (*ibid.*, § 188). Yet, in that case, the Court found no evidence supporting the view that the two elements, that is, the Royal Military Constabulary and the military personnel, colluded "to the point of impairing the quality of [the] investigations" – despite the fact that the investigators and the investigated were sharing living quarters (*ibid.*, § 189).

79. **Practical independence**, on the other hand, relates to a physical dimension, the close proximity between the investigators and those

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implicated. Yet, as the Court explained in *Jaloud v. the Netherlands* [GC], cited above, the fact that they shared living quarters or that the investigators were subordinated to the persons investigated were not seen as running afoul of the principle (*ibid.*, § 190).

(2) Adequacy

80. To be effective, an investigation must be **adequate**, that is, able to determine whether the force used was justified or not in the circumstances (*Isayeva v. Russia*, cited above, § 212; *Isayeva, Yusupova and Bazayeva v. Russia*, nos. 57947/00, 57948/00 and 57949/00, § 211, 24 February 2005; *Khashiyev and Akayeva v. Russia*, cited above, §144; *Oğur v. Turkey*, no. 21594/93, § 88, 20 May 1999; *Khamzayev and Others v. Russia*, cited above, 193). If it was not justified, then the investigation must lead to the identification and punishment of those responsible (*Al-Skeini and Others v. the United Kingdom* [GC], § 166; *Jaloud v. the Netherlands* [GC], § 200, as well as *Isayev v. Russia*, § 212; *Isayeva and Others v. Russia*, § 211; *Khashiyev and Akayeva*, § 144, all cited above; *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 128, 4 May 2001; *Estamirov and Others v. Russia*, cited above, § 86). The investigation must also be prompt (*Mustafa Tunç and Fecire Tunç v. Turkey* [GC], cited above, § 225).

81. For the purpose of the present analysis, the standard of “adequacy” in the Court’s case-law, can be split into at least **five different elements** which are relevant in the context of a military operation overseas.

(a) COLLECTING AND SECURING EVIDENCE

82. Determining the legality of the use of force entails collecting and securing evidence that sheds light on the circumstances that have led to the loss of life. In this process, it is imperative that **potential suspects be identified**. Indeed, major shortcomings in the investigation might undermine the ability to identify the perpetrator and thus the bringing of appropriate domestic proceedings, such as criminal prosecution, disciplinary proceedings and any other proceedings for the exercise of remedies available to victims and their families (*Erdoğan and Others v. Turkey*, no. 19807/92, § 88, 13 September 2006). Consequently, States are under an obligation to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence, and where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (*Al-Skeini and Others* [GC], cited above, § 166, *Isayeva and Others*, cited above, § 211; *Salman v. Turkey* [GC], no. 21986/83, § 106, 27 June 2000; *Estamirov and Others*, cited above, § 86; *Khamzayev and Others*, cited above, § 194).

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83. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard (*Isayeva v. Turkey*, cited above, § 212; *Isayeva and Others v. Turkey*, cited above, § 211; *Avşar v. Turkey*, no. 21986/83, § 394, 10 July 2001; *Khamzayev and Others v. Russia*, cited above, § 194). That being said, it must be constantly kept in mind that **the obligation to investigate is one of means and not results** (*Al-Skeini and Others v. the United Kingdom* [GC], § 166; *Jaloud v. the Netherlands* [GC], § 186, both cited above).

84. Immediate access to the scene of death is not required; rather, the investigation must start as soon as control is gained over the area (*Khamzayev and Others*, cited above, § 198). Also, to ensure the safety of personnel, practical alternative solutions must be sought (*Cangöz and Others v. Turkey*, no. 7469/06, § 125, 26 April 2016).

85. Furthermore, in a situation where members of the armed forces are present at the scene of the incident, the standard procedure would in principle require those implicated to be disarmed and separated. In *Jaloud v. the Netherlands* [GC], cited above, the Court lamented the lack of precautions to separate the members of the armed forces when they were in fact in charge of maintaining security in the area. The reason for separating the soldiers is that, given the opportunity and especially the time, they might “collude with others to distort the truth”. The Court explained that the mere fact that appropriate steps were not taken to reduce the risk of collusion was a shortcoming (*ibid.*, §§ 207-208).

