

# Lawyers' Rights Watch Canada

*NGO in Special Consultative Status with the Economic and Social Council of the United Nations  
"Promoting human rights by protecting those who defend them."*

## **Duty of States to Investigate Extra - Judicial Killings**

### **Introduction**

The right to life is the fundamental human right because it is a prior condition for realization of all other human rights. The failure to effectively investigate an extra-judicial killing violates the right to life. Effective investigation of an extra-judicial killing is an inseparable part of a state's duty to protect the right to life. Where there is a pattern of extrajudicial killings, the failure to conduct effective investigations creates an environment of impunity, which promotes further killings and human rights violations.

This paper discusses a state's duty to investigate crimes that occur within its jurisdiction. Part one focuses on the general duty of states conduct effective investigations when individuals have been killed as a result of the use of force (duty to investigate). Part two examines the standards for of an effective investigation. Part three discusses remedies for a breach of the duty to investigate.

### **Part I: The Duty to Investigate**

#### **1. The European Court of Human Rights**

The European Court of Human Rights (ECtHR), which hears complaints of violations of the *European Convention on Human Rights* (ECHR) has produced the most developed body of jurisprudence dealing with the duty to investigate extra-judicial killings (the duty to investigate). This jurisprudence holds that Articles 1 and 2(1) of the ECHR compel States to carry out effective investigations and that a failure to do so constitutes a violation of these articles.<sup>1</sup>

Article 1 provides that each State to the ECHR shall secure to everyone within its jurisdiction the rights and freedoms defined in the ECHR and Article 2(1) states:

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

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<sup>1</sup> *Hugh Jordan v. the United Kingdom* (Application no. 24746/94) Judgment, Strasbourg, 4 May 2001, para. 105; *Çiçek v. Turkey* (Application no. 25704/94) Judgment, Strasbourg 27 February 2001, para. 148; *Kaya v. Turkey* (158/1996/777/978) Judgment, Strasbourg, 19 February 1998, 105; *McKerr v. the United Kingdom*, (Application no. 28883/95), Judgment, Strasbourg, 4 May 2001, para. 111-115; *Kelly and Others v. the United Kingdom*, (Application no. 30054/96), Judgment, Strasbourg, 4 May 2001, *Shanaghan v. the United Kingdom*, (Application no. 37715/97) Judgment, Strasbourg, 4 May 2001; *Makaratzis v. Greece* [GC], (Application no. 50385/99), Judgment, Strasbourg, 20 December 2004, para. 73-79.

The most articulate discussion of the duty to investigate is found in *Finucane v. The United Kingdom*.<sup>2</sup> Patrick Finucane was murdered by the Ulster Freedom Forces (UFF). His death was investigated by the Royal Ulster Constabulary (RUC) but no one was ever convicted and there was evidence, which indicated that the RUC, as well as the army, security, and police forces of the United Kingdom (U.K.) may have colluded with the UFF. Finucane's wife made a complaint to the ECtHR, alleging that there had been no effective investigation of the murder. The ECtHR found that when an individual is killed by the use of force, the states' obligation to protect the right to life includes the duty to ensure an effective investigation, which culminates in appropriate prosecutions and punishment. It described the duty to investigate as follows:

67. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, p. 49, § 161, and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 324, § 86). 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. What form of investigation will achieve those purposes may vary in different circumstances.<sup>3</sup>

The ECtHR held that the proceedings following the death of Finucane failed to provide a prompt and effective investigation into the allegations of collusion by security personnel, and, as a result, the UK had violated Article 2 of ECHR.

The duty to investigate exists even in cases where the State is not directly implicated in the extra-judicial killing. In *Kaya v. Turkey*<sup>4</sup>, the ECtHR held that although it had not been established that the applicant's brother was unlawfully killed, Article 2 was nonetheless breached "on account of the failure of the authorities of the respondent State to conduct an effective investigation into the circumstances surrounding the death of Hasan Kaya."<sup>5</sup> Similarly, in *Ergi v. Turkey*<sup>6</sup>, the ECtHR stated that the duty to investigate "is not confined to cases where it has been established that the killing was caused by an agent of the State".<sup>7</sup>

## 2. The Inter-American Court of Human Rights

The Inter-American Court of Human Rights (IACtHR) hears complaints of violations of the *American Convention on Human Rights* (ACHR). It has held that a State has a duty to investigate an extra-judicial killing as part of an overarching duty to ensure that all persons

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<sup>2</sup> *Finucane v. The United Kingdom* (Application no. 29178/95) Judgment, Strasbourg, 1 July 2003.

