Daniel Hunt

Investigating Extra-territorial Human Rights Violations in Conflict: A Principled Disharmony

LLB(Hons) Research Paper

LAWS 524: Human rights

2013

Table of Contents

Abstract

This paper discusses a sequence of litigation concerning attempts by Iraqi citizens to have the United Kingdom Government investigate their claims of ill-treatment and death by British soldiers during the six-year British occupation of Basra, Southern Iraq. This paper uses the litigation as a foil to examine broader issues arising from the extra-territorial application of the duty to effectively investigate rights violations under the European Convention on Human Rights, an unprecedented occurrence. Specifically, it compares the duty of effective investigation to comparative institutional responses to human rights violations in conflict. These mechanisms have developed a broader set of victim-oriented objectives in dealing with violations and this paper argues the duty of effective investigation is comparatively deficient. It then looks at the manner in which the domestic courts have applied the duty, arguing that the various factors have driven the High Court to adopt a limited model of investigation.

Key words: European Convention on Human Rights; Right to life; Right to freedom from torture and ill-treatment; Duty of effective investigation

I Introduction

In March 2013, in *R (Mousa) v Secretary of State for Defence* (*Mousa (No 2)*),[1] the United Kingdom High Court held that the manner by which the British government was executing its obligation to investigate cases of death and ill-treatment by British troops in Iraq was not in compliance with the standards of the European Convention on Human Rights (ECHR). Declining to order a single public inquiry as requested by the claimants', the High Court ordered the government to restructure its pre-existing investigative mechanism, the Iraq Historic Claims Tribunal (IHAT), and provided an investigative model to guide the government in this task and to comply with the requirements of the ECHR.

I argue that the model adopted by the High Court is a positive development in terms of its objective of identifying and potentially prosecuting individuals responsible for rights violations in Iraq. However, drawing from comparative institutional responses to severe rights violations in conflict I argue that the duty of effective investigation, as applied by the ECtHR and embodied in the High Court's approach, neglects wider victim-oriented objectives, despite their adoption being supported by the case law.

[1] *R (Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin) [*Mousa* (No 2)].

After setting out the previous investigations and litigation that preceded *Mousa (No 2)*, this paper first analyses the ECtHR's previous case law from Northern Ireland, Turkey and Russia concerning the requirements of effective investigations in conflict. It demonstrates that, notwithstanding the exigencies of conflict, the standards of investigation remain high and the investigative duty thus presents a strong mechanism for ensuring individual accountability for rights abuses in conflict.

However, when assessed against comparative institutional approaches to rights violations that have incorporated objectives of victims' needs and restorative justice – namely, comparative human rights law, truth commissions and international criminal law – the procedural duty is deficient in its primary focus on individual accountability. Accordingly, when the duty of effective investigation is considered in relation to the nature of allegations faced in the Iraq investigations, which include "murder, manslaughter, the wilful infliction of serious bodily injury, sexual indignities, cruel, inhuman and degrading treatment and large scale violation of international humanitarian law",[2] I argue that principles of victims' needs and restorative justice have a role to play.

The final part of this paper demonstrates that domestic United Kingdom case law supports a victim-oriented approach to investigating systemic rights violations like those in Iraq. The High Court however rejected a wider model of investigation in *Mousa (No 2)*. This demonstrates the limitations in the extra-territorial application of the procedural duty by domestic courts.

II Previous Investigations and the ECHR's Legal Framework

The claims considered in this paper sit against a detailed factual background and legal framework. In order to adequately consider the procedural duty – its standards, purposes and rationales – in Iraq and against comparative institutional responses to human rights violations, it is necessary to briefly introduce the litigation and other forms of investigation that have preceded the claims in *Mousa (No 2)*.

A An Introduction to the Al-Skeini *and* Mousa *Litigation*

The Iraq investigations owe their existence to two interrelated strands of litigation which originate in the British government's March 2004 announcement that it would not establish

[2] At [4].

independent inquiries into the deaths of 113 Iraqi citizens, killed by British soldiers either during patrol or in detention.[3] In the *Al-Skeini* litigation, relatives of the deceased applied for judicial review of the decision. Six test cases were chosen. Five concerned fatal shootings by soldiers on patrol while the sixth, Mr Baha Mousa, died following severe ill-treatment in British military custody. In 2007 the United kingdom House of Lords held that the ECHR's extra-territorial jurisdiction did not extend to any of the deaths except, following a concession by the Secretary of State, that of Baha Mousa.[4] In July 2011 the ECtHR held in *Al-Skeini v United Kingdom* that the ECHR applied extra-territorially to all the deaths and art 2 required an investigation in each case.[5]

The *Mousa* litigation begins in September 2010, prior to the ECtHR's *Al-Skeini* decision. In *Mousa (No 1)* the claimant, Mr Ali Zaki Mousa, represented 140 Iraqi citizens who alleged gross ill-treatment whilst in British military custody.[6] Prior to commencement of the proceedings, the Government accepted that these allegations raised an arguable case of serious ill-treatment and established IHAT to investigate the claims. *Mousa (No 1)* is the claimants' challenge to the Government's investigative mechanism, IHAT, and an attempt to secure a full public inquiry. In November 2011 the Court of Appeal allowed the application, holding that IHAT lacked sufficient independence. Without determining the necessity of a full public inquiry the Court of Appeal ordered IHAT to be restructured.[7]

Prior to the proceedings in *Mousa (No 2)*, IHAT's task increased immensely as a result of the ECtHR's afore-mentioned judgment in *Al-Skeini v United Kingdom*, which held that the ECHR applied to certain instances of ill-treatment and death allegedly caused by British troops in Basra, Iraq, during the 2003–2009 occupation.[8] IHAT was tasked with investigating these deaths as well as the ill-treatment cases. The number of deaths requiring investigation is estimated at 150 to 160, and those of ill-treatment to be as high as 800.[9]

The High Court's decision in *Mousa (No 2)* and its recently delivered follow-up decision that refines the nature of IHAT's reformed investigations are discussed in detail below.

---

[3] At [10].
[4] *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] AC 153 at [6], [61] and [132].
[5] *Al-Skeini v United Kingdom* (2012) 53 EHRR 18 (Grand Chamber, ECHR).
[6] *R (Mousa) v Secretary of State for Defence* [2010] EWHC 3304 (Admin), [2011] UKHRR 268 [*Mousa* (No 1) (HC)] at [1].
[7] *R (Mousa) v Secretary of State for Defence* [2011] EWCA Civ 1334, [2012] HRLR 6 [*Mousa* (No 1) (CA)].
[8] *Al-Skeini v United Kingdom* (2012) 53 EHRR 18 (Grand Chamber, ECHR).
[9] *Mousa* (No 2), above n 1, at [3].

B Previous Inquiries

In addition to the IHAT investigations, the United Kingdom Government has established two public inquiries into specific incidents that occurred during the British military's time in Basra – the *Baha Mousa Inquiry* and the *Al Sweady Inquiry*. A combination of different types of investigation may satisfy the ECHR's procedural obligation to investigate deaths and ill-treatment.[10] The scope, form and findings of these two inquiries therefore bear on the Government's overall compliance with its procedural obligation in Iraq.

The *Baha Mousa Inquiry* was established in May 2008 to inquire into the circumstances surrounding the death of a hotel receptionist, Mr Baha Mousa, and the treatment of others whilst detained in British custody in Basra, Iraq, in 2003. Its terms of reference additionally focused the inquiry on the particular military united involved in Mr Mousa's death.[11] The inquiry concluded with a three volume report, making 73 recommendations, published in September 2011.[12]

The still on-going *Al Sweady Inquiry* was established to inquire into allegations of ill-treatment and unlawful killings by British soldiers in Majar-al-Kabir, Iraq, in 2004, after the Government conceded it was necessary during judicial review proceedings commenced by the relatives of those detained and allegedly killed and ill-treated by British soldiers.[13] Its terms of reference require investigation into allegations at issue in the judicial proceedings.[14]

C Effective Investigations in the ECHR

This section of the paper provides a general introduction to the obligations imposed by the ECHR's art 2 and 3 procedural duty to effectively investigate certain cases of death and ill-treatment. The practical operation of these standards is then given content by analysis of the duty's application in Northern Ireland, Turkey and Russia in the following section.

---

[10] Discussed below at n 57.
[11] William Gage *The Baha Mousa Public Inquiry Report* (HC 1452–I, 8 September 2011) Vol I, at [1.4]; *Mousa* (No 1) (HC), above n 6, at [20].
[12] William Gage *The Baha Mousa Public Inquiry Report* (HC 1452–III, 8 September 2011) vol III, at 1267–1285. The Report is available at <http://www.bahamousainquiry.org/>
[13] *R (Al Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin), [2010] HRLR 2 at [11]
[14] *Mousa* (No 1) (HC), above n 6, at [24]; see also Thayne Forbes "The Al Sweady Inquiry: Ruling Re: Terms of Reference" (12 March 2013) at [5] available at <http://www.alsweadyinquiry.org/>.

1 Article 2 and 3 Investigations

Article 2(1) of the ECHR provides that "everyone's right to life shall be protected by law."[15] The ECtHR has interpreted these words to impose on states a negative duty to refrain from the unlawful taking of life, and "also to take positive steps to protect the right to life in a variety of ways."[16] The primary, and general, positive obligation imposed on States is one of protection within reasonable means, and the ECtHR states:[17]

> … the first sentence of art 2(1) enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.

States must establish an effective framework of laws, procedures, precautions and enforcement machinery that deters, prevents and sanctions offences against the person.[18] The framework of procedures and enforcement must include, where appropriate, means for criminal prosecution and civil redress.[19]

This expansive obligation arises from the ECtHR's "practical and effective" method of interpreting the ECHR,[20] which aims to ensure the actual protection of ECHR rights and freedoms on the basis that "[s]tates cannot fulfil their duties under the Convention by simply remaining passive."[21] Where a death occurs in circumstances potentially engaging the state's responsibility, art 2 imposes:[22]

---

[15] Convention for the Protection of Human Rights and Fundamental Freedoms CETS 5 (signed 4 November 1950, entered into force 3 September 1953), art 2(1).
[16] *R (Smith) v Secretary of State for Defence* [2010] UKSC 29, [2011] 1 AC 1 at [133].
[17] *Chief Constable of Hertfordshire Police v Van Colle* [2008] UKHL 50, [2009] AC 225 at [28]; *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807 at [19]; *LCB v United Kingdom* (1999) 27 EHRR 212 (ECHR) at [36]; and *Osman v United Kingdom* (1998) 29 EHRR 245 (Grand Chamber, ECHR) at [115].
[18] *R (Smith) v Secretary of State for Defence*, above n 16, at [201]; *R (Humberstone) v Legal Services Commission* [2010] EWCA Civ 1479, [2011] 1 WLR 1460 at [65] and [67]; *Chief Constable of the Hertfordshire Police v Van Colle*, above n 17, at [28]; *R (Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182 at [2]; *Osman v United Kingdom*, above n 17, at [115]; see further Juliet Chevalier-Watts "Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to life or an Onerous Burden on a State?" (2010) 21(3) EJIL 701 at 702.
[19] *R (Smith) v Secretary of State for Defence*, above n 16, at [203] per Lord Mance.
[20] *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653 at [18]; *Salman v Turkey* (2002) 34 EHRR 425 (Grand Chamber, ECHR) at [97]; *Jordan v United Kingdom* (2001) 37 EHRR 52 (Section III, ECHR) at [102]; and *İlhan v Turkey* (2002) 34 EHRR 36 (Grand Chamber, ECHR) at [91].
[21] Alistair Mowbray "The Creativity of the European Court of Human Rights" (2005) 5(1) HRL Rev 57 at 78; see also Chevalier-Watts "Effective Investigations under Article 2 of the European Convention on Human Rights", above n 18, at 703.
[22] *Öneryildiz v Turkey* (2004) 39 EHRR 12 (Grand Chamber, ECHR) at [91].

> … a duty for the state to ensure by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative or administrative framework set up to protect the right to life is properly implement.

This gives rise to the second positive obligation imposed by art 2 – the right to an effective investigation. This procedural obligation is inextricably intertwined with the primary positive obligation to protect. The necessary legal framework must ensure an "independent and impartial investigation procedure that satisfies certain minimum standards as to effectiveness."[23] The ECtHR implied the procedural obligation in the case of *McCann v United Kingdom* (*McCann*) "in order to make sure that [the substantive obligation] is effective in practice".[24] *McCann* concerned the fatal shooting of three terrorist suspects by British military Special Forces in Gibraltar. In reading the procedural duty into art 2, the ECtHR stated:[25]

> … a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life … read in conjunction with the State's general duty under Article 1 … requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the state.

McCann established that alleged violations of the right to life required strict scrutiny and review.[26] This standard of review applied to the procedures and investigation following death, and, as stressed by the ECtHR, the broader circumstances of a death.[27] The procedural obligation is most stringent in circumstances where, like those in the *Mousa* litigation, persons

[23] *Öneryildiz v Turkey*, above n 22, at [94]; *Jordan v United Kingdom*, above n 20, at [105]–[109]; and *Edwards v United Kingdom* (2002) 35 EHRR 487 (Section III, ECHR) at [69]–[71].
[24] *McCann v United Kingdom* (1995) 21 EHRR 97 (Grand Chamber, ECHR) at [161]; See generally *Al-Skeini v United Kingdom*, above n 5, at [163]; *R (Smith) v Secretary of State for Defence*, above n 16, at [200] per Lord Mance; *R (Middleton) v West Somerset Coroner*, above n 18, at [5].
[25] *McCann v United Kingdom*, above n 24, at [161].
[26] Fionnuala Ni Aolain "Truth telling, accountability and the right to life in Northern Ireland" (2002) 5 EHRLR 572 at 577.
[27] At 577.

have been killed by state agents' use of force.[28] The essential purpose of investigation, as commonly phrased by the ECtHR, is to:[29]

> … secure the effective implementation of the domestic laws safeguarding the right to life, and in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.

In order to be considered effective, the investigation must be "capable of leading to the determination of whether the particular force used was or was not justified in the circumstances and to the identification and punishment of those responsible."[30] This includes the existence of justification for an individual state agent's use of force, to responsibility for any systemic failure to protect life.[31] Defects that undermine the capacity for identification of the responsible parties breach this standard.[32]

Article 3 also imposes an obligation to ensure that there is an effective, prompt and independent investigation into claims of ill-treatment in violation of art 3. As with the procedural duty under art 2, the ECtHR implied this obligation by interpreting art 3 in conjunction with the obligation owed by States in art 1 to "secure to everyone within [their] jurisdiction" ECHR rights.[33] Equally, an investigation under art 3 must be:[34]

> … capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.

---

[28] *McCann v United Kingdom*, above n 24, at [161].
[29] *Al-Skeini v United Kingdom*, above n 5, at [163]; *Nachova v Bulgaria* (2006) 42 EHRR 43 (Grand Chamber, ECHR) at [110]; and *Jordan v United Kingdom*, above n 20, at [105].
[30] *Ramsahai v Netherlands* (2008) 46 EHRR 43 (Grand Chamber, ECHR) at [321]; and *Nachova v Bulgaria*, above n 29, at [113].
[31] *R (Hurst) v Commissioner of Police of the Metropolist* [2007] UKHL 726, [2007] 2 WLR 726 at [28].
[32] *Al-Skeini v United Kingdom*, above n 5, at [166]; *Bazorkina v Russia* (69481/01) Section I, ECHR 26 July 2006 at [118].
[33] *Özkan v Turkey* (21689/93) Section II, ECHR 6 April 2004 at [358].
[34] *Assenov v Bulgaria* (1999) 28 EHRR 652 (ECHR) at [102].

A failure to undertake an investigation where a claimant raises an arguable case of ill-treatment breaches art 3.[35] Though the ECtHR has indicated investigations into allegations of ill-treatment fall to be dealt with under art 13, the ECHR's remedial provision,[36] more recently the ECtHR has applied a similar scope to the investigative duties under articles 2 and 3.[37] Accordingly, the essential requirements of an ECHR compliant effective investigation under arts 2 and 3 are the same.[38]

In order to be considered effective an investigation must satisfy a number of criteria. Once aware of a death falling within art 2 or arguable ill-treatment in breach of art 3, state authorities must proactively investigate and cannot wait for next of kin to request investigation.[39] That investigation must be reasonably expeditious and prompt.[40] More broadly, the legal system must operate expeditiously in practice so that the courts may complete a timely examination of each case's individual merits.[41] The reasonable expedition requirement is vital to both ensuring public confidence in state authorities' compliance with the rule of law and in order to preclude the perception of State tolerance of or collusion in unlawful acts.[42]

The body responsible for the investigation must be independent of the persons involved in the death.[43] This entails institutional, hierarchical and practical independence.[44] The ECtHR has held this standard to have been breached where, for instance, an investigation is carried out by the colleagues of the implicated party.[45] Independent supervision of such an investigation is also insufficient.[46]

---

[35] *Selmouni v France* (2000) 29 EHRR 403 (Grand Chamber, ECHR) at [79]; see also Richard Clayton and Hugh Tomlinson (eds) *The Law of Human Rights* (2nd ed, Oxford University Press, Oxford) vol 1 at [8.74]–[8.76].
[36] *İlhan v Turkey*, above n 20, at [92]–[93].
[37] David Harris and others (eds) *Law of the European Convention on Human Rights* (2nd ed, Oxford University Press, Oxford, 2009) at 109–110.
[38] *DJ v Croatia* (42418/10) Section I, ECHR 24 July 2012 at [85]; *Mousa (No 1)* (CA), above n 7, at [12]–[13].
[39] *Jordan v United Kingdom*, above n 20, at [105]; *Edwards v United Kingdom*, above n 23, at [69].
[40] *Al-Skeini v United Kingdom*, above n 5, at [167]; *Isayeva v Russia* (2005) 41 EHRR 38 (Section I, ECHR) at [213].
[41] *Calvelli v Italy* (32967/96) Grand Chamber, ECHR 17 January 2002 at [53].
[42] *Isayeva v Russia*, above n 40 at [213]; *Jordan v United Kingdom*, above n 20, at [213].
[43] *Bazorkina v Russia*, above n 32, at [118]; *Nachova v Bulgaria*, above n 29, at [112].
[44] *Al-Skeini v United Kingdom*, above n 5, at [167]; *Ramsahai v Netherlands*, above n 30, at [325]; *McKerr v United Kingdom* (2002) 24 EHRR 20 (Section III, ECHR) at [128].
[45] *Ramsahai v Netherlands*, above n 30, at [337].
[46] *Ramsahai v Netherlands*, above n 30, at [337]; *McKerr v United Kingdom*, above n 44, at [128].