**(b) INTERROGATING THE SOLDIERS PRIMA FACIE INVOLVED IN
THE INCIDENT**

86. THE SECOND ELEMENT IS THAT MEMBERS OF THE ARMED FORCES PRIMA FACIE involved in the incident must be interrogated about the incident in an adequate manner (*Aktas v Turkey*, no. 24351/94, § 306, 24 April 2003). In particular, reliance on written evidence and/or reports produced by the soldiers (e.g., *Cangöz and Others v. Turkey*, cited above, § 127) as well as transcripts of interviews, is not sufficient, as it does not allow for the reliability or credibility of the accounts of those involved in the incident to be verified (*McKerr v. the United Kingdom*, cited above, § 144; *Jordan v. the United Kingdom*, cited above, § 127). As a matter of fact, in such transcripts, crucial factual elements might have been, voluntarily or not, omitted, and contradictory information might not be cross-checked (see, e.g., *Cangöz and Others*, cited above, §§ 127-133). As a result, failure to collect the testimony of those implicated in the incident might render it difficult to ascertain whether the force used was justified.

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(c) IDENTIFICATION AND INTERROGATION OF WITNESSES

87. The Court has also stressed that there must be an attempt at promptly identifying or locating witnesses, even in the context of military operations, and at taking their statements, since this enables the investigators to create a comprehensive picture of the incident (*Khashiyev and Akayeva v. Russia*, cited above, § 160; *Musayev and Others v. Russia*, nos. 57941/00, 58699/00 and 60403/00, § 162, 31 March 2008; *Önen v. Turkey*, no. 22876/93, § 88, 14 May 2002). State authorities must do their best to locate the witnesses (*Isayeva and Others v. Russia*, cited above, § 224).

88. In *Hugh Jordan v. the United Kingdom*, cited above, the Court acknowledged that the State could not be held responsible for a witness' unwillingness to come forward (*ibid.*, § 118). In *Al-Skeini and Others v. the United Kingdom* [GC], in a military context, it specified that "every effort should have been taken to identify Iraqi eyewitnesses and to persuade them that they would not place themselves at risk by coming forward and giving information and that their evidence would be treated seriously and acted upon without delay" (*ibid.*, § 170). The dearth of (competent) interpreters to carry out such interviews is another impediment faced by the investigators when talking to potential witnesses (*ibid.*, § 30).

(d) INSPECTING THE SCENE OF THE EVENTS AND COLLECTING AND PRESERVING EVIDENCE

89. The **fourth** element is that the scene of the events must be **adequately and independently inspected** so that all the evidence can be collected and preserved (*Hugh Jordan*, cited above, § 107; *Ateş v. Turkey*, no. 30949/96, §§ 96, 108, 31 July 2005). This would normally require taking photographs of the scene and collecting empty cartridges and bullet fragments, recording their exact number and location, and numbering them individually (*Önen v. Turkey*, cited above, § 88; *Khashiyev and Akayeva*, cited above, § 146; see also *Kaya v. Turkey*, cited above, § 89, where no ballistic tests had been carried out although spent cartridges had been found on site). Such a task is all the more important, as it enables the State to determine which/whose weapon fired the rounds and thus attribute individual responsibility. In a second phase, the forensic evidence must be thoroughly analysed (see, e.g., *Estamirov and Others v. Russia*, cited above, § 91).