<sup>3</sup> *Ibid.*, note 2 at para. 67.

<sup>4</sup> *Kaya v. Turkey* (158/1996/777/978) Judgment, Strasbourg, 19 February 1998, 105.

<sup>5</sup> *Ibid.*, p. 33

<sup>6</sup> *Ergi v. Turkey*, (Application no. 66/1997/850/1057), Judgment, Strasbourg, 28 July 1998.

<sup>7</sup> *Ibid.*, para.82.

within the State's jurisdiction enjoy the full and free exercise of the human rights defined in the ACHR.<sup>8</sup> This duty stems from the combination of Articles 1(1) and 4(1) of the ACHR.

#### Article 1(1)

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

#### and Article 4(1)

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

In *Velasquez Rodriguez*<sup>9</sup>, the IACtHR discussed disappearances that occurred in Honduras from 1981 to 1984. These disappearances all followed a similar pattern and it was public knowledge in Honduras that the kidnappings were carried out by military personnel or the police, or persons acting under their orders. In its decision the IACtHR held that the Honduran Armed Forces kidnapped Manfredo Velasquez, a student who was alleged to be involved in dangerous activities, and that Honduras was directly responsible for his disappearance. It said:

172. Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, or all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

Specifically regarding the duty to investigate, the Court said:

176. The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

177. In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must

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<sup>8</sup> I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4; I/A Court H.R., *Case of Juan Humberto Sánchez v. Honduras*. Judgment of June 7, 2003. Series C No. 99; I/A Court H.R., *Case of Myrna Mack-Chang v. Guatemala*. Judgment of November 25, 2003. Series C No. 101.

<sup>9</sup> I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4, para. 172.

have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.

It is important to note, however, that the IACtHR would have found a violation solely on the basis that Honduras failed to secure Rodríguez' human rights:

182. The Court is convinced, and has so found, that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1 (1) of the Convention, which obligated it to ensure Manfredo Velásquez the free and full exercise of his human rights.

Myrna Mack Chang was an anthropologist who studied the phenomenon of internally displaced persons in Guatemala during the armed conflict there. Based on her research, she concluded that the main cause of the internal displacements of the Guatemalan indigenous communities was the Guatemalan Army's counterinsurgency program. After she criticized the Army's policies toward the displaced population, Mack was placed under surveillance and then executed in a military intelligence operation developed by the high command of the Presidential General Staff. In its review of her murder, *Myrna Mack Chang*<sup>10</sup>, the IACtHR explained how the lack of an effective investigation into a series of extra-judicial killings violates the right to life:

152. On this matter, the Court has pointed out that when there is a pattern of extra-legal executions fostered or tolerated by the State, this generates an environment that is incompatible with effective protection of the right to life. This Court has established that the right to life plays a fundamental role in the American Convention because it is a prior condition for realization of the other rights. When the right to life is not respected, all the other rights lack meaning. The States have the obligation to ensure the creation of such conditions as may be required to avoid violations to this inalienable right and, specifically, the duty of avoiding attempts against it by the agents of the State.

153. Compliance with Article 4 of the American Convention, in combination with Article 1(1) of that same Convention, requires not only that no person be arbitrarily deprived of his or her life (negative obligation), but also that the States adopt all appropriate measures to protect and preserve the right to life (positive obligation), under their duty to ensure full and free exercise of the rights by all persons under their jurisdiction. This active protection of the right to life by the State involves not only its legislators, but all State institutions, and those who must protect security, be these its police forces or its armed forces. Therefore, the States must adopt all necessary measures, not only to prevent, try, and punish deprivation of life as a consequence of criminal acts, in general, but also to prevent arbitrary executions by its own security agents.

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156. In cases of extra-legal executions, it is essential for the States to effectively investigate deprivation of the right to life and to punish all those responsible, especially when State agents are involved, as not doing so would create, within the environment of impunity, conditions for this type of facts to occur again, which is contrary to the duty to respect and ensure the right to life.