The investigative duty is an obligation of means, not result, and its content varies according to circumstance.[47] State authorities must take steps reasonably open to them to secure relevant evidence.[48] This includes "eye-witness 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 cause of death."[49]

All this must occur by means of a public investigation that is subject to sufficient public scrutiny.[50] As with the other standards of investigation, this requirement is to ensure public confidence in state agents' adherence to the rule of law and provide accountability not only in theory, but practice.[51] The requisite level of public scrutiny varies with circumstance, but must preclude the risk of a cover-up by state authorities.[52] Additionally, next of kin must be involved in the processes of investigation to the "extent necessary to safeguard his or her legitimate interests".[53] This can include access to the investigation and court documents or notification of decisions whether to prosecute,[54] or access to investigation files and provision of a reasoned decision following appeal proceedings where the decision to not prosecute the Police officer responsible for a death is challenged.[55]

These minimum standards allow a degree of flexibility.[56] In addition, when the procedural obligation is triggered, it is wise to keep in mind that it may be satisfied by different forms of investigation – including inquests, public inquiry and criminal proceedings, whether alone or in combination – so long as these minimum standards are met.[57] These are the minimum standards of investigation. The next part of this paper examines these standards in practice where the investigation duty has been applied to deaths and ill-treatment during conflict.

---

[47] *Al-Skeini v United Kingdom*, above n 5, at [166]; *Ramsahai v Netherlands*, above n 30, at [324]; *R (Goodson) v HM Coroner for Bedfordshire & Luton* [2004] EWHC 2931 (Admin), [2006] 1 WLR 432 at [59(iv)].
[48] *Bazorkina v Russia*, above n 32, at [118].
[49] *Al-Skeini v United Kingdom*, above n 5, at [166].
[50] *Ramsahai v Netherlands*, above n 30, at [321]; *Nachova v Bulgaria*, above n 29, at [140]; *Isayeva v Russia*, above n 40, at [213].
[51] *Ramsahai v Netherlands*, above n 30, at [321] and [353]; *Nachova v Bulgaria*, above n 29, at [140].
[52] *Ramsahai v Netherlands*, above n 30, at [354].
[53] *Jordan v United Kingdom*, above n 18, at [109].
[54] At [109].
[55] *Ramsahai v Netherlands*, above n 30, at [354].
[56] *R (D) v Secretary of State for the Home Department* [2006] EWCA Civ 143, [2006] 3 All ER 946 at [10]; *R (Goodson) v HM Coroner for Bedfordshire & Luton*, above n 47, at [68].
[57] *R (Smith) v Secretary of State for Defence*, above n 16, at [205].

III The Procedural Duty at War

The investigative duty is born out of conflict. *McCann* concerned the deaths of Irish Republican Army members in Gibraltar. Much of Strasbourg's jurisprudence concerning the procedural duty concerns anti-insurgency operations conducted by military and security forces in Russia, Turkey and Northern Ireland. This section demonstrates that, notwithstanding the exigencies of conflict, the standard of investigation required by arts 2 and 3 remains high.

A Investigations in Northern Ireland

The key Northern Ireland cases are a quintet concerning alleged violations of art 2 by Police and Military forces in the 1980s. In each of the four joined cases – *Jordan*, *Kelly*, *McKerr* and *Shanaghan v United Kingdom* – the ECtHR applied the same procedural standards and unanimously held that the deceased's right to life had been violated by the state's failure to conduct an effective investigation.[58]

In each case the ECtHR criticised pervasive defects in Northern Ireland's institutional processes for the investigation of deaths. The initial Police investigations into each death lacked independence.[59] The Director of Public Prosecution's decisions to refrain from prosecution, based on defective Police investigations, were thus tainted and made without public scrutiny.[60] Subsequent inquests were also defective in many respects. Individually and collectively these procedural elements failed to satisfy art 2.

The ECtHR severely criticised the Coroner's inquest procedure in each case. Inquests were delayed,[61] one for ten years before its ultimate abandonment.[62] The inability to compel testimony by responsible officers prevented determination of the facts and legality of the use

[58] *Jordan v United Kingdom*, above n 20, at [105]–[109]; *McKerr v United Kingdom*, above n 44, at [111]–[115]; *Kelly v United Kingdom* (30054/96) Section III, ECHR 4 May 2001 at [91]–[98]; *Shanaghan v United Kingdom* (37715/97) Section III, ECHR 4 May 2001 at [88]–[92]; See generally Fionnuala Ni Aolain "Truth telling, accountability and the right to life in Northern Ireland", above n 26, at 572–590.
[59] *Jordan v United Kingdom*, above n 20, at [120]; *Kelly v United Kingdom*, above n 58, at [114]–[115]; *McKerr v United Kingdom*, above n 44, at [128]; *Shanaghan v United Kingdom*, above n 58, at [105].
[60] *Jordan v United Kingdom*, above n 20, at [122]–[124]; *Kelly v United Kingdom*, above n 58, at [116]–[118]; *McKerr v United Kingdom*, above n 44, at [130]–[132]; *Shanaghan v United Kingdom*, above n 58, at [108].
[61] *Jordan v United Kingdom*, above n 20, at [140]; *Kelly v United Kingdom*, above n 58, at [134]; *Shanaghan v United Kingdom*, above n 58, at [119].
[62] *McKerr v United Kingdom*, above n 44, at [152]–[155].

of force.[63] Victim's families were not provided legal aid or witness statements, preventing their effective participation.[64] Finally, inquests could not provide a verdict of "unlawful death", which would require the DPP to reconsider their decision not to prosecute, precluding any contribution to the "identification or prosecution of any criminal offences".[65]

The ECtHR affirmed the wider object of procedural protection – requiring processes that protect and ensure rights – inherent in the procedural duty. In *McKerr v United Kingdom*, forced delays and attempts to conceal information cast legitimate doubt on the process's integrity, from investigation to trial.[66] In such cases, art 2 demanded wider scrutiny of these matters to ensure the criminal trial had not been undermined.[67] Breach of the procedural duty followed where the successive inquest could not assess these wider matters.[68]

In all cases the ECtHR lamented the pernicious effect the climate of closed justice which engendered these defects had on the procedural duty's broader rationales. Procedural ineffectiveness and opacity obstructed the object of defusing public perception of state agents' impunity.[69] Inquests could not examine credible allegations of collusion between security forces and state agents.[70] Non-disclosure of the reasons for deciding killings were lawful undermined public confidence in state authorities' adherence to the rule of law.[71] Overall, the institutional structure, antithetical to aims of open justice, lacked the capacity to "safeguard against the dangers of introspective investigations leading to secret reports."[72]

The ECtHR used this jurisprudence to emphasise the importance of four principles that carry through the case-law: expediency, independence, official sanction and openness.[73] Each goes to the investigative duty's role in ensuring public confidence in state accountability,

---

[63] *Jordan v United Kingdom*, above n 20, at [127]; *Kelly v United Kingdom*, above n 58, at [137]; and *McKerr v United Kingdom*, above n 44, at [144].
[64] *Jordan v United Kingdom*, above n 20, at [134]; *McKerr v United Kingdom*, above n 44, at [147]–[148]; and *Shanaghan v United Kingdom*, above n 58, at [117].
[65] *Jordan v United Kingdom*, above n 20, at [129]–[131]; *Kelly v United Kingdom*, above n 58, at [123]–[124]; *McKerr v United Kingdom*, above n 44, at [145]; and *Shanaghan v United Kingdom*, above n 58, at [113].
[66] *McKerr v United Kingdom*, above n 44, at [127] and [128].
[67] At [137].
[68] At [143].
[69] *Jordan v United Kingdom*, above n 20, at [144].
[70] *Shanaghan v United Kingdom*, above n 58, at [111].
[71] *Jordan v United Kingdom*, above n 20, at [124]; *McKerr v United Kingdom*, above n 44, at [157]; and *Shanaghan v United Kingdom*, above n 58, at [108].
[72] Alistair Mowbray *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, Oxford, 2004) at 38.
[73] Chevalier-Watts "Effective Investigations under Article 2 of the European Convention on Human Rights", above n 20, at 713.

adherence to the rule of law, and state authorities' use of lethal force. Finally, emergency circumstances did not alter the ECtHR's application of the investigative duty. Conversely, the ECtHR criticised the precise procedural elements that had been created to respond to the exigencies of the Northern Ireland conflict. Implicit in the ECtHR's approach is that, notwithstanding the difficulties presented by internal armed conflict, "general principles of accountability could not be disregarded."[74]

B Inadequate Investigations in South-East Turkey

The ECtHR's jurisprudence on Turkey provides further insight into the standards of investigation that must be met when a state's armed forces cause civilian deaths. Emerging from the conflict between paramilitary forces and the State in South-Eastern Turkey in the 1990s, in these cases, the ECtHR has considered factual circumstances ranging from killings during violent protests,[75] to large-scale military assaults.[76] As in Northern Ireland, a significant characteristic of these cases is the ECtHR's refusal to dilute the standards of effective investigation in light of the frequency of armed clashes and high number of fatalities.[77]

In this jurisprudence's formative case, *Kaya v Turkey*, there was insufficient evidence before the ECtHR to establish that the applicant's brother had been unlawfully killed by Turkish security forces during military operations.[78] Notwithstanding, the ECtHR found the brother's right to life had been violated for lack of an effective investigation into his death.[79] Conceptually, and as elaborated below, this is significant for the retrospective manner it secures the victim's substantive right to life.[80] For present purposes, *Kaya v Turkey's* significance lies in the ECtHR's reception of the Government's submission that the requirements of investigation could "legitimately be reduced to a minimum" because it was plain the brother's death was a result of the security forces lawful use of force during military operations.[81] In unequivocal terms the ECtHR rejected this submission and asserted the importance of investigation for ensuring the procedural protection of the right to life and the

[74] Aolain "Truth telling, accountability and the right to life in Northern Ireland", above n 58, at 585.
[75] *Gülec v Turkey* (1998) 28 EHRR 121 (ECHR).
[76] *Özkan v Turkey*, above n 33, at [8].
[77] *R (Al-Skeini) v Secretary of State for Defence* [2005] EWCA Civ 1609, [2007] QB 140 at [136] per Brooke LJ; See generally *Gülec v Turkey*, above n 75, at [81].
[78] *Kaya v Turkey* (1998) 28 EHRR 1 (ECHR) at [78].
[79] At [92].
[80] See below n 146.
[81] *Kaya v Turkey*, above n 78, at [82].

accountability of state agents.[82] Regarding the Government's submission seeking the dilution of the investigative obligation to accommodate difficult security situations, the ECtHR stated:[83]

> … neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under art 2 to ensure that an effective, independent investigation is conducted into the 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.

The ECtHR accordingly held that the public prosecutor's unquestioning acceptance of the military's explanation that the brother was a terrorist, failure to take statements from relevant soldiers, collect scene evidence, and conduct an autopsy led to a violation of art 2.[84]

In subsequent cases, and applying the standard principles and purposes of the investigative duty,[85] the ECtHR has affirmed that the prevalence of armed conflict in South-East Turkey did not preclude the duty to investigate killings and ill-treatment.[86] In this jurisprudence the ECtHR has criticised the investigating Public prosecutor's subservience to state agents' explanations for killings and ill-treatment,[87] failure to even consider possible State agent involvement and responsibility for killings,[88] and lack of independent capacity to initiate prosecutions.[89] The ECtHR has found repetitive failures to identify and interview state agents responsible for killings,[90] as well as to conduct ballistics tests and autopsies.[91] Administrative investigations were found to be equally defective. Lacking institutional independence from the security forces being investigated,[92] they similarly failed to conduct necessary autopsies or

---

[82] At [87].
[83] At [91].
[84] At [88]–[90].
[85] *Özkan v Turkey*, above n 33, at [309]–[314] and [358]; *Oğur v Turkey* (2001) 31 EHRR 40 (Grand Chamber, ECHR) at [88]; and *Ergi v Turkey* (2001) 32 EHRR 18 (ECHR) at [82].
[86] *Özkan v Turkey*, above n 76, at [319] and [334]; *Salman v Turkey* (2002) 34 EHRR 17 (Grand Chamber, ECHR) at [104]; *Ergi v Turkey*, above n 85, at [85]; *Tanrikulu v Turkey* (2000) 30 EHRR 950 (Grand Chamber, ECHR) at [110]; *Gülec v Turkey*, above n 75, at [81]; See generally Carla Buckley "The European Convention on Human Rights and the Right to Life in Turkey" (2001) 1(1) HRL Rev 35.
[87] *Özkan v Turkey*, above n 33, at [327]; *Ergi v Turkey*, above n 85, at [83]; and *Gülec v Turkey*, above n 75, at [79].
[88] *Yasa v Turkey* (1999) 28 EHRR 408 (ECHR) at [105].
[89] *Gülec v Turkey*, above n 75, at [80].
[90] *Özkan v Turkey*, above n 33, at [317]; *Ergi v Turkey*, above n 85, at [83]; and *Oğur v Turkey*, above n 85, at [90].
[91] *Salman v Turkey*, above n 86, at [106]; *Oğur v Turkey*, above n 85, at [89]; and *Gülec v Turkey*, above n 75, at [79].
[92] *Oğur v Turkey*, above n 85, at [91].

ballistics tests,[93] question members of security forces involved in operations or investigate clear circumstances of ill-treatment by security forces.[94] Regarding victim participation, victims and their relatives have not been provided with case files and excluded from judicial proceedings, precluding their ability to appeal adverse civil claims.[95] Finally, the ECtHR found violations of the right to an effective investigation under art 13 where defective criminal investigations rendered recourse to civil remedies equally ineffective.[96]

In these cases the ECtHR's scrutiny has extended to criticism of failures to investigate whether military operations had been properly conducted,[97] to soldier's failures to verify civilian casualties following operations.[98] Most significantly, the ECtHR rejected the Government's submissions for a weakened standard of investigation during conflict, stating that such an approach "would exacerbate still further the climate of impunity and insecurity in the region and thus create a violent circle."[99] However, this jurisprudence has also elicited criticism of the ECtHR that, "One of the ECtHR's weaknesses has been its lack of attention to the truth and acknowledgement in its approach to remedies … international organisations should have insisted on public acknowledgement of state violence."[100] Both of these elements, a strong approach to ensuring investigations capable of determining individual accountability for violations of arts 2 and 3, but a failure to consider wider victim-friendly objectives, carry through the ECtHR's case law, and are considered below in relation to comparative institutional responses to human rights violations in conflict.

The ECtHR's approach in this case-law from Turkey has especially influenced the next body of procedural duty case law considered, that concerning allegations of arts 2 and 3 violations by Russian military forces in Chechnya.[101]

C Ineffective Investigations in the Land of Minerals

The Russian cases concern the second civil war in Chechnya, which began in October 1999 between Russian military forces and Chechen rebel forces of the separatist regime established

[93] At [90].
[94] *Özkan v Turkey*, above n 33, at [360]; *Oğur v Turkey*, above n 85, at [90].
[95] *Oğur v Turkey*, above n 85, at [92].
[96] *Salman v Turkey*, above n 86, at [123].
[97] *Ergi v Turkey*, above n 85, at [89].
[98] *Özkan v Turkey*, above n 76, at [307].
[99] *Yasa v Turkey*, above n 88, at [104].
[100] Ilias Bantekas and Lutz Oette *International Human Rights: Law and Practice* (Cambridge University Press, New York, 2013) at 234.
[101] At 237.

following the First Chechen War in 1996.[102] This jurisprudence further develops the principles applied in the ECtHR's Turkish case law.

The ECtHR has considered incidents of Russian military forces extra-judicially executing applicants' family members during military operations. [103] It has also heard a claim involving the Russian air force's indiscriminate bombing of civilian vehicle convoys following the military's promise it would allow civilians safe passage.[104] Similarly the ECtHR has heard claims concerning the bombing of civilians as they attempted to escape their villages along a nearby roadway.[105] Other aspects of the conflict considered include the targeted abduction of individuals from their homes, the security forces' use of shelling and bombing, and large-scale "sweeping up" operations where civilians were killed or detained during purported searches for insurgents.[106]

In these cases the ECtHR has acknowledged the Russian authorities' right to respond to the emergency situation, commonly commenting to the effect:[107]

> … that the situation that existed in Chechnya at the relevant time called for exceptional measures by the State in order to regain control over the Republic and to suppress the illegal armed insurgency.