(e) CARRYING OUT AN ADEQUATE AUTOPSY

90. The **fifth** element stemming from the Court's case-law is that if the use of force results in the death of a person, requires an adequate **autopsy** to be completed (e.g., *Estamirov and Others*, cited above, § 91). The autopsy must be of a certain quality as an expert medical examination helps ascertain the circumstances of a death and thus undergirds the State's

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obligation to carry out an effective domestic investigation (*Khashiyev and Akayeva v. Russia*, cited above, § 163; see also *Salman v. Turkey* [GC], cited above, §§ 106-107). Among other things, it should be checked (depending on the circumstances of the case):

- whether forensic specialists, rather than general practitioners, were taking part in the process (*Tanrikulu v. Turkey*, cited above, § 106);
- whether proper forensic photographs of the body have been taken (*Salman* [GC], cited above, § 106);
- whether the number of bullet entry and exit wounds has been recorded (*Ateş v. Turkey*, cited above, § 109; *Akkum and Others v. Turkey*, cited above, § 196);
- whether there are traces of bullets, shrapnel or other evidence (*Ateş*, cited above, § 109);
- whether injuries and marks on the body have been the subject of a histopathological analysis (*Salman* [GC], cited above, § 106);
- if appropriate, whether clothes have been examined (*Cangöz and Others v. Turkey*, cited above, §§ 133-134).

91. An additional important element that needs to be assessed is that the autopsy report must be properly translated (*Jaloud v. the Netherlands* [GC], cited above, § 170).

(3) Promptness and reasonable expedition

92. As mentioned above (§§ 68-71), the obligation to launch an investigation begins as soon as State authorities are informed or become aware of facts that potentially constitute a violation of Article 2.

93. The requirement of **promptness and reasonable expedition** is implicit in the context of investigations under Article 2 of the Convention (*Isayeva v. Russia*, cited above, § 212; *Mahmut Kaya v. Turkey*, no. 21986/93, §§ 106-107, 28 March 2000; *Estamirov and Others v. Russia*, cited above, § 87; *Khamzayev and Others v. Russia*, cited above, § 195). These requirements stem from the need to maintain public confidence in adherence to the rule of law and prevent the appearance of collusion in, or tolerance of, unlawful acts (*Isayeva*, cited above, § 213; *Isayeva and Others v. Russia*, cited above, § 212; *Khashiyev and Akayeva v. Russia*, cited above, § 144; *Khamzayev and Others*, cited above, § 195). Also, gathering useful evidence becomes more difficult with the passage of time (*Zubayrayev v. Russia*, no. 67797/01, § 98, 10 January 2008) and so the chances of the investigation to be completed are diminished. In specific situations, the Court has stressed that failure to comply with this requirement of promptness might “exacerbate still further the climate of impunity and insecurity in the region and thus create a vicious circle” (*Yaşa v. Turkey*, cited above, § 104).

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94. A potential noteworthy problem is the quality of the report as the Court dismisses justifications such as reports being drafted in the heat of the moment and in which there are so-called “innocent omissions” (*Akkum and Others v. Turkey*, cited above, § 195, 202). Fulfilling the principle of promptness does not indeed displace the State’s obligation to carry out an effective investigation.

(4) Public scrutiny and the participation of the next -of-kin

95. Finally, for the investigation to be effective, there must be an element of **public scrutiny** of the investigation or its results (*Acar v. Turkey*, cited above, § 225; *Al-Skeini and Others v. the United Kingdom* [GC] cited above, §167).

96. In *McKerr v. the United Kingdom*, cited above, the Court noted the importance of public scrutiny, since “proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force” (ibid., § 160). While it is accepted that “the degree of public scrutiny required may well vary from case to case”, in all cases, the victim or next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (*Isayeva v. Russia*, § 214; *Isayeva and Others v. Russia*, § 213; *Khashiyev and Akayeva v. Russia*, § 144; *McKerr*, § 115; *Hugh Jordan v. the United Kingdom*, § 109; *Cangöz and Others v. Turkey*, § 144; *Khamzayev and Others v. Russia*, § 196, all cited above).

97. Besides granting victims or relatives access to the procedure, the Court’s case-law endows them with a right to information, which would normally include the right **to access the case file** (*Oğur v. Turkey*, § 92; *Estamirov and Others v. Russia*, § 92; *Khashiyev and Akayeva*, §§ 148 and 150; *Khamzayev and Others*, § 203, all cited above).