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<sup>10</sup> I/A Court H.R., *Case of Myrna Mack-Chang v. Guatemala*. Judgment of November 25, 2003. Series C No. 101.

157. In this regard, safeguarding the right to life requires conducting an effective official investigation when there are persons who lost their life as a result of the use of force by agents of the State.

It concluded that the extra-legal execution of Mack, carried out in a climate of impunity tolerated by various State authorities and institutions, violated Article 4(1) in combination with Article 1(1) of the ACHR.<sup>11</sup>

When individuals are killed within a ratifying state's jurisdiction, both the ECtHR and the IACtHR have interpreted the ECHR and the ACHR as imposing a positive duty on the state to conduct an effective investigation. This duty arises from a person's "right to life"<sup>12</sup> in combination with the State's obligation to recognize and guarantee the rights in the respective Conventions.<sup>13</sup> A proper investigation is necessary to secure the effective implementation of the domestic laws, which protect the right to life. Further, the failure to investigate, especially where there is a pattern of extra-judicial killings, creates a culture of impunity that is incompatible with this right.

### **3. African Charter of Human and People's Rights**

As the *International Convention on Civil and Political Rights (ICCPR)*<sup>14</sup> and the *African Charter of Human and People's Rights (ACHPR)*<sup>15</sup> have right to life and State guarantee provisions<sup>16</sup> comparable to those in the ECHR and ACHR, states that have ratified these instruments are also bound by a duty to effectively investigate. Article 6.1 of the ICCPR guarantees the right to life:

Every human being has the inherent right to life. This right shall be protected by law.  
No one shall be arbitrarily deprived of his life.

Articles 1 to 3 of the ICCPR impose on ratifying states a duty to take effective measures to protect the right to life and provide remedies for rights violations. Article 3 extends this duty to cases in which the rights violations have been committed by state agents:

3. Each State Party to the present Covenant undertakes:
  - a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

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<sup>11</sup> *Ibid*, para. 301

<sup>12</sup> Article 2(1) of the ECHR and Article 4(1) of the ACHR.

<sup>13</sup> Article 1(1) of the ECHR and Article 1(1) of the ACHR.

<sup>14</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

<sup>15</sup> Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

<sup>16</sup> Right to life: Article 6(1) of the ICCPR and Article 4 of the ACHPR. State guarantee: Article 2 of the ICCPR and Article 1 of the ACHPR.

The United Nations Human Rights Committee (HRC'ee) comments on Article 2 of the ICCPR are consistent with the view that states that have ratified the ICCPR have positive obligations to investigate violations of the rights protected under the ICCPR:

The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.<sup>17</sup>

Even apart from the obligations created by human rights treaties, there is a strong argument that states have a duty to investigate extra-judicial killings under customary international law. The right to life is among the most strongly protected of all fundamental human rights and is widely recognized as having reached the status of customary international law.<sup>18</sup> It follows that the duties and obligations to take effective measures to protect the right and to punish violations are also part of customary international law. In addition to the above case law and HRC'ee comments, support for this position is evidenced by the fact that the United Nations has developed extensive detailed standards for investigation of extra-judicial killing, including the *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (UN Investigation Principles)<sup>19</sup> and the *Model Protocol for a Legal Investigation of Extra-Legal, Arbitrary and Summary Executions* (Minnesota Protocol).<sup>20</sup>

Further, in 2005, the UN General Assembly affirmed the duty of states to provide victims of gross human rights violations with 'full and effective reparation ...which include[s] ...where applicable ...[v]erification of the facts and full and public disclosure of the truth' ...and '[i]nclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.'<sup>21</sup>

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<sup>17</sup> Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 April 2004, para. 8.

<sup>18</sup> See Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law* (1995-96) 25 Ga. J. Int'l and Comp. L. 287 at 343.

<sup>19</sup> Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989.

<sup>20</sup> Part III of the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Doc. E/ST/CSDHA/ 12 (1991)

<sup>21</sup> GA Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, Articles 18 and 22.