Nevertheless, in the absence of an express derogation from the ECHR under art 15 or declaration of martial law by the Russian Government, the ECtHR has assessed Russian military operations in Chechnya "against the normal legal background."[108] As such, the ECtHR has assessed the investigations undertaken by the Russian authorities, or lack of, against the procedural duty's conventional purposes and standards.[109] In relation to the difficulties imposed by conflict, the ECtHR has commonly noted that though various obstacles may be presented to investigating authorities, a prompt investigation into the "use of lethal force may generally be regarded as essential in ensuring public confidence in the

[102] Joseph Barrett "Chechnya's Last Hope? Enforced Disappearances and the European Court of Human Rights" (2009) 22 Harv Hum Rts J 133 at 133.
[103] *Khashiyev and Akayeva v Russia* (2006) 42 EHRR 20 (Section I, ECHR) at [13]–[27].
[104] *Isayeva, Yusupova and Bazayeva v Russia* (2005) 41 EHRR 39 (Section I, ECHR) at [13]–[34].
[105] *Isayeva v Russia*, above n 40, at [17].
[106] See Philip Leach "The Chechen conflict: analysing the oversight of the European Court of Human Rights" (2008) 6 EHRLR 732–761 at 733.
[107] *Kerimova v Russia* (17170/04) Section I, ECHR 3 May 2011 at [246]; *Isayeva, Yusupova and Bazayeva v Russia*, above n 104, at [180]; and *Isayeva v Russia*, above n 40, at [180].
[108] *Isayeva, Yusupova and Bazayeva v Russia*, above n 104, at [191].
[109] *Kerimova v Russia*, above n 107, at [263]; *Khashiyev and Akayeva v Russia*, above n 103, at [153]; *Isayeva, Yusupova and Bazayeva v Russia*, above n 104, at [209]; *Isayeva v Russia*, above n 40, at [213].

maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."[110]

Applying these principles the ECtHR has consistently and trenchantly criticised the processes of investigation open to victims of the Chechen conflict and frequently found violations of the procedural duty's various standards.[111] The ECtHR has criticised frequent and extensive delays in commencing investigation, ranging from five days to three to eight months to eight years.[112] The ECtHR has found consistent failures by investigating authorities to identify the military units involved in, let alone responsible for, killings, as well as to obtain the military plans for operations conducted in particular areas.[113] Investigating authorities frequently failed to identify or question other victims and witnesses,[114] order autopsies or medical examinations where appropriate,[115] or make contact with, grant victim status to or notify complainants of investigative developments.[116] Frequently, investigations were closed and re-opened, or transferred between different state prosecutors without the applicants' knowledge, undermining the ability of victims and family to appeal the decisions to close or re-open investigations.[117] Investigations commonly failed to address matters essential to the question of whether particular killings were justified or lawful, including in one case the Russian military's promise of safe passage to civilians prior to attack,[118] and in another the credible allegation that civilians were deliberately targeted for attack by soldiers.[119] Finally, because Russian courts are reliant on the findings of criminal investigations to determine claims and identify responsible parties in civil claims,[120] the ECtHR also found violations of art 13 with

[110] *Kerimova v Russia*, above n 107, at [265]; *Khashiyev and Akayeva v Russia*, above n 103, at [155].
[111] *Isayeva, Yusupova and Bazayeva v Russia*, above n 104, at [225]; *Isayeva v Russia*, above n 40, at [217].
[112] *Musayeva v Russia* (12703/02) Section I, ECHR 3 July 2008 at [112]; *Betayev and Betayeva v Russia* (37315/03) Section I, ECHR 29 May 2008 at [85]; *Khashiyev and Akayeva v Russia*, above n 103, at [157]; and *Isayeva, Yusupova and Bazayeva v Russia*, above n 104, at [218]; *Isayeva v Russia*, above n 105, at [217].
[113] *Musayeva v Russia*, above n 112, at [113]; and *Khashiyev and Akayeva v Russia*, above n 103, at [159].
[114] *Goncharuk v Russia* (58643/00) Section I, ECHR 4 October 2007 at [69]; *Khashiyev and Akayeva v Russia*, above n 103, at [160]; and *Isayeva, Yusupova and Bazayeva v Russia*, above n 104, at [224]
[115] *Chitayev and Chitayev v Russia* (59334/00) Section I, ECHR 18 January 2007 at [165]; *Estamirov v Russia* (60272/00) Section I, ECHR 12 October 2006 at [91];and *Khashiyev and Akayeva v Russia*, above n 103, at [163].
[116] *Akhmadova and Sadulayeva v Russia* (40464/02) Section I, ECHR 10 May 2007 at [104]; *Estamirov v Russia*, above n 115, at [92] and [94]; and *Isayeva, Yusupova and Bazayeva v Russia*, above n 104, at [224].
[117] *Akhmadova and Sadulayeva v Russia*, above n 116, at [104]; *Estamirov v Russia*, above n 115, at [93]; *Betayev and Betayeva v Russia*, above n 112, at [89]; and *Khashiyev and Akayeva v Russia*, above n 103, at [164].
[118] *Isayeva, Yusupova and Bazayeva v Russia*, above n 104, at [222].
[119] *Isayeva v Russia*, above n 40, at [220]–[221].
[120] *Akhmadova and Sadulayeva v Russia*, above n 116, at [77]–[78]; *Estamirov v Russia*, above n 115, at [77]; *Khashiyev and Akayeva v Russia*, above n 103, at [119]–[121].

routine frequency on the basis that any remedy available in the civil courts was precluded by the defective criminal investigations.[121]

Overall, the ECtHR has been severely critical of the absence of adequate investigation into credible claims of ill-treatment, kidnappings, disappearances and extra-judicial executions,[122] even noting that the "phenomenon of 'disappearances' is well known in Chechnya".[123] Though the ECtHR's findings must be considered with regard to the systemic unwillingness of Russian authorities to investigation human rights abuses,[124] the ECtHR's tenacity demonstrates "a particularly thorough scrutiny even if domestic investigations and proceedings have already taken place."[125] Furthermore, in the cases the ECtHR has maintained a particular stress on the importance of effective criminal proceedings as a means to fulfilling the purposes of the procedural duty and countering impunity,[126] confirming, for one commentator at least, that "criminal proceedings would appear to constitute *par excellence* the most appropriate remedy for satisfying the procedural requirements".[127]

The above jurisprudence from Northern Ireland, Turkey and Chechnya demonstrates that the duty of effective investigation is a mechanism by which strong judicial scrutiny may be applied to the manner a state investigates and ensures accountability for rights violations.

D Al-Skeini v United Kingdom

Al-Skeini v United Kingdom forms a perhaps obvious but fitting coda to the ECtHR's jurisprudence on the application of the duty of effective investigation during conflict. *Al-Skeini* is particularly significant because the ECtHR applied the above jurisprudence, developed in cases of *internal* conflict, to the extra-territorial circumstances of Iraq.

In *Al-Skeini*, and following its holding on the issue of extra-territoriality, the ECtHR found that the United Kingdom had violated its art 2 duty to effectively investigate each death in the

[121] *Khashiyev and Akayeva v Russia*, above n 103, at [185].
[122] Leach "The Chechen conflict: analysing the oversight of the European Court of Human Rights", above n 106, at 750; *Akhmadova and Sadulayeva v Russia*, above n 116, at [105].
[123] *Kaykharova v Russia* (11554/07) Section I, ECHR 1 August 2013 at [141]; *Akhmadova and Sadulayeva v Russia*, above n 116, at [105].
[124] Leach "The Chechen conflict: analysing the oversight of the European Court of Human Rights", above n 106, at 755.
[125] Barrett "Chechnya's Last Hope? Enforced Disappearances and the European Court of Human Rights", above n 102 at 136.
[126] *Khashiyev and Akayeva v Russia*, above n 103, at [121]; *Isayeva v Russia*, above n 105, at [157]; *Akhmadova and Sadulayeva v Russia*, above n 116, at [106].
[127] Francoise Tulkens "The Paradoxical Relationship between Criminal Law and Human Rights" (2011) 9 JICJ 577 at 591.

six test cases chosen, excepting Baha Mousa, whose death was now the subject of the *Baha Mousa Inquiry*.[128] The ECtHR held that, notwithstanding the difficult security conditions presented by occupied Iraq "during a period when crime and violence were endemic" the procedural duty demanded all reasonable steps to undertake an investigation capable of identifying those responsible for killings and the legality of their use of force.[129] The procedural duty's essential purpose and requirement of adequate scope to consider broader issues of planning and operational control continued to apply.[130]

In applying these principles, the ECtHR held that British military's investigations into the cases of fatal shooting by British soldiers on patrol lacked institutional and operation independence from the military chain of command and failed to investigate whether the military had taken steps to safeguard civilians in the patrolled areas.[131] In one case the investigation had failed to question the soldier responsible for the killing and then closed before completion.[132] In the fifth applicant's case, whose 15-year old son was allegedly drowned by British soldiers, the delay between the investigation and court-martial rendered the investigation ineffective, and the narrow focus of the criminal proceedings failed to consider, as required by art 2, "broader issues of State responsibility for the death, including the instructions, training and supervision given to soldiers."[133] In conclusion the ECtHR awarded declaratory relief and compensation but, following its general principle that states remain free to determine their method of compliance with ECtHR judgments, declined to order the United Kingdom to initiate fresh investigations into each death.[134]

Strasbourg's jurisprudence thus demonstrates that, notwithstanding the exigencies of armed conflict, thorough and effective investigations are required by arts 2 and 3 into allegations of killings and ill-treatment and, where applicable, wider matters of military operational planning, execution and control.[135] This conclusion is drawn from the ECtHR's application in *Al-Skeini* of the principles of effective investigation developed in cases from Russia, Turkey

[128] *Al-Skeini v United Kingdom*, above n 5, at [176] and [177].
[129] At [161] and [164]–[166].
[130] At [163].
[131] At [171]–[172].
[132] At [173].
[133] At [174].
[134] At [181]–[182].
[135] *R (Smith) v Secretary of State for Defence*, above n 16, at [80], [145] and [196]; Mowbray *The Development of Positive Obligations under the European Convention on Human Rights*, above n 72, at 40.

and Northern,[136] jurisprudence which itself demonstrates that the standards of investigation are not diluted for the exigencies of conflict.[137]

In these circumstances the primary purpose of investigation remains the identification and, where possible, punishment of responsible parties and the provision of adequate procedural mechanisms to hear individual's claims.[138] This evinces a primary focus on justice as individual accountability informed by rationales of prevention and deterrence. As an element of the state's art 1 obligation to respect and ensure,[139] the procedural duty serves "an essential public function" to "deter future violations and uphold the rule of law",[140] (hopefully) restraining state authorities' abuse of power by the knowledge that their conduct will be subject to "rigorous investigations and prosecutions in the criminal courts."[141]

I would argue that, based on the standards and purposes of investigation maintained in this jurisprudence, the investigative duty's extra-territorial application is a positive development in terms of ensuring individual accountability for rights violations committed by British soldiers in Iraq and, potentially, preventing future abuses. At the same time, the mechanism lacks a victim-focused orientation present in comparative institutional responses to rights violations. To illustrate this argument, and before undertaking this comparison, it is first necessary to provide the investigative duty's conceptual basis.

E Conceptualising the Right to Effective an Investigation

The afore-mentioned public function segues nicely into the procedural duty's first conceptual justification – as an emanation of the State's substantive duty to protect. This imports the notion of procedural protection, under which the legal processes of investigation and prosecution must effectively secure the rights in arts 2 and 3.[142] The breadth of this concept

---

[136] *Al-Skeini v United Kingdom*, above n 5, at [162]–[167], referring to, for example, *McCann v United Kingdom*, above n 24; *Jordan v United Kingdom*, above n 20; *Özkan v Turkey*, above n 33; *Gülec v Turkey*, above n 75; *Bazorkina v Russia*, above n 32; *Khashiyev v Russia*, above n 103.
[137] Mowbray *The Development of Positive Obligations under the European Convention on Human Rights*, above n 72, at 40.
[138] *Isayeva v Russia*, above n 40, at [223].
[139] *McCann v United Kingdom*, above n 24, at [161]; *Al-Skeini v United Kingdom*, above n 5, at [163]; Compare *Velásquez-Rodriguez v Honduras (Merits)* (1988) Inter-Am Ct HR (Ser C) 29 July 1988 at [166]–[167] .
[140] Thomas M Antkowiak "An Emerging Mandate for International Court: Victim-Centred Remedies and Restorative Justice" (2011) 47 Stan J Int'l L 279–332 at 303.
[141] Mowbray *The Development of Positive Obligations under the European Convention on Human Rights*, above n 72, at 40.
[142] Anja Seibert-Fohr *Prosecuting Serious Human Rights Violations* (Oxford University Press, New York, 2009) at 117; See also *Öneryildiz v Turkey*, above n 22, at [95].

can be seen in the Northern Ireland cases above, where the ECtHR found a violation of art 2 when early defects – collusion and secrecy – corrupted the entire process of investigation.[143] In this protective guise, the procedural duty serves a public interest by securing the enforcement of laws protecting the afore-mentioned rights.[144]

Conversely, by its second conceptual justification the procedural duty protects individual interest and in this regard is distinctly remedial. This is illustrated in two respects. The first is in cases where the investigative duty arises though the substantive right has not been breached,[145] for instance in cases like *Kaya v Turkey* where insufficient evidence prevents determination of a killing's legality.[146] In these cases the procedural duty retrospectively secures the victim's substantive right, reflecting the notion that, in circumstances where prosecution is not possible, the duty to investigate "functions as a surrogate for the duty not to take life unlawfully."[147]

Second, and perhaps unsurprisingly, the procedural duty's remedial function is by way of art 13 – the ECHR's remedial provision. In cases of arguable violation of arts 2 and/or 3, art 13 requires:[148]

> … in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.

This wording reflects the procedural obligation's essential purpose under arts 2 and 3.[149] While the ECtHR has commonly stated the investigative duty in art 13 is "broader", it had provided little clarification otherwise.[150] Additionally, the ECtHR often foregoes separate analysis of art 13 and finds concurrent violations of the duty to investigate in arts 2 and/or 3

[143] Discussed above n 66.
[144] Seibert-Fohr *Prosecuting Serious Human Rights Violations*, above n 142, at 131.
[145] *Ramsahai v Netherlands*, above n 30, at [363]; *Tanrikulu v Turkey*, above n 86, at [111].
[146] *Kaya v Turkey*, above n 78, at [78].
[147] Seibert-Fohr *Prosecuting Serious Human Rights Violations*, above n 142, at 129; see also Neil Martin "*Bubbins v United Kingdom*: Civil Remedies and the Right to Life" (2006) 69(2) MLR 242–261 at 247.
[148] *Isayeva v Russia*, above n 105, at [226]–[227]; *Aksoy v Turkey* (1996) 23 EHRR 553 (ECHR) at [98]; *Kaya v Turkey*, above n 78, at [107].
[149] *McCann v United Kingdom*, above n 24, at [163]–[164]; and *Assenov v Bulgaria*, above n 34, at [102].
[150] *Ergi v Turkey*, above n 85, at [98]; *Kaya v Turkey* (1998) at [107]; see also *Jordan v United Kingdom*, above n 20, at [160] and *Kelly v United Kingdom*, above n 44, at [154].

and art 13.[151] As one commentator has noted, the absence of distinction rests on the general principle that violations of ECHR rights require access to an effective remedy.[152]

However, this conceals the limited nature of the duty's remedial character, which itself stems from the ECtHR's overall limited remedial approach, characterised by one commentator as "cost-centred".[153] At base, the right to an effective remedy is treated as procedural, rather than substantive, such that the ECtHR focuses on "the right to access a remedy rather than taking a position on what constitutes an effective remedy."[154] This approach distinguishes the right to an effective remedy from the right to reparation, and entails the:[155]

> … procedural right of any person claiming that his or her human rights have been violated to access to national and any available international procedures that might provide redress against past violations and protection against future violations.

This approach is reflected in the ECtHR's awards of reparation under art 41 of the ECHR, which operations in conjunction with art 13,[156] and allows the ECtHR to award "just satisfaction" to applicants whose rights have been violated. Under art 41 the ECtHR prefers declaratory relief and monetary compensation,[157] often holding that a finding of violation is itself sufficient just satisfaction.[158] Most pertinently for our purposes, the operation of arts 13 and 41 under the ECtHR's limited remedial approach produces the ECtHR's consistent and

---

[151] *Kaykharova v Russia*, above n 123, at [141]; *Ramsahai v Netherlands*, above n 30, at [363]; See also Harris and others *Law of the European Convention on Human Rights*, above n 37, at 573; Pieter van Dijk and others (eds) *Theory and Practice of the European Convention on Human Rights* (4th ed, Intersentia, Oxford (UK), 2006) at 1013–1014.

[152] Mowbray *The Development of Positive Obligations under the European Convention on Human Rights*, above n 72, at 5.

[153] Antokowiak "Victim-centered Remedies and Restorative Justice", above n 140, at 289.

[154] Christine Evans *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press, Cambridge, United Kingdom, 2012) at 59.

[155] Manfred Nowak "Reparations by the Human Rights Chamber for Bosnia and Herzegovina" in K De Feyter and others (eds) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, Antwerp, 2005) at 278. See also Theo van Boven *Revised Draft Basic Principles and Guidelines on the right to reparation for victims of (gross) violations of human rights and humanitarian law"* UN Doc E/CN.4/1997/104 (1997).