98. On the other hand, the Court’s case-law has also set limits on the extent to which relatives must be involved and the concomitant duties of the authorities. The Court has shown some flexibility by accepting that the disclosure or publication of materials that deal with “sensitive issues with possible prejudicial effects to private individuals or other investigations [...] cannot be regarded as an automatic requirement under Article 2” (*Hugh Jordan*, § 121; *McKerr*, § 129, both cited above). However, it must be borne in mind that these judgments have been made in the context of counter-terrorism operations rather than regular warfare, and it is still not sure whether the Court has thus only recognised the special implications of releasing information on future similar operations. Moreover, the Court does not give the State carte blanche over which information cannot be released: it does examine the type and content of the information that

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remains undisclosed to the relatives (*Cangöz and Others*, cited above, §§ 123 and 145-146).

99. Additionally, the outcome of the investigation must be duly **brought to the attention of the next-of-kin** (*Damayev v. Russia*, cited above, § 87). In *Isayeva v. Russia*, cited above, the Court explained that a list of names without further details sent to a regional administration did not satisfy this requirement as the victims could not be appropriately informed (*ibid.*, § 222).

100. It must be reminded once again that the Court has crafted almost all these principles and elements thereof based on situations either happening in a domestic setting and/or in peacetime and has applied them to military operations at home and abroad. As a result, the relevant question is to what extent they are suitable in the military context outside the national territory of a State.

GENERAL CONCLUSIONS

101. The “jurisdiction” of a State and the attribution or imputability of an action to that State are two different, albeit mutually connected, questions. In the context of military operations abroad, the basic criterion to establish whether the alleged violation is imputable to the respondent State is the question on who retains “ultimate authority and control” over the armed forces of the respondent State: the State itself, another State, or an international organisation or entity such as the United Nations or the NATO. Concerning extraterritorial jurisdiction of a State in the military context, it can primarily be established in one of the following two ways: (1) on the basis of the power (or control) actually exercised over the person of the applicant (*ratione personae*); or (2) on the basis of control actually exercised over the foreign territory in question (*ratione loci*), namely in a classical situation of a military occupation as defined by international humanitarian law. In any event, the Court has never established a principle according to which an airstrike (or any kind of artillery strike) carried out by the army of a State would establish the jurisdiction of that State.

102. Concerning the obligations stemming from the procedural aspect of Article 2 of the Convention in the context of a military operation, the Court’s case-law has followed a nuanced and differentiated approach, accepting different standards of investigation depending on the type of the armed conflict at issue. Thus, conflicts to which the existing case-law on the procedural limb of Article 2 has been applied can, so far, be clearly divided in four categories:

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- (1) internal conflicts, such as a civil war, an insurrection, or any kind of local armed conflict, within the internationally recognized boundaries of a State – where the Court applies the same ordinary standards as in any case concerning the use of lethal force by police or other State agents;
- (2) armed conflicts following the disintegration of previously existing States – where the Court generally applies the “impossible or disproportionate burden” test;
- (3) military operations carried out by Contracting States abroad – where the Court is prepared to make even more “reasonable allowances” for the difficult conditions and practical problems faced in a foreign and hostile region;
- (4) armed conflicts having occurred in a distant past – where the standard of expedition of the investigation is much lower than in other cases.

103. As to the specific procedural obligations in the case of a military operation overseas, it appears from the Court’s relevant case-law to date that the investigation must meet minimum standards in terms of: independence; adequacy; public scrutiny and the participation of the next-of-kin; promptness and expediency. In particular, the requirement of adequacy seems to encompass at least five different elements: collecting and securing evidence, properly interrogating the soldiers *prima facie* involved in the incident, a proper identification and interrogation of witnesses, inspecting the scene of events and preserving evidence, an adequate autopsy of the body or bodies.