## **Part II: Standards for an Effective Investigation**

In *Finucane*<sup>22</sup>, the EctHR summarized its views on the standards that should be applied to determine whether the state has conducted an effective investigation:

68. 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 (see, for example, *Güleç v. Turkey*, judgment of 27 July 1998, Reports 1998-IV, p. 1733, §§ 81-82; *Oğur v. Turkey* [GC], no. 21594/93, §§ 91-92, ECHR 1999-III). This means not only a lack of hierarchical or institutional connection but also a practical independence (see, for example, *Ergi v. Turkey*, judgment of 28 July 1998, Reports 1998-IV, pp. 1778-79, §§ 83-84, and the recent Northern Irish cases cited above, for example, *McKerr*, § 128, *Hugh Jordan*, § 120, and *Kelly and Others*, § 114).

69. The investigation must also 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 (see, for example, *Kaya*, cited above, p. 324, § 87) and to the identification and punishment of those responsible (see *Oğur*, cited above, § 88). This is not an obligation of result, but of means. The authorities must have taken 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 (see, for example, *Salman v. Turkey* [GC], no. 21986/93, § 106, ECHR 2000-VII; *Tanrikulu v. Turkey* [GC], no. 23763/94, § 109, ECHR 1999-IV; and *Gül v. Turkey*, 22676/93, § 89, 14 December 2000). 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 the recent Northern Irish cases concerning the inability of inquests to compel the security force witnesses directly involved in the use of lethal force, for example *McKerr*, cited above, § 144, and *Hugh Jordan*, cited above, § 127).

70. A requirement of promptness and reasonable expedition is implicit in this context (see *Yaşa v. Turkey*, judgment of 2 September 1998, Reports 1998-VI, pp. 2439-40, §§ 102-04; *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80, 87 and 106, ECHR 1999-IV; *Tanrikulu*, cited above, § 109; and *Mahmut Kaya v. Turkey*, no. 22535/93, §§ 106-07, ECHR 2000-III). 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, for example, *Hugh Jordan*, cited above, §§ 108, 136 40).

71. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Güleç*, cited above, p. 1733, § 82; *Oğur*, cited above, § 92; *Gül*, cited above, § 93; and the recent Northern Irish cases, for example *McKerr*, cited above, § 148).

The ECtHR has applied these standards and found a breach of the state's duty to investigate in several cases.<sup>23</sup> The case of *Nachova and Others v. Bulgaria*<sup>24</sup> is illustrative of the acts and

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<sup>22</sup> *Supra*, note 2.

<sup>23</sup> See: *Ülkü Ekinci v Turkey*, ECHR, Application no. 27602/95, Judgment of 16 July 2002; *Aydin v Turkey*, ECHR, Application no. 57/1996/676/866, Judgment of 25 September 1997, para. 106; *Buldan v Turkey*, ECHR, Application no. 28298/95, Judgment of 20 April 2004; *Ognyanova and Choban v Bulgaria*, ECHR, Application no. 46317/99,

omissions, which will be considered breaches of the duty to investigate. In that case, two men were shot and killed by a member of the Bulgarian military police. The men were conscripts and had been sentenced to imprisonment for being repeatedly absent without leave. Acting on outstanding warrants and a telephone tip, the police attempted to apprehend the two men in a local village. After repeated verbal warnings to stop and several warning shots, the senior officer in charge shot and killed both men. The officer claimed he aimed at their feet in order to not give a fatal injury.

Bulgaria's Unpublished Regulations on the Military Police allowed the use of firearms "to arrest a person serving in the army who has committed or is about to commit a publicly prosecutable offence and who does not surrender after being warned." The regulations further stipulated that the use of force be preceded by an oral warning and a shot fired in the air, and imposed a duty to protect the life of the person as far as is possible.

However, in its decision, the ECtHR found three breaches of Article 2 of the ECHR:

- (1) The authorities had failed to put in place an appropriate legal and administrative framework on the use of force and firearms by military police because the regulations:
  - a. effectively permitted lethal force to be used when arresting a member of the armed forces for even the most minor offence; and
  - b. the regulations were not published and contained no clear safeguards to prevent the arbitrary deprivation of life.
- (2) the authorities had failed to comply with their obligation to minimize the risk of loss of life since the arresting officers had been instructed to use all available means to arrest the two men, despite the fact that they were unarmed and posed no danger to life or limb; and
- (3) in respect of the shooting itself, other means could have been used to arrest the men.<sup>25</sup>

The ECtHR then considered the duty to investigate in the context of the above breaches and said that the investigation was flawed because it operated under the assumption that the above-mentioned regulations and the planning of the operation were not flawed:

126. Furthermore, it was necessary to investigate the planning of the operation and its control, including the question whether the commanders had acted adequately so as to minimise the risk of loss of life.