[156] Evans *The Right to Reparation in International Law for Victims of Armed Conflict*, above n 154, at 58.

[157] Harris and others *Law of the European Convention on Human Rights* at 857.

[158] *Nikolova v Bulgaria* (1999) 31 EHRR 64 (Grand Chamber, ECtHR) at [76]; *Golder v United Kingdom* (1979–1980) 1 EHRR 524 (ECHR); See also Harris and others *Law of the European Convention on Human Rights*, above n 37, at 861.

explicit refusal to order states to conduct effective investigations,[159] despite its status as a legal obligation owed under the ECHR.[160]

Though criticised by commentators,[161] there are of course persuasive reasons for the ECtHR's "cost-centred" remedial approach. Foremost is the ECtHR's desire to protect its institutional integrity by not imposing extra remedial costs on States parties.[162] More contentiously, the ECtHR has also declined to order redress out of policy considerations, in *McCann* the ECtHR declined to grant compensation as inappropriate, despite finding a violation of art 2, because "the three terrorist suspects who were killed had been intending to plant a bomb in Gibralter".[163]

We therefore have two distinct facets to the procedural duty, one of ensuring individual accountability, in the public interest, for violations of arts 2 and 3, the other protecting individual's art 2 and 3 rights and ensuring the availability of a mechanism to individuals to hear their claim of rights violation. At a glance these objectives are complementary, and one cannot deny that identifying and punishing individuals responsible for art 2 and 3 violations provides a measure of relief to victims.[164]

Nevertheless, I argue that the ECtHR's failure to reflect on the procedural duty's form, and specifically its remedial form, when applied extra-territorially is problematic for two reasons. First, the ECtHR's approach is itself in tension with the general thrust of contemporary international mechanisms designed to address gross human rights violations in conflict. Second, by the principles of subsidiarity and flexibility the procedural duty allows much scope for domestic judicial manipulation as to the purposes of investigation and the subsequent mechanisms considered sufficient as a result. These propositions are illustrated in the rest of the paper.

---

[159] *Al-Skeini v United Kingdom*, above n 5, at [181].
[160] *McCann v United Kingdom*, above n 24, at [157]–[164]; *Assenov v Bulgaria*, above n 34, at [101]–[106]; See also Antkowiak "Victim-Centered Remedies and Restorative Justice", above n 140, at 291.
[161] Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, NP Engel, Germany) at 74.
[162] Antkowiak "Victim-centered Remedies and Restorative Justice", above n 140, at 318.
[163] *McCann v United Kingdom*, above n 24 at [219]; See also Harris and others *Law of the European Convention on Human Rights*, above n 37, at 861.
[164] Antkowiak "Victim-Centered Remedies and Restorative Justice", above n 140, at 303, FN 168.

IV Comparative Institutional Responses to Rights Violations in Conflict

Comparative international mechanisms have developed a diverse set of objectives in their approach to human rights violations. With the objectives and rationales of the procedural duty in mind, the theme of the following discussion is simple – to determine the effects and nature of these institutional reactions to human rights violations during conflict and compare them to the approach of the ECHR's system, and evaluate the tension, if any.

A Victims, remedy and truth

The conventional focus of international human rights law has been "standard-setting and the establishment of institutions tasked with promoting human rights and monitoring states' compliance with their obligations."[165] This paralleled a focus on perpetrators and the best means of ensuring their prosecution and punishment.[166] In this the procedural duty's focus on ensuring processes for accountability and identification of perpetrators, and emphasis on criminal accountability for violations of fundamental rights,[167] operating in conjunction with the procedural protection concept, shares links with comparative international jurisprudence.[168]

However, these comparative institutional mechanisms have in recent years broadened their objectives to account for the needs of victims and considerations of adequate reparation.[169] Under these victim-oriented principles, notions of accountability and justice are no longer conceptualised in purely legal terms, but encompass:[170]

> … a wide range of measures – truth-telling, judicial reform, prosecutions, exhumations and reburials, memorialisation, reparations (including

[165] Bantekas and Oette *International Human Rights: Law and Practice*, above n 100, at 522.
[166] Priscilla B Hayner *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2ed, Routledge, New York, 2011) at 166.
[167] *El-Masri v Yugoslavia* (39630/09) Grand Chamber, ECHR 13 December 2012 at [186]–[194], [242] and]259]; *Öneryildiz v Turkey*, above n 22, at [94]; and *Mahmut Kaya v Turkey* (22535/93) Section I, ECHR 28 March 2000 at [85].
[168] *Velásquez-Rodriguez v Honduras (Merits)*, above n 139, at [178]–[181]; See Seibert-Fohr *Prosecuting Serious Human Rights Violations*, above n 142, at 111; see also Aolain "Truth-telling, accountability and the right to life in Northern Ireland", above n 26 at 585.
[169] Caroline Fournet "Mass Atrocity: Theories and Concepts of Accountability – On the Schizophrenia of Accountability" in Ralph Henham and Mark Findlay (eds) *Exploring the Boundaries of International Criminal Justice* (Ashgate, United Kingdom, 2011) 27–45 at 28.
[170] Naomi Roht-Arriaza "Civil Society Processes in Accountability" in M Cherif Bassiouni (ed) *Post-Conflict Justice* (Transnational Publishers, New York, 2002) 97–114 at 97.

rehabilitation, restitution and compensation), lustration to police and security forces, and other guarantees of non-reparation.

At the United Nations level, this paradigm shift is most evident in the General Assembly's 2005 adoption of the *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* (*Basic Principles*).[171] Preceded 20 years earlier by a draft instrument,[172] the *Basic Principles* are drafted from a "victim-based perspective" with the intention of providing procedures to implement existing international humanitarian and human rights law obligations and coherent methods for addressing victim's rights.[173] Though not binding, the *Basic Principles* influence is evident in treaty-making,[174] jurisprudence and developing concepts of reparation.[175] This shift toward victim-focused paradigms is easily dealt with under the concepts of remedy, reparation and truth.

The paradigm-shift in the concepts of remedy and reparation are most easily dealt with first. The concept that breach of a right demands a remedy is an inherent feature of legal systems worldwide,[176] and numerous international instruments affirm the right to an effective remedy.[177] As noted above in regards to the ECtHR's remedial approach, on conventional analysis the right to an effective remedy is primarily procedural.[178] In this form the right ensures victims have access to appropriate bodies that may fairly hear and decide their claim of rights violation.[179] A conceptual distinction is thus made between the procedural right to a remedy and substantive right to reparation,[180] and the latter refers to the redress that is

[171] *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* GA Res 60/147, A/Res/60/147 (2005) Annex, at [3(c)], [8], and [24].
[172] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* GA Res 4034, A/Res/40/34 (1985).
[173] M Cherif Bassiouni "International Recognition of Victims' Rights" (2006) 6(2) HRL Rev 203–279 at 251 referring to the Second Consultative Meeting Report at 26 (Explanatory comments).
[174] See, for example, Convention on the Rights of Persons with Disabilities, GA Res 61/106 UN Doc A/Res/106 (Jan 24 2007), art 16(4); and International Convention for the Protection of All Persons from Enforced Disappearance GA Res 61/177, UN Doc A/Res/61/177 (12 January 2007), art 24.
[175] Bantekas and Oette *International Human Rights Law and Practice*, above n 100, at 528.
[176] Bassiouni "International Recognition of Victims' Rights", above n 173, at 206–208.
[177] *Universal Declaration of Human Rights*, GA Res 217, III (1948), art 8; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 2(3).
[178] Christian Tomuschat *Human Rights: Between Idealism and Realism* (Oxford University Press, Oxford, 2008) at 358.
[179] Bantekas and Oette *International Human Rights Law and Practice*, above n 100 at 537.
[180] Van Boven *Revised Basic Principles and Guidelines on the Right to Reparation*, above n 155, at [4]–[11].

awarded following a successful result in the procedural forum.[181] Furthermore, so long as the former is provided, States have broad discretion to determine appropriate substantive reparation.[182]

However, this conceptual distinction has weakened in recent years. The *Basic Principles* treat the victim's right to reparation as one aspect of the right to a remedy.[183] Various courts and treaty bodies also adopt this interpretation. The International Court of Justice has affirmed the right to reparation for human rights violations that "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[184] This approach, the international law principle of *restitution in integrum*,[185] is said to be consistent with the remedial model adopted in the *Basic Principles*.[186] The United Nations Human Rights Committee has adopted the expanded concept of the right to a remedy.[187] The Human Rights Chamber for Bosnia and Herzegovina (the Chamber) – charged with applying the ECHR –used this power to order adequate reparation "commensurate with the seriousness of these violations and to the suffering of the victims."[188] In direct contrast to the ECtHR's refusal to order investigations, and on the basis of art 13 of the ECHR, the Chamber has consistently ordered States to not merely conduct criminal investigations but to "bring the perpetrators to justice and to provide effective access for the applicants to the investigatory procedure."[189]

The Chamber's jurisprudence leads nicely into consideration of the Inter-American Court of Human Right's (IACtHR) reparations jurisprudence. Applying as it does the dual concept of

[181] Thomas M Antkowiak "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond" (2007–2008) 46 Colum J Transnat'l L 351 at 356.
[182] Nowak "Reparation by the Human Rights Chamber for Bosnia and Herzegovina", above n 155, at 278
[183] *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, above n 171, at [11].
[184] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2004) ICJ Reports 136, 9 July 2004 at [153].
[185] *Factory at Chorzów (Germany v Poland)* (1928) PCIJ (Ser A) No 17 at [125].
[186] Thomas M Antkowiak "Victim-Centered Remedies and Restorative Justice", above n 140, at 288, FN 56.
[187] United Nations Human Rights Committee *General Comment 31* CCPR/C/21/Rev.1/Add.13 (2004) at [16].
[188] Nowak "Reparation by the Human Rights Chamber for Bosnia and Herzegovina", above n 155, at 286; See, for example, *HR and Momani v Federation (Admissibility and merits)*Case No CH/98/946 Human Rights Chamber for Bosnia and Herzegovina, 5 November 1999 at [181]; See also Christine Evans *The Right to Reparation in International Law for Victims of Armed Conflict*, above n 154, at 97.
[189] See, for example, *Selimović v Republic of Srpska (Admissibility and Merits)* Case No CH/01/8365 Human Rights Chamber for Bosnia and Herzegovina, 7 March 2003 [*Srebrenica Cases*] at [211]–[212]; and *HR and Momani v Federation of Bosnia and Herzegovina (Admissibility and Merits)* Case No CH/98/946 Human Rights Chamber for Bosnia and Herzegovina, 5 November 1999 at [146]–[147].

remedy, its approach is often contrasted with the ECtHR's remedial approach.[190] The IACtHR laid out its remedial perspective in its first judgment, stating that:[191]

> The object of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the State responsible.

The IACtHR orders reparation under several principles: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Not coincidentally, the *Basic Principles* considers these principles as necessary for full and effective reparation.[192]

As to restitution and cessation, the IACtHR commonly orders States to locate victim's remains and return them to next of kin, an act incorporating the principle of rehabilitation.[193] As well the IACtHR has ordered the release of prisoners convicted by unfair trials,[194] the quashing of unfair convictions made under laws inconsistent with the IACHT,[195] and the expungement of criminal records.[196] Regarding satisfaction, the IACtHR has ordered States to publish excerpts of its judgments,[197] publicly recognise their international responsibility by official public ceremony,[198] and the implementation of national exhumations programs.[199] As to guarantees of non-repetition, the IACtHR has ordered legislative and regulatory reform that adequately defines the crime of forced disappearance,[200] protects indigenous property rights,[201] and allows states to comply with their obligations to investigate violations and identify and punish responsible parties.[202] As to rehabilitation, States have been ordered to

---

[190] Antkowiak "Victim-Centered Remedies and Restorative Justice", above n 140.
[191] *Velásquez-Rodriguez v Honduras (Merits)*, above n 139, at [134].
[192] *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, above n 171, at [18]–[23].
[193] *Ibsen Cárdenas and Ibsen Peña v Bolivia (Merits, Reparations and Costs)* (2010) Inter-Am Ct HR (Ser C) No 217 at [242]; *Moiwana Community v Suriname* (2005) Inter-Am Ct HR (Ser C) No 124 at [208]; and *Neira Alegria v Peru (Reparations and Costs)* (1996) Inter-Am Ct HR (Ser C) No 29 at [69].
[194] *Loayza Tamayo v Peru (Merits)* Inter-Am Ct of HR (Ser C) No 42 at [84].
[195] *Cantoral-Benevides (Reparations and costs)* (2001) Inter-Am Ct HR (Ser C) No 88 at [77]–[78].
[196] *Acosta Calderon v Ecuador (Merits, Reparations and costs)* (2005) Inter-Am Ct HR (Ser C) No 129 at [165]; *Suárez-Rosero v Ecuador (Reparations and Costs)* (1999) Inter-Am Ct HR (Ser C) No 44 at [76].
[197] *Heliodoro Portugal v Panama (Preliminary Objections, merits, reparations and costs)* (2008) Inter-Am Ct HR (Ser C) No 186 at [248]; and *Cantoral Benavides v Perú*, above n 195, at [79].
[198] *Ibsen Cárdenas and Ibsen Peña v Bolivia*, above n 193, at [247]; *Heliodoro Portugal v Panama*, above n 197, at [249].
[199] *Bámaca-Velásquez v Guatemala (Reparations and costs)* (2002) Inter-Am Ct HR (Ser C) No 91 at [83].
[200] *Heliodoro Portugal v Panama*, above n 197, at [257]–[259].
[201] *Moiwana Community v Suriname*, above n 193, at [208].
[202] *Suárez-Rosero v Ecuador*, above n 196, at [80].

establish developmental funds for health, housing and educational programmes,[203] required the reopening and staffing of village schools and medical clinics,[204] and provide medical and psychological treatment by specialised clinics that seeks to reduce victim's mental and physical suffering.[205]

In direct contrast to the ECtHR, the IACtHR's most common order of substantive reparation against States is a sophisticated obligation to investigate human rights abuses and identify, prosecute and punish the perpetrators.[206] Factually, investigations have been ordered in cases concerning the 1986 massacre of an indigenous village by security forces,[207] state-sanctioned murder and subsequent cover-ups,[208] and multiple cases of forced disappearance.[209] In addition to the investigation and punishment of responsible parties, the IACtHR has ordered the removal of obstacles perpetuating impunity, the sanctioning of public officials who obstructed the criminal investigation, adequate safety guarantees to victims, witnesses and officials involved in the investigation, and finally the use of all technical means possible to recover victim's remains.[210] Additionally, the IACtHR has required States to ensure criminal proceedings already underway are conducted effectively and that victims and next of kin have full access and capacity to participate in all stages of an investigation and criminal proceedings.[211]

The IACtHR builds the duty to investigate from the needs to counter impunity and deter and prevent future abuses.[212] In this, as with the ECtHR, the duty to investigate stems from States

---

[203] *Moiwana Community v Suriname,* above n 193, at [214].
[204] *Aloeboetoe v Suriname (Reparations and Costs)* (1993) Inter-Am Ct of HR (Ser C) No 15 at [96]–[103].
[205] *Ibsen Cárdenas and Ibsen Peña v Bolivia*, above n 193, at [254]; and *Heliodoro Portugal v Panama*, above n 197, at [256].
[206] *Ibsen Cárdenas and Ibsen Peña v Bolivia*, above n 193, at [237]; *Baldeón-García v Peru (Merits, Reparations and Costs)* (2006) Inter-Am Ct HR (Ser C) No 147 at [197]; *Bulacio v Argentina (Merits, Reparations and costs)* (2003) Inter-Am Ct HR (Ser C) No 100 at [110]; *Velásquez-Rodriguez v Honduras*, above n 139, at [178]–[181]; See, generally, Antkowiak "Victim-Centered Remedies and Restorative Justice", above n 140, at 303.
[207] *Moiwana Community v Suriname*, above n 193, at [3].
[208] *Myrna Mack Chang v Guatemala (Merits, Reparations and Costs)* (2003) Inter-Am Ct HR (Ser C) No 101 at [4].
[209] *Heliodoro Portugal v Panama*, above n 197, at [2]; *Gomez-Palomino v Peru (Merits, reparations and costs judgment)* (2005) Inter-Am Ct HR (Ser C) No 136 at [1].
[210] *Moiwana Community v Suriname*, above n 193, at [207]–[208]; and *Myrna Mack Chang v Guatemala*, above n 208, at [275]–[277].
[211] *Heliodoro Portugal v Panama*, above n 197, at [245] and [247].
[212] *Baldeón-García v Peru*, above n 206, at [195]–[197]; *Pueblo Bello Massacre v Colombia (Merits, Reparations and Costs)* (2006) Inter-Am Ct HR (Ser C) No 209 at [266]; and *Villagrán Morales v Guatemala (Reparations and costs)* (2001) Inter-Am Ct HR (Ser C) No 77 at [98]–[99].

obligations to ensure and protect IACHR rights.[213] In addition, the IACtHR bases the duty of investigation on a victim's and family's right to know what happened to victims, and which state agents were responsible for specific acts.[214] This is predicated on the right to the truth, which the IACtHR considers an important measure of reparation owed to victims, next of kin, and society.[215] Therefore, while the starting point is the same, the IACtHR's substantive investigative duty offers a sharp contrast to the ECtHR's position.

The IACtHR's use of the right to the truth as a conceptual building block for its duty of investigation introduces discussion of this right and the victim-oriented conceptual rationale it provides. A legal concept that has emerged at domestic, regional and international law, the right to the truth is defined as an obligation upon the state to "provide information to victims or to their families or even society as a whole about the circumstances surrounding serious violations of human rights."[216] Originating in the law of armed conflict and initially expressed primarily in relation to the phenomenon of disappeared persons,[217] the right is recognised in the *Basic Principles* as a mode of reparation for human rights violations,[218] and various United Nations bodies have stressed its importance as a non-derogable right.[219]

Truth and reconciliation commissions, the institutional response to human rights violations perhaps most closely associated with the right to the truth, provide insight into the right's conceptual rationale. Developed specifically to respond to episodes of political violence and rights violations, truth commissions are generally defined as:[220]

> A truth commission (1) is focused on past, rather than ongoing, events; (2) investigations a pattern of events that took place over a period of time; (3)

[213] Antkowiak "Victim-Centered Remedies and Restorative Justice", above n 140, at 303.
[214] *Bámaca-Velásquez v Guatemala*, above n 199, at [74]; *Villagrán Morales v Guatemala*, above n 212, at [100].
[215] *Bámaca-Velásquez v Guatemala*, above n 199, at [76].
[216] Yasmin Naqvi "The right to truth in international law: fact or fiction?" (2006) 88 International Review of the Red Cross 245 at 245.
[217] *Resolution on Assistance and Co-operation in accounting for persons who are missing or dead in armed conflicts* GA Res 3220 XXIX (1974); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (opened for signature 8 June 1977, entered into force 7 December 1978), art 32.
[218] *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, above n 171, at [22(b)]–[24].
[219] United Nations Economic and Social Council *Promotion and Protection of Human Rights: Study on the right to the truth* (2006) E/CN.4/2006/91 at [60]; See also United Nations Human Rights Committee *Lyashkevich v Belarus* Communication CCPR/C/77/D/950/2000 (2003) at [9.2]; see also United Nations Human Rights Committee *Concluding observations: Algeria* CCPR/C/79/Add.95 (1998) at [10]; and *Concluding observations: Uruguay* CCPR/C/79/Add.90 (1998) at [C].
[220] Hayner *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, above n 166, at 11–12.

> engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorised or empowered by the state under review.

As their moniker suggests, truth commissions are established to "tell the truth" and, more elaborately, to "make a full account of what has happened and to draw a record for history of unprecedented educational value for generations to come."[221] They are given a broad scope of inquiry and systemic violations of human rights over a number of years.[222] As above, truth commissions' truth-telling aim operates in conjunction with their victim-centred approach,[223] itself reflective of the influence of restorative justice principles.[224]

The victim-centred truth-telling focus is said to confer multiple benefits. In the literature, truth commissions are often situated dichotomously with and said to benefit victims in a manner criminal trials cannot. These benefits range from the generic – truth commissions possess the "markedly superior characteristic, rarely apparent in criminal trials, of systematic consideration of the victims",[225] to the cathartic – "healing forums that focus specifically on the voices of victim-survivors."[226] More tangibly, the knowledge engendered by fulfilling the right to the truth is said to prevent future violations,[227] and truth commissions are designed to counter impunity, contribute toward reconciliation, and provide closure and aid the healing of victims.[228] These developments in the concepts of remedy, reparation and the right to the truth, underlain by a general focus on victims' needs, are also evident in international criminal law.

---

[221] Caroline Fournet "Mass Atrocity: Theories and Concepts of Accountability", above n 169, 27–45 at 36.
[222] United Nations Security Council *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* S/2004/616 (2004) at [50].
[223] At [50].
[224] Alison Bisset *Truth Commissions and Criminal Courts* (Cambridge United Press, New York, 2012) at 31
[225] Brian F Havel "Public Law and the Construction of Collective Memory" in M Cherif Bassiouni (ed) *Post-Conflict Justice* (Transnational Publishers, New York, 2002) at 389.
[226] Lisa J Laplante "On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development" (2007) 10 Yale Hum Rts & Dev LJ 141 at 146.
[227] Philip Alston and Ryan Goodman *International Human Rights: The Successor to International Human Rights in Context* (Oxford University Press, United Kingdom, 2013) at 1409; Lisa J Laplante "On the Indivisibility of Rights", above n 226, at 147.
[228] Bill Rolston "Dealing with the Past: Pro-State Paramilitaries, Truth and Transition in Northern Ireland" (2006) 28 Hum Rts Q 3 at 656.

B International Criminal Law

In recent years International criminal law's (ICL) institutional design has been heavily influenced by victim-centred and restorative justice paradigms. This conceptual diversification is evident in a 2004 Report of the Secretary-General, which comments on the objectives of ICL:[229]

> … bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace.

Of course, ICL's conceptual heritage is predicated on effectively punishing individual perpetrators.[230] This justice narrative, premised on philosophical currents of western liberalism and legalism, is still ICL's predominant mode of determining responsibility and dealing in punishment.[231] It was the prime objective of the International Criminal Tribunal for the Former Yugoslavia (ICTY),[232] and is evident in ICL's adoption from domestic criminal law the processes – charge, trial appeal and punishment – and principles of individual culpability.[233] Finally, at the conceptual core of the International Criminal Court (ICC) remains ensuring the prosecution of perpetrators of serious international crimes.[234]

Nevertheless, wider objectives exist and have been recently adopted in ICL. The function of "establishing a record of past events" noted in the Secretary-General's report,[235] said to aid

---

[229] United Nations Security Council *Report of the Secretary-General on the Rule of Law and Transitional* Justice, above n 222, at [38]; See Jean Galbraith "The Pace of International Criminal Justice" (2009) 31 Mich J Int'l L 79 at 85.

[230] Conor McCarthy "Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice" (2012) 10 JICJ 351–372 at 352; Galbraith "The Pace of International Criminal Justice", above n 229, at 94.

[231] Mark A Drumbl *Atrocity, Punishment and international law* (Cambridge University Press, New York, 2007) at 5.

[232] Statute of the International Criminal Tribunal for Rwanda, adopted by and annexed to *Resolution 955 (1994)* UN SC Res 955 S/RES/955 (1994), Preamble [ICTR Statute]; Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended), adopted by and annexed to *Resolution 827 (1993)* SC Res 827, S/RES/827 (1993), preamble and [2] [ICTY Statute].

[233] Rome Statute of the International Criminal Court 2187 UNTS 90 (opened for signature 17 July 1998, entered into force 1 July 2002), arts 58, 61, 67, 77, and 81 [Rome Statute]; ICTR Statute, above n 232, arts 17–19, 22–24; ICTY Statute, above n 232, arts 18–20, 23–25; See Galbraith "The Pace of International Criminal Justice", above n 229, at 85–88.

[234] Rome Statute, above n 233, preamble. Caroline Fournet "Mass Atrocity: Theories and Concepts of Accountability", above n 169, at 28 and 33.

[235] See above n 229.

societies emerging from conflict "by establishing detailed and well-established records of particular incident",[236] has been a contentious aspect of ICL since Tokyo and Nuremburg.[237] Different international criminal tribunals have embraced this function,[238] and their judgments have been said to "challenge the long-held assumption in socio-legal scholarship that courts are inappropriate venues to construct wide-ranging historical explanations of past conflicts."[239] Conceptualised as both a means and an end, ICL's function as an "arbiter of historical truth" is said to contribute to both the determination of guilt and,[240] due to the nature of atrocities in which ICL trades, where "uncertainty is the horrible norm", fulfils the "pressing moral obligation to obtain the truth about them, as best as the truth can be determined."[241] Here is introduced ICL's relationship with the right to the truth, said to "intermesh strategically with the broader objectives of international criminal law," including the restoration of peace, facilitating reconciliation, the countering of impunity and establishing a historical record.[242]

These wider objectives lead into consideration of the Rome Statute of the ICC (the Rome Statute), said to be a "testament to the successes of the restorative justice and victims' rights movements",[243] and characterised by its "victim-friendliness".[244] The ICC Appeals Chamber has stated that the protection of victim's interests "is a recurring theme of the Statute",[245] and one commentator has stated the ICC stands for deterrence, criminal accountability, and also "social welfare and restorative justice."[246] Prior to this ICL processes made little room for victims.[247] Primarily, the Rome Statute provides for victim's interest in two respects: participation as witnesses and with independent standing, and redress and reparation.[248]

---

[236] *Report of the Secretary-General on the Rule of Law and Transitional Justice*, above n 222, at [39].
[237] William A Schabas *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press, Oxford) at 157; Richard Ashby Wilson "Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia" (2005) 27 Hum Rts Q 908 at 911–912.
[238] *Prosecutor v Akayesu (Judgment)* ICTR Trial Chamber I ICTR-96-4-T, 2 September 1998 at [78]–[111.
[239] Wilson "Judging History", above n 237, at 909.
[240] Schabas *Unimaginable Atrocities*, above n 237, at 157.
[241] Galbraith "The Pace of International Criminal Justice", above n 229, at 89.
[242] Yasmin Naqvi "The right to truth in international law: fact or fiction?", above n 216, at 247.
[243] Antkowiak "Victim-Centered Remedies and Restorative Justice", above n 140, at 288.
[244] Christine Van den Wyngaert "Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge" (2011) 44 Case W Res J Int'l L 475 at 479.
[245] *Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 24 December 2007* (2008) ICC Appeals Chamber ICC-01/04-556, 19 December 2008 at [56].
[246] Antkowiak "Victim-Centred remedies and restorative justice", above n 140, at 287.
[247] Evans *The Right to Reparation in International law for victims of armed conflict*, above n 154, at 89–99; Salvatore Zappala "The Rights of Victims v. the Rights of the Accused" (2010) 8 JICJ 137 at 138; See also

The ICC's victim participation regime has been lauded as moving toward a restorative justice-oriented paradigm and away from a retributive justice one.[249] The ICC prosecutor is required to consider victim's interests during their investigation and when deciding to initiate prosecution.[250] Under the Rome Statute victims are entitled to "present their views and concerns" to the ICC "where their personal interests are affected",[251] and the ICC is required to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses".[252] Finally, all victims are entitled to legal representation which, for reasons of practicality, is provided by common legal representatives.[253]

As to redress for victims, the Rome Statute has been referred to as a "watershed developed" in relation to the advancement of victim-oriented remedial paradigms, akin to the approaches of the IACtHR and United Nations human rights institutions.[254] The ICC is required to "establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."[255] However, the interpretation of this provision was left to the ICC.[256] A reparatory mechanism has been established: the Trust Fund for Victims.[257] It may act in the process of allocating reparations to victims after a conviction or use its resources to benefit victims in instances where prosecution does not occur.[258] The Trust Fund has begun implementing the latter by providing assistance to victims in the form of physical rehabilitation, and material and/or psychological rehabilitation.[259]

It may be said that these provisions sit within their specific institutional context. I argue that more significant is the entrenchment of victim-focused principles and restorative justice

---

Claude Jorda and Jerome de Hemptinne "The Status and the Role of the Victim" in Antonio Cassese, Paola Gaeta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, New York, 2002) vol 1 at 1387–1419.

[248] Van den Wyngaert "Victims before the International Criminal Court", above n 244, at 477; and Zappala "The Rights of Victims v. the Rights of the Accused", above n 247, at 138.

[249] Van den Wyngaert "Victims before the International Criminal Court", above n 244, at 476; see also Christine H Chung "Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise? (2008) 6 Nw U J Int'l Hum Rts 459 at 459.

[250] Rome Statute, arts 54(1)(b) and 53(1)(c).

[251] Rome Statute, arts 15(3), 19(3) and 68(3).

[252] Rome Statute, art 68(1) This aspect of the ICC's mandate is implemented in greater detail by various rules and regulations, see Rules of Procedure and Evidence ICC-ASP/1/3 (Sept 9 2002).

[253] Van den Wyngaert "Victims before the International Criminal Court", above n 244, at 480.

[254] Antkowiak "Remedial approaches to human rights violations", above n 140, at 363.

[255] Rome Statute, art 75(1).

[256] Van den Wyngaert "Victims before the International Criminal Court", above n 244, at 487.

[257] Articles 75(2) and 79.

[258] Van den Wyngaert "Victims before the International Criminal Court", above n 244, at 480.

[259] At 481.

concepts. Under the Rome Statute, as well as other international criminal tribunals,[260] victim participation in proceedings is not a privilege, but a right.[261] In addition, the right of participation is itself tied conceptually, both in the literature and jurisprudence, to the realisation of other rights – primarily the right to truth and the right to justice.[262] Victim participation is said to contribute to the determination of an accused's innocence or guilt,[263] enable a victim's rights to reparation for the violation suffered,[264] and, at its broadest, to fulfil the objective of satisfying victims' interest in the proper administration of justice.[265] These conceptual rationales also bring us full circle in regards to the entrenchment of victim-focused norms within international law. The provisions for victim participation and redress in the Rome Statute were partially inspired by the *1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*,[266] the predecessor to the 2005 *Basic Principles*, parts of which were directly copied into the Rome Statute.[267] In 2009 the ICC additionally drew on both the 1985 and 2005 Declarations in adopting its guiding Strategy regarding victims.[268]

Of course, these objectives are not without criticism. Many commentators criticise victim participation for the potentially detrimental effect it may have on the defendant's fair trial rights.[269] Similarly, the historical record function of ICL has been criticised as incompatible with legal modes of reasoning and the accused's rights.[270] Indeed, the Secretary-General has

---

[260] Extraordinary Chambers in the Courts of Cambodia *Internal Rules (Rev 8)* (12 June 2007), Rule 23 available at <www.eccc.gov.kh/en>.
[261] *Prosecutor v Muthaura and Kenyatta (Decision on victims' representation and participation)* ICC Trial Chamber V ICC-01/09-02/11, 3 October 2012 at [8]; and *Prosecutor v Dyilo (Decision on victims' participation)* ICC Trial Chamber I ICC-01/04-101/06-1119, 18 January 2008 at [115], and [13] per Judge René Blattman dissenting.
[262] *Situation in the Democratic Republic of the Congo (Decision on Applications for Participation in the Proceedings of VPRS 1,VPRS 2,VPRS 3,VPRS4, VPRS 5 and VPRS 6)* Pre-Trial Chamber I ICC-01/04-101-tEN-Corr, 17 January 2006 at [63].
[263] Jérôme de Hemptinne "Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon (2010) 8(1) JICJ 165 at 167, referring to STL President's Explanatory Memorandum of the Rules of Procedure and Evidence, 10 June 2009, at [15].
[264] Valentina Spiga "No Redress without Justice: Victims and International Law" (2012) 10 JICJ 1377 at 1387.
[265] Zappala "The Rights of Victims v. the Rights of the Accused", above n 247, at 153.
[266] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, above n 172.
[267] Van den Wyngaert "Victims before the International Criminal Court", above n 244, at 478.
[268] International Criminal Court *Report of the Court on the Strategy in relation to Victims* (Nov 10 2009) ICC-ASP-8/45 at [6].
[269] Liesbeth Zegveld "Victims' Reparations Claims and International Criminal Courts: Incompatible Values?" (2010) 8 JICJ 79–111; and Zappala "The Rights of Victims v. the Rights of the Accused", above n 247, at 145.
[270] Wilson "Judging History", above n 237, at 912; and Galbraith "The Pace of International Criminal Justice", above n 229, at 96.

acknowledged that, given this diversity of objectives, "achieving and balancing the various objectives of [international] criminal justice is less straightforward."[271]

As well, it would be unwise to draw conclusions from these comparisons without first briefly commenting on the highly contextual nature of these institutions. Truth commissions and international criminal tribunals are self-consciously mechanisms of transitional justice, which itself constitutes:[272]

> …the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.

Therefore, in comparing these mechanisms and the procedural duty, regard needs to be had to the fact these mechanisms are tailored according to context and work in conjunction to benefit a society holistically by seeking to fulfil the objectives of "promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace."[273]

Nevertheless, transitional justice embraces the principles of restorative justice, such that it focuses on repairing past harm and bringing reconciliation to those most affected by that harm.[274] I would argue that underlying the conceptual shift in these institutional responses to human rights abuses is the principle that justice for victims of armed conflict requires three different elements: truth, reparations and judicial accountability.[275] This general principle is equally applicable to the procedural duty.

C Concluding Remarks on Comparative Institutional Mechanisms

The above discussion demonstrates that, in terms of the objective of ensuring individual accountability for rights abuses, the objectives of the procedural duty and comparative mechanisms sit in harmony. Comparative institutions of international human rights and ICL aim for prosecution. Despite the fact that the ECHR's procedural duty is one of means not

---

[271] *Report of the Secretary-General on the Rule of Law and Transitional Justice*, above n 229, at [39].
[272] At [8].
[273] *Report of the Secretary-General on the Rule of Law and Transitional Justice*, above n 229, at [38]; Alison Bisset *Truth Commissions and Criminal Courts* (Cambridge University Press, New York, 2012) at 9; Galbraith "The Pace of International Criminal Justice", above n 229, at 91; Eric A Posner and Adrian Vermeule "Transitional Justice as Ordinary Justice" (2004) 117 Harv L Rev 762 at 766.
[274] Bisset *Truth Commissions and Criminal Courts*, above n 273, at 11.
[275] Evans *The Right to Reparation in International law for victims of armed conflict*, above n 154, at 1.

result,[276] and as such does not mandate a particular outcome,[277] the procedural duty, as reinforced by the ECHR's expectations of the criminal process as capable of leading to the punishment of identified perpetrators,[278] presents a means of ensuring the strength of the criminal process in punishing violations of arts 2 and/or 3.[279]

In relation to the Iraq claims, it is also not inappropriate to mention that this provides some means of plugging an accountability gap between ICL and international human rights law.[280] The United Kingdom has an international legal obligation to prosecute certain conduct in Iraq. The Geneva Conventions, the Convention against Torture, and the Rome Statute of the ICC require the United Kingdom to prosecute the ill-treatment and unlawful killing of civilians.[281] This is reflected in domestic legislation.[282] Under the principle of complementarity the ICC has jurisdiction to initiate prosecution where a state with relevant jurisdiction is unwilling or unable to carry out a prosecution.[283] However, the ICC is unlikely to intervene in this regard, as illustrated by a United States diplomatic cable, which stated: [284]

> Ocampo [the first ICC Prosecutor] has said that he looking at the actions of British forces in Iraq – which … led a British ICTY prosecutor to nearly fall off his chair … Privately, Ocampo has said that he wishes to dispose of the Iraq issues (i.e. not investigate them).