127. In the present case, none of the above was seen by the authorities as being relevant to the question whether or not the requirements of domestic law on the use of force had been complied with (see paragraphs 46-50 above).

128. The Court thus considers that the investigation into the deaths of Mr. Angelov and Mr. Petkov was flawed in that it did not apply a standard comparable to the "no more than absolutely necessary" standard required by Article 2 § 2 of the Convention.

The ECtHR also identified several procedural inadequacies of the investigation:

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Judgment of 23 February 2006; *Anguelova v Bulgaria*, ECHR, Application no. 38361/97, Judgment of 13 June 2002, paras. 142-145

<sup>24</sup> *Nachova and Others v. Bulgaria*, (Application No. 43577/98 and 43579/98) Judgment of 6 July 2005.

<sup>25</sup> *Ibid.* Holdings of the Court.

129. The Court notes that all the witnesses were heard, including those called by the applicants. Autopsies were performed and a number of expert reports were commissioned (see paragraphs 37-45 above).

130. On that basis, and noting that the applicants had not requested the collection of other evidence despite having been given every opportunity to do so, the Government considered that all possible investigative steps had been undertaken.

131. The Court considers that the State's obligation under Article 2 § 1 of the Convention to carry out an effective investigation arises independently of the position taken by the victim's relatives. The fact that there has been no request for particular lines of inquiry to be pursued or items of evidence obtained cannot relieve the authorities of their duty to take all possible steps to establish the truth and ensure accountability for deaths caused by agents of the State. Furthermore, an investigation will not be effective unless all the evidence is properly analysed and the conclusions are consistent and reasoned.

132. The Court notes that important initial steps, such as preserving evidence at the scene and taking all relevant measurements, were neglected (see paragraphs 32-36 above).

133. Further, the sketch map relied upon by the authorities was insufficiently detailed, as it did not indicate the characteristics of the terrain and only covered a limited area. Not all relevant measurements were noted and no reconstruction of the events was staged.

134. However, the information that could have been obtained through a reconstruction of the events and detailed descriptions was crucial, in particular, in order to establish whether Major G. had committed a criminal offence. It would have enabled the investigators to check the arresting officers' accounts and to form an opinion on, inter alia, the exact position from which Major G. had fired and the possible explanations for the fact that Mr. Petkov was shot in the chest. The authorities at no stage sought to collect evidence on these issues (see paragraphs 32-50 above).

135. It is further highly significant that the investigator and the prosecutors failed to comment on a number of facts which appeared to contradict Major G.'s statements. In particular, there was no attempt to draw conclusions from the location of the spent cartridges or the fact that Mr. Petkov was hit in the chest. Without any proper explanation, the authorities merely accepted Major G.'s statements (see paragraphs 46-50 above).

136. The Court thus finds that the investigation was characterised by a number of serious and unexplained omissions. It ended with decisions which contained inconsistencies and conclusions unsupported by a careful analysis of the facts.

137. The Court has held that it regards as particularly serious cases where indispensable and obvious investigative steps that could have elucidated acts of deprivation of life by State agents were not taken and the respondent Government failed to provide a plausible explanation about the reasons why that was not done (*Velikova v. Bulgaria*, no. 41488/98, § 82, ECHR 2000-VI).

138. In the present case, the investigator and prosecutors at all levels ignored certain facts, failed to collect all the evidence that could have clarified the sequence of events and omitted reference in their decisions to troubling facts. As a result, the killing of Mr. Angelov and Mr. Petkov was labelled lawful on dubious grounds and the police officers involved and their superiors were cleared of potential charges and spared criticism despite there being obvious grounds for prosecuting at least one of them.