As well, one of the few Court Martials of British soldiers for the death of an Iraqi civilian, Mr Baha Mousa, was undermined by "a more or less obvious closing of ranks."[285] If the procedural duty is able to produce investigations that contribute to remedying the

[276] *Al-Skeini v United Kingdom*, above n 5, at [166]; and *Bitayev and Bitayeva v Russia*, above n 112, at [158].
[277] Seibert-Fohr *Prosecuting Serious Human Rights Violations*, above n 142, at 133–134.
[278] *Calvelli and Ciglio v Italy*, above n 41, at [51]; *McKerr v United Kingdom*, above n 44, at [121]; *Khashiyev and Akayeva v Russia*, above n 103, at [153] and [177]; and *Assenov v Bulgaria*, above n 34, at [102].
[279] Tulkens "The Paradoxical Relationship between Criminal Law and Human Rights", above n 127 at 584–587; Seibert-Fohr *Prosecuting Serious Human Rights Violations*, above n 142, at 117.
[280] M Cherif Bassiouni "International Recognition of Victims' Rights", above n 173, at 205.
[281] Geneva Convention (III) Relative to the Treatment of Prisoners of War 75 UNTS 135 (opened of signature 12 August 1949, entered into force 21 October 1950), art 129; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (opened of signature 12 August 1949, entered into force 21 October 1950), art 146; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987), arts 4(2) and 7; and Rome Statute, art 1.
[282] International Criminal Court Act 2001 (UK); Geneva Conventions Act 1957 (UK) 5 & 6 Eliz II c 52.
[283] Rome Statute, art 17.
[284] Quoted in William A Schabas "The Banality of International Justice" (2013) 11 JICJ 545 at 549.
[285] *Mousa* (No 2), above n 1, at [163].

accountability gap produced by these political and practical obstacles to prosecution,[286] it is beneficial in itself and achieves a measure of consistency with other international approaches.

Nevertheless, the procedural duty sits in disharmony with these comparative institutional responses and their adoption of objectives broader than conventional individual accountability. At their broadest, the objectives of truth-telling, appropriate reparation based on principles of rehabilitation, restitution and satisfaction, as conceptually informed by victim-oriented and restorative justice principles, are designed to "give victims of gross violations of human rights and international humanitarian law a voice and to promote reconciliation."[287] On this front, the procedural duty, as informed by the ECtHR's broader jurisprudential and remedial approach, is deficient.

This is not to say there are not glimpses of the conceptual building blocks for such an approach in Strasbourg's jurisprudence. The ECtHR already requires, in certain circumstances, family participation at inquests and adequate legal representation to enable such participation under the procedural duty's requirement of public scrutiny.[288] As well, the Grand Chamber has acknowledged United Nations Human Rights Council Resolutions and submissions of third-party interveners concerning the right to the truth,[289] and the right can be derived from the effective protection duty to guarantee and protect human rights, a fundamental conceptual pillar of the procedural duty.[290]

However, majority approaches in the ECtHR lack the conceptual basis that a concerted adoption of victims' rights paradigms possesses. For instance, under the ECtHR's jurisprudential approach the right to the truth is subsidiary to the objectives of accountability and effective protection, and "'legal truth' is merely a by-product of a dispute settlement mechanism."[291] As well, the Grand Chamber in the above-mentioned case did not explicitly the applicant's right to the truth as a remedial concept, as noted by the Judges in the minority

[286] Rami Mani "Reparation as a Component of Transitional Justice: Pursuing 'Reparative Justice' in the Aftermath of Violent Conflict" in K De Feyter and others (eds) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, Antwerp, 2005) at 57–58.
[287] Elisabeth Baumgartner "Aspects of participation in the proceedings of the International Criminal Court" (2008) 90 International Review of the Red Cross 409 at 410.
[288] *Edwards v United Kingdom*, above n 23, at [83]–[84]; see also *Jordan v United Kingdom*, above n 20, at [134]; *McKerr v United Kingdom*, above n 58, at [147]–[148]; and *Shanaghan v United Kingdom*, above n 58, at [117].
[289] *El-Masri v The Former Yugoslav Republic of Macedonia*, above n 167, at [104] and [175]–[179].
[290] Naqvi "The right to truth in international law: fact or fiction?", above n 216 at 257 and 265.
[291] At 245–246.

on this conceptual point and who advocated that the ECtHR acknowledge a free-standing right to the truth under art 13.[292]

Therefore, while the procedural duty may meet victims' demand for justice,[293] the nature of the allegations raised in conflict, for instance the Iraq claims involve "murder, manslaughter, the wilful infliction of serious bodily injury, sexual indignities, cruel, inhuman and degrading treatment and large scale violation of international humanitarian law",[294] calls for an approach more akin to those of the comparative mechanisms analysed. Without account of victims, where processes of investigation and possible prosecution take place overseas, any sense of justice gained by the victims and family risks being lessened by the process's "hierarchical, temporal and physical remoteness."[295] Conversely, victim support and reparations may "provide a more tangible and concrete form of justice and one that can readily be made manifest in the localities where victims live."[296]

This brings us to the *Mousa* litigation itself – the first challenges in the High Court and Court of Appeal to the IHAT investigations, and then the most recent successful challenge in the High Court. This litigation elucidates the second tension created by the procedural duty's extra-territorial application by the domestic courts. As will be demonstrated, at the point of contact between the supra-national and domestic courts, for various reasons, the possibility of incorporating wider and victim-friendly objectives is lost.

V The Mousa *Litigation*

A Mousa (No 1)

In *Mousa (No 1)* the claimant, Ali Zaki Mousa, representing over 140 Iraqi citizens detained by British forces at different points during their 2003–2008 occupation of Basra in Southern Iraq, applied for judicial review of the government's refusal to order a public inquiry to

[292] *El-Masri v The Former Yugoslav Republic of Macedonia,* above n 167, Joint concurring opinion of Judges Tulkens, Spielmann, Sicilianos, and Keller.
[293] Antonio Cassese "Clemency Versus Retribution in Post-Conflict Situations" (2007–2008) 46 Colum J Transnat'l L 1 at 5–6.
[294] *Mousa* (No 2), above n 1, at [4].
[295] Conor McCarthy "Victim Redress and International Criminal Justice", above n 230, at 370.
[296] At 371.

investigate the claimants' allegations that during their detention they were ill-treated by British soldiers in violation of art 3.[297]

In both the High Court and Court of Appeal, Mr Mousa submitted that the mechanism used to investigate the claims, IHAT, was insufficiently independent for its inclusion of members of the Royal Military Police, and the procedural duty could in any case only be satisfied by conducting a full public inquiry.[298] Specifically, the inquiry sought was stated to be:[299]

> … a comprehensive and single public inquiry that will cover the UK's detention policy in South East Iraq, examining in particular the systemic use of coercive interrogation techniques which resulted in the Claimants' ill-treatment and which makes it possible to learn lessons for the future action of the British military.

In response, the Secretary of State submitted that the procedural duty was satisfied by IHAT's process of investigation and the already established *Baha Mousa* and *Al-Sweady Inquiries*, both looking into certain specific instances of the alleged of ill-treatment of detainees in Iraq.[300]

1 Judgments of the High Court and Court of Appeal

Richards LJ for the High Court rejected Mr Mousa's submission that IHAT lacked sufficient independence by its use of Royal Military Police members to investigate the claimants' allegations.[301] He further held that art 3 did not automatically require a public inquiry and the Secretary of State's "wait and see" approach as to whether a public inquiry was necessary following further investigation by IHAT, was adequate.[302] Richards LJ reasoned that IHAT's investigations would consider systemic issues,[303] that the *Baha Mousa* and *Al-Sweady Inquiries* were considering certain systemic issues and that the "very heavy resource

[297] *Mousa* (No 1) (HC), above n 6, at [1].
[298] At [2] and [29].
[299] At [2].
[300] At [3] and [28].
[301] At [87].
[302] At [111]–[114].
[303] *Mousa* (No 1) (HC) at [124].

implications" of a full inquiry merited "real weight".[304] The High Court concluded that a public inquiry was not yet required.[305]

Maurice Kay LJ allowed the applicant's appeal in the Court of Appeal. As in the High Court, the primary issue before the Court of Appeal was the independence of IHAT, as required under art 3's procedural duty.[306] With perhaps a hint of foreshadowing, Maurice Kay LJ first stated that "[i]t seems that part of the choreography of public accountability in this country is the clamour for a public inquiry into suspected wrongdoing by agents of the state."[307] After discussion of IHAT's structural intricacies, Maurice Kay LJ turned to the central issue. Noting the functional importance of the perception of independence in order to ensure public confidence, he stated "public perception of the possibility of unconscious bias is the key."[308] Maurice Kay LJ concluded that IHAT's independence was compromised by its use of Military Police members to investigate allegations which, if true, occurred when members of the same branch were involved in interrogating detainees in Iraq.[309]

Maurice Kay LJ then rejected the Secretary of State's "wait and see" policy regarding a public inquiry's necessity. Maurice Kay LJ held that the *Baha Mousa Inquiry* was not capable of considering issues arising from the whole 2003–2008 period of British occupation. With great significance for our later consideration of *Mousa No 2*, Maurice Kay LJ finished this point by stating:[310]

> … it was entirely foreseeable that [the Mousa Inquiry] would not and could not satisfy the Article 3 investigative obligation in relation to later allegations spreading over several years in various locations involving different units.

Nevertheless, Maurice Kay LJ did not order a full public inquiry, instead leaving it to the Secretary of State to reconsider how to satisfy art 3's procedural duty.[311] The Court of Appeal made further significant remarks. Regarding the purposes of investigation, Maurice Kay LJ referred to the purposes of fact-finding, public scrutiny of culpable conduct, the rectification

[304] At [134].
[305] At [130]–[135].
[306] *Mousa* (No 1) (CA), above n 7, at [10]–[11].
[307] At [1].
[308] At [35] citing *Lawal v Northern Spirit Ltd* [2003] ICR 856 (HL) at [14] per Lord Steyn.
[309] At [36]–[38].
[310] At [46].
[311] *Mousa No 1* (CA) at [49].

of dangerous practices and ensuring family members of deceased victims the lessons learned from a death may saves the lives of others.[312] In cases of ill-treatment, stated Maurice Kay LJ, the satisfaction of knowing that lessons learned may benefit future persons "would accrue to the proven victim in person."[313] Arguably, this demonstrates how the investigative duty's procedural remedial nature precludes consideration of victim-oriented questions of adequate reparation, and principally questions of rehabilitation.

B *The High Court's Decision in* Mousa (No 2)

Following the Court of Appeal's decision, IHAT's Royal Military Police members were replaced by Royal Navy Police and civilian personnel, largely ex-civilian Police investigators. The Government would keep under consideration the necessity of a public inquiry and review the *Baha Mousa Inquiry's* findings to determine the viability of prosecuting those involved in Baha Mousa's death. In addition, following as it did the ECtHR's judgment in *Al-Skeini*, IHAT was tasked with investigating those deaths engaging art 2.[314]

In May 2012 the original claimants in *Mousa (No 1)*, as represented by Mr Mousa, commenced judicial review proceedings challenging the reformed IHAT. Mr Mousa submitted that IHAT still lacked independence and that a public inquiry would inevitably be required to satisfy the United Kingdom's duty to investigate the alleged breaches of arts 2 and 3.[315] The High Court rejected the first claim, that IHAT lacked independence, but accepted the second and third, that IHAT could not satisfy the investigative duties under arts 2 and 3. However, the High Court declined to order an inquiry, for reasons to be discussed below.

1 IHAT's Independence

Concerning the first issue, Mr Mousa submitted that IHAT lacked sufficient independence on the basis that investigation of the claimants' allegations by any police branch of the British military constituted self-investigation. Specifically, Mr Mousa pointed to the operational

[312] At [13], referring to *R (Amin) v Secretary of State for the Home Department*, above n 20, at [31].
[313] *Mousa* (No 1) (CA), above n 7, [13].
[314] *Mousa* (No 2), above n 1 at [24].
[315] At [27].

deployment in Iraq of service police forces, from which IHAT's members were drawn, and their involvement in interrogation training and policy.[316]

After detailed explanation of IHAT's institutional structure, the High Court concluded that IHAT was independent.[317] It rejected the argument that, in principle, a service police force could not independently investigate military personnel. The question was ultimately whether sufficient independence existed in fact.[318]

The High Court did not refer to the principle that perceptions of unconscious bias are impermissible, as the Court of Appeal did in *Mousa (No 1)*.[319] Arguably this is for the same considerations of practicality that led the High Court to find IHAT was sufficiently independent. The High Court stated that a converse answer "would strike at the whole structure of the service police and prosecution service."[320] This holding looks to future cases of investigation in conflict zones and the High Court's arguable unwillingness to require of the military a completely separate investigation service to conduct investigations under the ECHR.

2 IHAT's Investigative Efficacy

Regarding IHAT's actual investigations, Mr Mousa submitted that, despite the question of independence, a single public inquiry was required to satisfy the investigative duty. This order was sought predominantly in relation to the deaths of Iraqi citizens that occurred in British custody or under the control of British forces.[321]

In setting out the law the High Court first noted the common law's particular concern for deaths that occur in state custody.[322] Investigation into such deaths is performed by coroner's inquests,[323] discussed further below. Referring to the art 2 investigative duty, the High Court emphasised three investigative objectives particularly significant to the claims in *Mousa*: public accessibility, especially relative to victims' families; the capacity to analyse broader

[316] *Mousa* (No 2) at [38].
[317] At [109].
[318] At [111] and [112].
[319] Above n 308.
[320] *Mousa* (No 2), above n 1, at [114].
[321] At [126].
[322] At [138] citing *R (Amin) v Secretary of State for the Home Department*, above n 20, at [30].
[323] *R (Amin) v Secretary of State for the Home Department*, above n 20, at [31].

issues of planning and operational control; and, the 'lessons learned' function.[324] The High Court summarised these objectives by stating:[325]

> …the article 2 investigative duty of the state in the case of deaths in custody is only discharged by a full, fair and fearless investigation accessible to the victim's families and to the public into each death, which must look into and consider the immediate and surrounding circumstances in which each of the deaths occurred.

The surrounding circumstances included the training, instructions and supervision of soldiers who participated in interrogations of detainees who died in custody. The investigations had to be capable of identify culpable conduct and the steps needed to rectify dangerous procedures and practices.[326]

In its application of these principles to the investigations undertaken by IHAT, the High Court stated that in each case of death it was first necessary to determine the viability of prosecution. This follows the principle, noted above, that criminal investigation and prosecution is the most effective means of fulfilling the procedural duty's requirement that an investigation must be capable of identifying and punishing responsible parties.[327] It was therefore necessary to determine whether prosecution could occur in each case so that IHAT's public, as opposed to criminal, investigation did not prejudice possible prosecution.

In cases where prosecution was not a realistic possibility, the High Court held that IHAT did not satisfy the procedural duty. It lacked the capacity to determine whether sufficient evidence existed in each case to initiate prosecution,[328] and the delay in investigating deaths, in some cases almost 10 years, in custody was so significant it amounted to a breach of art 2 in itself.[329] IHAT was also insufficiently accessible to the public and victims' families.[330] Finally, it was not capable of examining issues of systemic abuse or the deficiencies in training and supervision which produced it.[331]

---

[324] *Mousa* (No 2), above n 1, at [147].
[325] At [148].
[326] At [148].
[327] *McKerr v United Kingdom*, above n 44, at [121] and [134]; *Jordan v United Kingdom*, above n 20, at [129]–[130], and [142]; see also Aolain "Truth telling, accountability and the right to life in Northern Ireland", above n 58, at 585.
[328] *Mousa* (No 2), above n 1, at [179]–[183].
[329] At [184]–[186].
[330] At [187]–[190].
[331] At [191]–[193].

The High Court then referred to two mechanisms by which the government could comply with the procedural duty: a single public inquiry or multiple individual investigations based on the coroner's inquest model. Opting for the latter, the High Court stated that a full public inquiry would be excessive in duration and prohibitively expensive.[332] In addition, many of the *Baha Mousa Inquiry's* recommendations had been accepted, decreasing the significance of the lessons learned objective of investigation.[333] While the former point is understandable, the latter point is difficult. As noted above by the Court of Appeal, the *Baha Mousa Inquiry* could not fulfil the art 3 procedural duty in relation to a multitude of allegations spread over the six-year period of operation.[334] It is difficult to see how it could in any case fulfil the added requirements of the art 2 procedural duty and multiple deaths spread over the six year occupation. The significance of this point is the subject of this paper's last section.

The High Court then outlined the form of investigation it envisaged IHAT conducting into each death to comply with art 2. Referring to these as 'Inquisitorial inquiries' based on the coroner's inquest model of investigation, the High Court stated they would involve multiple persons investigating different deaths by an inquisitorial approach and conducting their own examination of witnesses.[335] The High Court has recently given judgment on this framework in practice, discussed below.

The Government was to be responsible for supervising the overall pace and efficiency of each inquiry and the High Court recommended that a Parliamentary inquiry would scrutinise wider systemic issues and make appropriate recommendations. The latter substituted for benefits that would be attained by a public inquiry,[336] arguably an attempt by the High Court to avoid trickier (political) issues of wider military planning.

Before concluding, the High Court considered IHAT's art 3 investigations. It held that IHAT' investigations into these cases, the task for which it was originally designed, was satisfactory subject to the family and public accessibility requirements, and questions of delay.[337] Despite unreasonable delay, the art 2 investigations took priority. Once they were completed, IHAT could use the experience gained to determine the possibility of prosecution in individual art 3

[332] At [202]–[206].
[333] At [208].
[334] Above n 310.
[335] *Mousa* (No 2), above n 1, at [215]–[218]
[336] At [223]–[224]
[337] *Mousa* (No 2), above n 1, at [226].

cases. Where prosecution could not occur, the High Court envisaged that IHAT could approach the art 3 cases by investigating a sample of the more serious cases.[338]

3 The Content of Inquisitorial Investigations

In early October 2013 the High Court gave judgment setting out the precise form of its model of investigation.[339] A High Court Judge, Leggatt J has been appointed to ensure against delay and ensure IHAT's overall focus in direction.[340] Individual inquiries, operating as inquests would, are to commence as soon as possible in cases requiring art 2 investigations once it is clear prosecution is not possible.[341] Each inquiry has the power to compel military personnel to give evidence and produce statements,[342] must be public and allow next of kin to participate by video-link from Iraq and possibly making documents available over the internet.[343]

Fundamentally, the purpose of each inquiry is to provide a description of how, when and where the deceased died, but may not identify specific responsible individuals.[344] As to systemic issues, the lessons that may be learnt are a matter to be decided in each case.[345] Inspectors have the discretion to determine the scope of disclosure in each inquiry, but it is likely to be limited.[346] Families may not access documents relating to training or supervision and will primarily participate by following the Inspector's cross-examination of witnesses.[347] Families and interested parties have no right to ask their own questions.[348] Some legal assistance will be provided to families to enable their presentation of evidence.[349] Finally, regarding the art 3 cases, IHAT was not entitled to suspend these cases while it dealt with the art 2 investigations, and Leggatt J must consider whether to appoint an inspector for claims of alleged ill-treatment once the art 2 inquiries begin.[350]

[338] At [229].
[339] *R (Mousa) v Secretary of State for Defence* [2013] EWHC 2941 (Admin) [*Mousa No 3*].
[340] At [4]–[6].
[341] At [9].
[342] At [15]–[17].
[343] At [22].
[344] At [25].
[345] At [26].
[346] At [30].
[347] At [34].
[348] At [39].
[349] At [43]–[44].
[350] At [48].

Significantly, in regard to victim and next of kin participation, the High Court stated that the Inspector in each inquiry must pay the "closest attention to the rehabilitative and cathartic issues that arise … and the interests of all the victims."[351] Acknowledgement of these aims is a significant step, associated as they are with the needs of victims. However, they sit incongruously with the limited practical steps taken for family and victim participation.

VI Elucidating the tension in Extra-territorial Investigations

By comparing the outcome in *Mousa (No 2)* with previous domestic investigative duty jurisprudence, this section will demonstrate that the model of investigation ordered by the High Court falls short of that indicated necessary in the case law. Indeed, the case law indicates a single public inquiry is indeed required by the nature and extent of the allegations.[352] The High Court's refusal demonstrates the tension created by domestic court's applying the procedural duty to extra-territorial human rights violations in conflict, where wider victim-focused objectives arise, but are overlooked by a focus on individual accountability.

A The Basics of Inquiries and Inquests

A brief introduction to the objectives of public inquiries and Coroner's inquests will guide this discussion. Public inquiries investigate and determine the truth on matters of public concern.[353] These matters can range from incompetence and impropriety to accidents and disasters.[354] A short summary of an inquiry's potential purpose includes to: establish the facts; learn from specific events; perform a cathartic function by reconciliation and resolution; reassurance by the rebuilding of public confidence; accountability and blame; and purely political functions, for instance, to show that "something is being done" concerning a particular event.[355]

---

[351] At [22], citing *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 2245 (Admin) at [157]; *R (Khan) v Secretary of State for Health* [2003] EWCA Civ 1129, [2004] 1 WLR 971 at [43].
[352] See above n 294.
[353] Paul Craig *Administrative Law* (7th ed, Sweet & Maxwell, London) at [9–001]; and Helen Quane "Challenging the report of an independent inquiry under the Human Rights Act" [2007] PL 529 at 529.
[354] Marc Elliot, Jack Beatson and Martin Matthews (eds) *Administrative Law: Text and Materials* (4th ed, Oxford University Press, Oxford, 2011) at 650.
[355] United Kingdom Public and Administration Select Committee *Government by Inquiry* (HC51-I, 2003–2004) at [12].

An inquiry's paramount focus is systemic failure, not minute detail.[356] Arguably, such a focus would, as felt by the High Court, be unworkable when applied to the number of claims in *Mousa*, creating as it would unreasonable delay and cost.[357] Yet, the *Mousa* claimants, throughout both the *Al-Skeini* and *Mousa* litigation, consistently pressed for a single public inquiry.[358] Arguably, this was to obtain the more victim-friendly benefits perceived to be offered by the full public inquiry mode of investigation. Public inquiries have been compared to truth commissions as a victim-focused accountability mechanism,[359] and most aligned with ensuring the right to the truth as set out under the *Basic Principles*.[360] In addition, victims of human rights abuse often prioritise exposure of the truth, and acknowledgement of responsibility and apology by the state over securing prosecution.[361]

The focus of the coroner's inquest is conversely narrower. In the United Kingdom, inquests are public hearings carried out by a coroner, an independent judicial officer, ordinarily sitting with a jury.[362] The coroner's duty, and any inquest's purpose, is to determine who the deceased was and how, when and where they died.[363] In deaths that engage art 2, the question of how a person died must be interpreted as "by what means and in what circumstances."[364] The purposes of the coroner's inquest are to establish and publicise the facts, expose discreditable and culpable conduct, dispel suspicions of wrongful conduct, remedy dangerous procedures and practices and ensure that the victim's family know that lessons may be learned to protect others' lives.[365] As referred to above in relation to the Court of Appeal's decision in Mousa No 1, these purposes are equally applicable to investigations under art 3.[366]

As outlined above, the High Court refused to order a full public inquiry, instead basing its model of investigation on the Coroner's inquest model.

---

[356] Louis Blom-Cooper "What Went Wrong on Bloody Sunday: A Critique of the Saville Inquiry" [2010] PL 61 at 78.
[357] At 78.
[358] *Mousa* (No 2), above n 1, at [1]; *Mousa* (No 1) (CA), above n 7, at [1]–[2]; *Mousa* (No 1) (HC), above n 6, at [1]–[3]; *R (Al-Skeini) v Secretary of State for Defence*, above n 4, at [1].
[359] Michael Humphrey "From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing" (2003) 14(2) Australian Journal of Anthropology 171 at 172.
[360] Marny Requa "Truth, transition, and the Inquiries Act 2005" (2007) 4 EHRLR 404 at 424.
[361] Antkowiak "Victim-Centred remedies and restorative justice", above n 140, at 282; see also Douglas Cassel and others *Report of the Independent International Panel on Alleged Collusion in Sectarian Killings in Northern Ireland* (Centre for Civil and Human Rights, Notre Dame Law School, 2006) at 84–85.
[362] *Jordan v United Kingdom*, above n 20, at [125].
[363] Coroners and Justice 2009 (UK), s 5; Coroners Rules 1984 (UK) (SI 1984/552), s 36(1).
[364] *R (Middleton) v West Somerset Coroner*, above n 18, at [35]; Coroners and Justice Act 2009 (UK), s 5(2).
[365] *R (Amin) v Secretary of State for the Home Department*, above n 20, at [31].
[366] *Mousa* (No 1) (CA), above n 7, at [13].

B The Procedural Duty through the Domestic Courts

The British courts follow Strasbourg in building the procedural duty from the substantive duty to protect, which the House of Lords termed the systemic duty.[367] The procedural duty is treated as an aspect of the broader duty to protect by prevention and punishment.[368] This confers on the procedural duty a broad ambit. Any investigation must lead to a determination on whether a use of force was justified,[369] but in appropriate cases the objectives of investigation extend beyond ensuring accountability of state agents to ensuring:[370]

> … so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.

This statement of principle, which forms the basis of any discussion of the procedural duty in domestic jurisprudence,[371] demonstrates that in appropriate cases the objectives of investigation extend beyond ensuring accountability of state agents to the determination of systemic failures.[372] Deaths that result from a state agent's use of force,[373] or occur in custody, attract the strongest procedural obligation,[374] and where multiple deaths form part of a systemic failure to protect, for instance the deaths of multiple individuals detained by the

[367] *R (JL) v Secretary of State for Justice* [2008] UKHL 68, [2009] AC 588 at [88]; *Van Colle v Chief Constable of the Hertfordshire Police*, above n 17, at [28].
[368] *R (JL) v Secretary of State for Justice*, above n 367, at [26].
[369] *R (Middleton) v Coroner for the Western District of Somerset*, above n 18, [16].
[370] *R (JL) v Secretary of State for Justice*, above n 367, at [29]; *R (Amin) v Secretary of State for the Home Department*, above n 367 at [62].
[371] See, for example, *Mousa* (No 2), above n 1, at [143]; *R (JL) v Secretary of State for Justice*, above n 367, at [27].
[372] *R (Sacker) v Coroner for the Country of West Yorkshire* [2004] UKHL 11, [2004] 1 WLR 796 at [11].
[373] *R (JL) v Secretary of State for Justice*, above n 367, at [59]–[60]; *R (Smith) v Secretary of State for Defence*, above n 16, at [116] per Lord Rodger, and [210(i)] per Lord Mance; *McCann v United Kingdom*, above n 24, at [161].
[374] *R (Smith) v Secretary of State for Defence*, above n 16, at [117] per Lord Rodger; *Edwards v United Kingdom*, above n 23, at [56].

British military in Iraq, the extent of investigation must mirror this failure.[375] In cases of systemic failure to ensure the rights to life and freedom from ill-treatment:[376]

> … an art 2 or art 3 investigation 'is required in order to maximise future compliance with those articles'. The purpose … is neither purely compensatory nor purely retributive; nor is it necessarily restricted to what has happened to the particular victim … It is to inform the public and its government about what may have gone wrong in relation to an important civic and international obligation and about what can be done to stop it happening again.

As refined in the case-law, the principles determining the extent of investigation indicate that, contrary to the High Court's holding, a full public inquiry is indeed required by the *Mousa* allegations. Consequently, the disparity illustrates key issues in the procedural duty's extra-territorial application. The following cases demonstrate this proposition.

R (AM) v Secretary of State for the Home Department arose from allegations that immigration detainees in United Kingdom immigration detention facilities had suffered ill-treatment contrary to art 3.[377] The issue on appeal was whether the availability of tort proceedings, a possible criminal investigation and Home Office Report satisfied, individually or collectively, satisfied the art 3 procedural obligation.[378] Sedley LJ stated that procedural obligation's case-specific nature meant an investigation sufficient for single instances of ill-treatment is inadequate to address multiple and systemic breaches of art 3.[379] The question for the court was "whether the entirety of what [the claimants] have now brought to the court's attention requires, or at some point required, the Home Secretary to set up an inquiry."[380] After discussing the ECtHR jurisprudence, Sedley LJ cast doubt on the proposition that wider political matters fall outside the procedural duty and concluded that the procedural duty could extend "well beyond the ascertainment of individual fault and reach questions of system,

[375] *Allen v Chief Constable of the Hampshire Constabulary* [2013] EWCA Civ 967 at [43]; *R (JL) v Secretary of State for Justice*, above n 367, at [31]; *R (JL) v Secretary of State for the Home Department* [2006] EWHC 2558 (Admin), [2006] Inquest LR 200 at [32].
[376] *R (AM) v Secretary of State for the Home Department* [2009] EWCA 219 at [57]; *R (Wright) v Secretary of State for the Home Department* [2001] EWHC Admin 520, [2001] UKHRR 1399 at [43(2)].
[377] *R (AM) v Secretary of State for the Home Department*, above n 376, at [7].
[378] At [31] per Sedley LJ.
[379] At [33] per Sedley LJ.
[380] At [35] per Sedley LJ.

management and institutional culture."[381] In light of the systemic issues raised by the claimants, the Secretary of State's failure to order an independent inquiry breached art 3 but, in light of the likely expense and passage of time, Sedley LJ declined to make a mandatory order, instead granting declaratory relief.[382] Longmore LJ agreed with Sedley LJ's explication of principle but disagreed with its application to the facts at hand.[383]

R (P) v Secretary of State for Justice concerned a prisoner who seriously and repeatedly self-harmed and on whose behalf it was argued arts 2 and 3 imposed a duty to conduct an inquiry into his treatment and detention conditions.[384] The Court of Appeal refused to order an inquiry as all the relevant facts were established, but agreed that an inquiry is required under art 3 where this is not the case and "good reason" is shown, including the need for investigation of systemic issues.[385] In so holding, the Court of Appeal agreed with the Longmore LJ's judgment in *AM* that the question whether a public inquiry is required is highly dependent on nature of the alleged breaches of art 3.[386] These cases indicate that the fact-specific nature of the investigative duty should respond to the allegations in *Mousa*, concerning as they do systemic violations of arts 2 and 3, with a full public inquiry.[387]

The High Court has elsewhere noted the suitability of the public inquiry, and its victim-oriented objectives, to investigations into allegations of extensive rights violations. *R (Keyu) v Secretary of State for Foreign & Commonwealth Affairs* concerned the historical claim brought by witnesses and survivors of the fatal shooting of 24 civilians by British soldiers in the State of Selangor (now Malaysia), at the time a British Protected State, in 1948.[388] The claimants, also comprising relatives of the deceased, sought judicial review of the Government's 2010 and 2011 decisions to not establish a public inquiry into the killings, and correspondingly requested a mandatory order from the High Court against the Government to establish a public inquiry.[389]

[381] At [60] per Sedley LJ.
[382] At [67]–[69] per Sedley LJ.
[383] At [82]–[84] per Longmore LJ.
[384] *R (P) v Secretary of State for Justice* [2009] EWCA Civ 701, [2010] QB 317 at [1] and [4]–[23].
[385] At [58].
[386] At [54].
[387] *R (Middleton) v Secretary of State*, above n 18, at [21] per Lord Bingham and [50] per Lord Steyn.
[388] *R (Keyu) v Secretary of State for Commonwealth Affairs*, above n 351, at [1]–[5].
[389] At [5] and [6].

In rejecting the claim, the High Court referred to the six objectives of public inquiries outlined above and commented on their applicability to the claimants' allegations.[390] To refresh, the six purposes are: (i) establish the facts; (ii) learn from events; (iii) provide therapeutic exposure and catharsis; (iv) rebuild confidence and provide reassurance; (v) retribution, blame, and accountability; (vi) and political considerations.[391] Regarding objectives (i) and (ii), the High Court held that, given the passage of time, a public inquiry could not helpfully determine the facts or improve military procedures to prevent a recurrence.[392] On objective (iii), the High Court acknowledged the importance of truth, reconciliation and provision of a forum in which the victims' voices could be heard, but considered these objectives could only be fulfilled where the facts could be definitively established.[393] Regarding objective (iv) the High Court stated that if the facts surrounding the killings could be established, "this might be a very powerful factor going to public confidence in the British Army".[394] As well, an inquiry could contribute to restoring public confidence and the impartiality and fairness of investigations.[395] Ultimately, these purposes were undermined by the difficulty in adequately determining the facts.

Though obiter, the High Court's remarks are judicial acknowledgment of the importance of restorative justice objectives to investigations into rights violations in conflict. This affirmation of the importance of truth, reconciliation and voice indicates support in the case law for victim-oriented investigative processes, and their incorporation in the procedural duty in appropriate cases.

In relation to the suitability of a public inquiry, and again contrary to the High Court's holding in *Mousa*, there is also clear authority supporting greater legal representation enabling participation by the next of kin in investigations under arts 2 and/or 3. In *R (Humberstone) v Legal Services Commission*, the Court of Appeal clarified the procedural duty's requirement that next of kin are involved to the "extent necessary to protect their legitimate interests."[396] The Court of Appeal held that the State is obliged to provide legal representation "where it is likely to be necessary to enable the next of kin to play an effective

[390] United Kingdom Public and Administration Select Committee *Government by Inquiry*, above n 355, at [12].
[391] *R (Keyu) v Secretary of State for Commonwealth Affairs*, above n 351, at [157].
[392] At [161]–[165].
[393] At [165].
[394] At [168].
[395] At [168].
[396] *Jordan v United Kingdom*, above n 20, at [109].

part in the proceedings", itself dependent on the facts of each case.[397] I would argue that the Iraq investigations trigger the claimants' legitimate interests, and legal representation is necessary as a "vital safeguard against dynamics which inherently tend toward internalisation."[398] As well, the Court of Appeal has previously affirmed the notion that, where the process of inquiry involves the next of kin, it served the functions of "learning, discipline, catharsis and reassurance."[399]

For reasons of practicality and expediency the High Court in *Mousa No 2* chose to forego the public inquiry and exclude victim-oriented elements like greater participation or legal representation. As demonstrated, there exists clear principle in the case law to support implementation of a wider model of investigation. I argue that the High Court's less ambitious model is driven by a judicial reticence to order an investigation that would inevitably encompass wider political matters. Accordingly, the flexible nature of the procedural duty allowed the High Court to calibrate the purposes of investigation to focus narrowly on the judicially amenable determination of individual accountability.