139. The Court considers that such conduct on the part of the authorities – which has already been remarked on by the Court in previous cases against Bulgaria (see *Velikova and Anguelova*, cited above) – is a matter of particular concern, as it casts serious doubts on the objectivity and impartiality of the investigators and prosecutors involved.

Based on the above the ECtHR found that Bulgaria's failure to conduct a proper investigation breached section 2 of the ECHR.

Several ECtHR decisions have cited the UN Investigation Principles as guidelines for the investigation of killings when government officials were allegedly complicit in those killings and involved in the subsequent legal proceedings. Although they are non-binding, the principles represent a detailed guide to good practice in investigating extra-judicial killings. The principles include requirements for:

- thorough, prompt, and impartial investigation of all suspected cases of extra-legal, arbitrary, and summary executions;
- an independent commission of inquiry for those cases in which the established investigative procedures are ineffective because of lack of expertise or impartiality, and for cases in which there are complaints from the family of the victim about these inadequacies or other substantial reasons;
- protection from violence or intimidation for complainants, witnesses, families, and investigators;
- removal from power or control over complainants, witnesses, families, or investigators of anyone potentially implicated in extra-legal, summary or arbitrary executions;
- access by families and their legal representatives to any hearing and to all relevant information, and the right to present other evidence;
- a detailed written report on the methods and findings of the investigation to be made public within a reasonable time;
- government action to bring to justice persons identified by the investigation as having taken part in extra-legal, arbitrary and summary executions;
- responsibility of superiors, officers or other public officials for acts committed under their authority if they had a reasonable opportunity to prevent such acts; and
- fair and effective compensation for the families and dependents of victims of extra-legal, arbitrary and summary executions within a reasonable period of time.<sup>26</sup>

The IACtHR has not set out in detail what it considers to be acceptable standards for an effective investigation.

### **Part III: Remedies for the Failure to Investigate**

When the ECtHR finds that there has been a violation of a right of the ECHR, it may award just satisfaction.<sup>27</sup> Thus far, where the ECtHR has found a violation of the right to life because of a failure to conduct an effective investigation, it has awarded only monetary compensation. It has not gone so far as to compel a state to carry out an effective investigation. In *Finucane*, the ECtHR said the following:

89. As regards the applicant's views concerning the provision of an effective investigation, the Court has not previously given any indication that a Government should, as a response to such a finding of a breach of Article 2, hold a fresh investigation into the death concerned and has on occasion expressly declined to do so (see *Ülkü Ekinci v. Turkey*, no. 27602/95, § 179, 16 July 2002). Nor does it consider it appropriate to do so in the present case. It cannot be assumed in such cases that a future investigation can usefully be carried out or provide any redress, either to the victim's family or to the wider public by ensuring transparency and accountability. The lapse of time and its effect on the evidence and the availability of witnesses inevitably render such an investigation unsatisfactory or inconclusive, by failing to establish important facts or put to rest doubts and suspicions. Even in disappearance cases, where it might be argued that more is at stake since the relatives suffer from the ongoing uncertainty about the exact fate of the victim or the location of the body, the Court has refused to issue any declaration that a new investigation should be launched (see *Orhan v. Turkey*, no. 25656/94, § 451, 18 June 2002). It rather falls to the Committee of Ministers acting under Article 46 of the Convention to address the issues as to what

<sup>26</sup> *Finucane*, *supra* note 2 at para. 56, *Hugh Jordan*, *supra* note 2 at para. 90, *McKerr*, *supra* note 2 at para. 95.

<sup>27</sup> Article 41 of the ECHR.

may be required in practical terms by way of compliance in each case (see, *mutatis mutandis*, *Akdivar and Others v. Turkey* (Article 50), judgment of 1 April 1998, Reports 1998-II, pp. 723-24, § 47).

In contrast to the ECtHR, the IACtHR has granted expansive remedies in cases where a state has breached its duty to investigate, including the ordering of a fresh investigation. The IACtHR has said that when an illegal act, which can be imputed to the state, occurs, the state's responsibility for the violation of the international norm in question arises immediately, with the consequent obligation to repair and to make the consequences of the said violation cease.<sup>28</sup> In the *Myrna Mack Chang Case*, the IACtHR said the following with respect to reparations where there has been an extra-judicial killing:

273. This Court has repeatedly referred to the right of the next of kin of the victims to know what happened and to know who are the agents of the State responsible for the respective facts. As the Court has stated, “[w]henver there has been a human rights violation, the State has a duty to investigate the facts and punish those responsible, [...] and this obligation must be complied with seriously and not as a mere formality.”

274. The Court has reiterated that every person, including the next of kin of the victims of grave violations of human rights, has the right to the truth. Therefore, the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with said violations. This right to the truth has been developed by International Human Rights Law; recognized and exercised in a concrete situation, it constitutes an important means of reparation. Therefore, in this case it gives rise to an expectation that the State must satisfy for the next of kin of the victim and Guatemalan society as a whole.

275. In light of the above, to completely redress this aspect of the violations committed, the State must effectively investigate the facts in the instant case, so as to identify, try, and punish all the direct perpetrators and accessories, and the other persons responsible for the extra-legal execution of Myrna Mack Chang, and for the cover-up of the extra-legal execution and of the other facts in the instant case, aside from the person who has already been punished for these facts. The outcome of the proceeding must be made known to the public, for Guatemalan society to know the truth.

The orders it made included the following:

- (a) the State must effectively investigate the facts of the case, with the aim of identifying, trying, and punishing all the direct perpetrators and accessories, and all others responsible for the extra-legal execution of Myrna Mack Chang, and for the cover-up of the extra-legal execution and other facts of the case;
- (b) the State must remove all de facto and legal obstacles and mechanisms that maintain impunity in the case, provide sufficient security measures to the judicial authorities, prosecutors, witnesses, legal operators, and to the next of kin of Myrna Mack Chang, and resort to all other means available to it so as to expedite the proceeding; and

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<sup>28</sup> *Myrna Mack Chang Case*, *supra* note 10, para. 235; I/A Court H.R., *Case of Bulacio v. Argentina*. Judgment of September 18, 2003. Series C No. 100, para. 71; *Juan Humberto Sánchez Case*, *supra* note 6, para. 148; and I/A Court H.R., *Case of the “Five Pensioners” v. Peru*. Judgment of February 28, 2003. Series C No. 98, para. 174. Note that Article 63(1) of the ACHR states that if the IACtHR finds that there has been a violation of a right or freedom protected by ACHR, the Court shall rule that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

- (c) the State must publish within three months of notification of the Judgment, at least once, in the official gazette “Diario Oficial” and in another national-circulation daily, the proven facts set forth in certain parts of the Judgment.

The IACtHR made similar orders in *Juan Humberto Sanchez*<sup>29</sup>, including an order to effectively investigate the case.

## **Conclusions**

The duty to effectively investigate extra-judicial killings arises from the obligations imposed by human rights instruments which guarantee the right to life in combination with the State’s obligation to recognize and guarantee the rights in the respective Conventions. Accordingly, any signatory to a human rights instrument which includes these provisions is bound by the duty to investigate. Also, any state that has a constitution which includes these provisions is bound by domestic law to conduct effective investigations of extra-judicial killings.<sup>30</sup> Even where a country is not a signatory to a human rights instrument, or does not have a constitution that includes these provisions, there is a strong argument that customary international law compels it to investigate an extra-judicial killing as part of recognizing and ensuring the right to life enshrined in the Universal Declaration of Human Rights and guaranteed by the other instruments referred to.

The UN Investigation Principles reflect a global consensus on the appropriate standards for such investigations. The initial remedy for the loss of life by violence is an investigation which is capable of effectively determining if the death occurred by an illegal use of force. If the loss of life was the result of illegal violence, the state has a duty to prosecute and try the perpetrator(s), to punish those convicted and to afford access to civil remedies.

Lawyers Rights Watch Canada (LRWC) is a committee of lawyers who promote human rights and the rule of law internationally by protecting advocacy rights. LRWC campaigns for advocates in danger because of their human rights advocacy, engages in research and education and works in cooperation with other human rights organizations. LRWC has Special Consultative status with the Economic and Social Council of the United Nations.

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<sup>29</sup> *Supra*, note 6.

<sup>30</sup> For example, Canada guarantees the right to life by virtue of section 7 of the *Charter of Rights and Freedoms*.