This is illustrated by reference to the cases from Iraq concerning deaths and ill-treatment. In *R (Smith) v Secretary of State for Defence* the claimant contended that the inquest into the death of her son by heat stroke while serving in Iraq did not satisfy art 2's procedural duty.[400] The United Kingdom Supreme Court, in a pre-*Al-Skeini* climate, held that Private Smith was outside the United Kingdom extra-territorial jurisdiction for the purposes of the ECHR.[401] Nevertheless, in considering the procedural duty Lord Phillips, with whom the majority agreed, made indicated that wider matters fall within the procedural duty. In discussing the appropriate subject matter of coroner's inquests vis-à-vis public inquiries, Lord Phillips noted that inquests appropriately investigate single deaths but, where the art 2 duty "extends to considering the competence with which military manoeuvres have been executed, a coroner's inquest cannot be the appropriate medium for inquiry."[402] The majority followed Lord Phillips on this point. Importantly, it demonstrates both the individualised focus of inquests and the Supreme Court's view that, though inquests cannot investigate these matters, they

[397] *R (Humberstone) v Legal Services Commission*, above n 18, at [77]–[78].
[398] Sam McIntosh "Fulfilling their purpose: inquests, article 2 and next of kin" [2012] PL 407 at 413.
[399] *R (Khan) v Secretary of State for Health*, above n 351, at [43].
[400] *R (Smith) v Secretary of State for Defence*, above n 16, at [1]–[2].
[401] At [60] per Lord Phillips.
[402] At [81] per Lord Phillips; Lord Brown agreed with Lord Phillips on this point at [151], while Lord Collins and Lord Kerr agreed with Lord Phillips on the art 2 issue, at [309] and [340].

nevertheless fall within the procedural duty and require investigation by a suitable mechanism, for instance a public inquiry.

Lord Rodger's antithetical opinion on this point usefully illustrates the flexibility in the investigative duty which allows a measure of judicial discretion as to the scope of investigation ordered. Lord Rodger stated that wider questions, such as the provision of more effective military equipment, "all raise issues which are essentially political rather than legal", and to be determined by Parliament.[403] This is a classically deferential viewpoint that reduces the procedural duty to the narrow objective of determining individual accountability. As wider matters are for Parliament, the scope of any investigation legitimately ordered by the courts is correspondingly narrowed.[404] Lord Rodger's view demonstrates the scope open to judges when determining whether particular wider systemic matters are caught by the investigative duty – "[w]here the line is drawn is a matter of fact and degree",[405] thus permitting judges to calibrate the line's position in each case.

Additionally, both the High Court and Court of Appeal decisions in *Mousa (No 1)* demonstrate that Lord Rodger's is not the predominant approach and provide further indication a larger public inquiry is required by the Iraq claims. First, though the High Court in *Mousa (No 1)* declined a public inquiry, it nevertheless considered wider matters of systemic abuse to fall within the procedural duty, and "so closely related to the circumstances of the individual allegations of abuse … as to be capable of falling within the scope of the investigative obligation under article 3."[406] Accordingly, questions of training and policy were not "matters for wider debate falling outside the scope of art 3."[407] Second, and contrary to Lord Rodger's characterisation, the High Court held that the question of a public inquiry's necessity in a given case is one of law, not fact, stating that "it is ultimately for the court to decide whether article 3 requires a public inquiry" and "we doubt whether the Secretary of State can be strictly be said to enjoy a margin of appreciation in the matter."[408]

The Court of Appeal affirmed this point, that the decision to order a public inquiry is one of law, not fact, in its opening paragraph.[409] Of course, this principle still allows considerable

[403] At [127] per Lord Rodger.
[404] At [127] per Lord Rodger.
[405] *Mousa No 1* (HC), above n 6, at [112].
[406] At [113].
[407] At [113].
[408] At [133].
[409] *Mousa No 1* (CA), above n 7, at [1].

judicial discretion. As discussed above, the Court of Appeal's judgment also demonstrates the necessity of a public inquiry for the eventual totality of the Iraq claims. The Court of Appeal held that the *Baha Mousa Inquiry* was incapable of addressing systemic issues and making recommendations relating to the "present allegations which cover the whole period from 2003 to 2008 in a number of different locations."[410] Second, and most significantly, the Court of Appeal stated that the *Baha Mousa Inquiry*:[411]

> … would not and could not satisfy the Article 3 investigative obligation in relation to later allegations spreading over several years in various locations involving different units.

From this case law it becomes apparent that, if not a full public inquiry, a wider form of investigation was necessitated by the quantity and nature of allegations in *Mousa*. That is, the nut to be cracked in this case required a (victim-friendly) sledgehammer. Therefore, I would argue that the High Court's decision in *Mousa (No 2)* to refuse a public inquiry, while permissible as a matter of public law, was driven by judicial concern at the politically contentious subject matter that would inevitably be raised by a full public inquiry into the British military's conduct during the whole period of occupation in Iraq. One may not agree with this, or place greater weight on the High Court's concerns regarding expenditure and delay. In either case, this illustrates the second tension created by the investigative duty's extra-territorial application. Domestic courts are applying a mechanism to circumstances in which wider "political matters" are inevitably raised. This in turns foregrounds the procedural duty's underlying fall-back principle that the appropriate form of investigation in each is not prescriptive – "[s]o long as the minimum standards are met, it is for the state to decide the most effective method of investigating."[412] In the Iraq cases, the operation of this principle is to foreground determinations of individual accountability over victim-oriented objectives.

VII Conclusion

This paper has explored the purposes and rationales of the ECHR's duty of effective investigation in the context of its extra-territorial application to allegations of severe rights violations by British soldiers in Iraq. It has demonstrated that the standards of investigation

[410] At [43].
[411] At [46].
[412] *R (D) v Secretary of State for the Home Department*, above n 56, at [9(ii)]; *R (Amin)* at [31] per Lord Bingham, [42] per Lord Slynn and [63] per Lord Hoffman; *Edwards v United Kingdom*, above n 23, at [69].

imposed by the procedural duty in conflict remain high, thus offering potentially strong protection and affirmation of individual's whose art 2 and/or 3 rights have been violated. Nevertheless, this paper has also shown that the procedural duty is comparatively deficient regarding account for principles of victims' rights and restorative justice, arguably called for by the Iraq claims. This deficiency is exacerbated when the procedural duty is applied by domestic courts.

Bibliography

A Cases

1 England and Wales

Allen v Chief Constable of the Hampshire Constabulary [2013] EWCA Civ 967.

Lawal v Northern Spirit Ltd [2003] ICR 856 (HL).

Chief Constable of Hertfordshire Police v Van Colle [2008] UKHL 50, [2009] AC 225.

R (Al-Skeini) v Secretary of State for Defence [2007] UKHL 26, [2008] AC 153.

R (Al-Skeini) v Secretary of State for Defence [2005] EWCA Civ 1609, [2007] QB.

R (Al-Sweady) v Secretary of State for Defence [2009] EWHC 2387 (Admin), [2010] HRLR 2.

R (AM) v Secretary of State for the Home Department [2009] EWCA 219.

R (Amin) v Secretary of State for the Home Department [2003] UKHL 51, [2004] 1 AC 653.

R (D) v Secretary of State for the Home Department [2006] EWCA Civ 143, [2006] 3 All ER 946.

R (Goodson) v HM Coroner for Bedfordshire & Luton [2004] EWHC 2931 (Admin), [2006] 1 WLR 432.

R (Humberstone) v Legal Services Commission [2010] EWCA Civ 1479, [2011] 1 WLR 1460.

R (Hurst) v Commissioner of Police of the Metropolist [2007] UKHL 726, [2007] 2 WLR 726.

R (JL) v Secretary of State for Justice [2008] UKHL 68, [2009] AC 588.

R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 2245 (Admin).

R (Khan) v Secretary of State for Health [2003] EWCA Civ 1129, [2004] 1 WLR 971.

R (Middleton) v West Somerset Coroner [2004] UKHL 10, [2004] 2 AC 182.

R (Mousa) v Secretary of State for Defence [2013] EWHC 1412 (Admin).

R (Mousa) v Secretary of State for Defence [2011] EWCA Civ 1334, [2012] HRLR 6.

R (Mousa) v Secretary of State for Defence [2010] EWHC 3304 (Admin), [2011] UKHRR 268.

R (P) v Secretary of State for Justice [2009] EWCA Civ 701, [2010] QB 317.

R (Sacker) v Coroner for the Country of West Yorkshire [2004] UKHL 11, [2004] 1 WLR 796.

R (Smith) v Secretary of State for Defence [2010] UKSC 29, [2011] 1 AC 1.

R (Wright) v Secretary of State for the Home Department [2001] EWHC Admin 520, [2001] UKHRR 1399.

Re McKerr [2004] UKHL 12, [2004] 1 WLR 807.

2 European Court of Human Rights

Akhmadova and Sadulayeva v Russia (40464/02) Section I, ECHR 10 May 2007.

Aksoy v Turkey (1996) 23 EHRR 553 (ECHR).

Al-Skeini v United Kingdom (2012) 53 EHRR 18 (Grand Chamber, ECHR).

Assenov v Bulgaria (1999) 28 EHRR 652 (ECHR).

Bazorkina v Russia (69481/01) Section I, ECHR 26 July 2006.

Betayev and Betayeva v Russia (37315/03) Section I, ECHR 29 May 2008.

Calvelli v Italy (32967/96) Grand Chamber, ECHR 17 January 2002.

Chitayev and Chitayev v Russia (59334/00) Section I, ECHR 18 January 2007.

DJ v Croatia (42418/10) Section I, ECHR 24 July 2012.

Edwards v United Kingdom (2002) 35 EHRR 487 (Section III, ECHR).

El-Masri v Yugoslavia (39630/09) Grand Chamber, ECHR 13 December 2012.

Ergi v Turkey (2001) 32 EHRR 18 (ECHR).

Estamirov v Russia (60272/00) Section I, ECHR 12 October 2006.

Goncharuk v Russia (58643/00) Section I, ECHR 4 October 2007.

Golder v United Kingdom (1979–1980) 1 EHRR 524 (ECHR).

Gülec v Turkey (1998) 28 EHRR 121 (ECHR).

İlhan v Turkey (2002) 34 EHRR 36 (Grand Chamber, ECHR).

Isayeva v Russia (2005) 41 EHRR 38 (Section I, ECHR).

Jordan v United Kingdom (2001) 37 EHRR 52 (Section III, ECHR).

Kaya v Turkey (1998) 28 EHRR 1 (ECHR).

Kaykharova v Russia (11554/07) Section I, ECHR 1 August 2013.

Kelly v United Kingdom (30054/96) Section III, ECHR 4 May 2001.

Kerimova v Russia (17170/04) Section I, ECHR 3 May 2011.

Khashiyev and Akayeva v Russia (2006) 42 EHRR 20 (Section I, ECHR).

LCB v United Kingdom LCB v United Kingdom (1999) 27 EHRR 212 (ECHR).

Mahmut Kaya v Turkey (22535/93) Section I, ECHR 28 March 2000.

McCann v United Kingdom (1995) 21 EHRR 97 (Grand Chamber, ECHR).

McKerr v United Kingdom (2002) 24 EHRR 20 (Section III, ECHR).

Musayeva v Russia (12703/02) Section I, ECHR 3 July 2008.

Nachova v Bulgaria (2006) 42 EHRR 43 (Grand Chamber, ECHR).

Nikolova v Bulgaria (1999) 31 EHRR 64 (Grand Chamber, ECtHR).

Oğur v Turkey (2001) 31 EHRR 40 (Grand Chamber, ECHR).

Öneryildiz v Turkey (2004) 39 EHRR 12 (Grand Chamber, ECHR).

Osman v United Kingdom (1998) 29 EHRR 245 (Grand Chamber, ECHR).

Özkan v Turkey (21689/93) Section II, ECHR 6 April 2004.

Ramsahai v Netherlands (2008) 46 EHRR 43 (Grand Chamber, ECHR).

Salman v Turkey (2002) 34 EHRR 425 (Grand Chamber, ECHR).

Selmouni v France (2000) 29 EHRR 403 (Grand Chamber, ECHR).

Shanaghan v United Kingdom (37715/97) Section III, ECHR 4 May 2001.

Tanrikulu v Turkey (2000) 30 EHRR 950 (Grand Chamber, ECHR).

2 Inter-American Court of Human Rights

Acosta Calderon v Ecuador (Merits, Reparations and costs) (2005) Inter-Am Ct HR (Ser C) No 129.

Aloeboetoe v Suriname (Reparations and Costs) (1993) Inter-Am Ct of HR (Ser C) No 15.

Baldeón-García v Peru (Merits, Reparations and Costs) (2006) Inter-Am Ct HR (Ser C) No 147.

Bámaca-Velásquez v Guatemala (Reparations and costs) (2002) Inter-Am Ct HR (Ser C) No 91.

Bulacio v Argentina (Merits, Reparations and costs) (2003) Inter-Am Ct HR (Ser C) No 100.

Cantoral-Benevides (Reparations and costs) (2001) Inter-Am Ct HR (Ser C) No 88.

Gomez-Palomino v Peru (Merits, reparations and costs judgment) (2005) Inter-Am Ct HR (Ser C) No 136.

Heliodoro Portugal v Panama (Preliminary Objections, merits, reparations and costs) (2008) Inter-Am Ct HR (Ser C) No 186.

Ibsen Cárdenas and Ibsen Peña v Bolivia (Merits, Reparations and Costs) (2010) Inter-Am Ct HR (Ser C) No 217.

Loayza Tamayo v Peru (Merits) Inter-Am Ct of HR (Ser C) No 42.

Moiwana Community v Suriname (2005) Inter-Am Ct HR (Ser C) No 124.

Myrna Mack Chang v Guatemala (Merits, Reparations and Costs) (2003) Inter-Am Ct HR (Ser C) No 101.

Neira Alegria v Peru (Reparations and Costs) (1996) Inter-Am Ct HR (Ser C) No 29.

Pueblo Bello Massacre v Colombia (Merits, Reparations and Costs) (2006) Inter-Am Ct HR (Ser C) No 209.

Suárez-Rosero v Ecuador (Reparations and Costs) (1999) Inter-Am Ct HR (Ser C) No 44.

Velásquez-Rodriguez v Honduras (Merits) (1988) Inter-Am Ct HR (Ser C) 29 July.

Villagrán Morales v Guatemala (Reparations and costs) (2001) Inter-Am Ct HR (Ser C) No 77.

3 Other International Tribunals

Factory at Chorzów (Germany v Poland) (1928) PCIJ (Ser A) No 17 (13 September).

HR and Momani v Federation (Admissibility and merits) Case No CH/98/946 Human Rights Chamber for Bosnia and Herzegovina, 5 November 1999.

Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 24 December 2007 (2008) ICC Appeals Chamber ICC-01/04-556.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) (2004) ICJ Reports 136, 9 July 2004.

Prosecutor v Akayesu (Judgment) ICTR Trial Chamber I ICTR-96-4-T, 2 September 1998.

Prosecutor v Dyilo (Decision on victims' participation) ICC Trial Chamber I ICC-01/04-101/06-1119, 18 January 2008.

Prosecutor v Muthaura and Kenyatta (Decision on victims' representation and participation) ICC Trial Chamber V ICC-01/09-02/11, 3 October 2012.

Selimović v Republic of Srpska (Admissibility and Merits) Case No CH/01/8365 Human Rights Chamber for Bosnia and Herzegovina, 7 March 2003 [*Srebrenica Cases*].

Situation in the Democratic Republic of the Congo (Decision on Applications for Participation in the Proceedings of VPRS 1,VPRS 2,VPRS 3,VPRS4, VPRS 5 and VPRS 6) Pre-Trial Chamber I ICC-01/04-101-tEN-Corr, 17 January 2006.

B Legislation and Statutory Instruments

1 United Kingdom

Coroners and Justice Act 2009 (UK).

Coroners Rules 1984 (UK) (SI 1984/552).

Geneva Conventions Act 1957 (UK) 5 & 6 Eliz II c 52.

International Criminal Court Act 2001 (UK).

C Treaties

Convention for the Protection of Human Rights and Fundamental Freedoms CETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953).

International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (opened for signature 8 June 1977, entered into force 7 December 1978).

Rome Statute of the International Criminal Court 2187 UNTS 90 (opened for signature 17 July 1998, entered into force 1 July 2002).

Statute of the International Criminal Tribunal for Rwanda, adopted by and annexed to *Resolution 955 (1994)* UN SC Res 955 S/RES/955 (1994).

Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended), adopted by and annexed to *Resolution 827 (1993)* SC Res 827, S/RES/827 (1993).

D Books and Chapters in Books

Philip Alston and Ryan Goodman *International Human Rights: The Successor to International Human Rights in Context* (Oxford University Press, United Kingdom, 2013).

Ilias Bantekas and Lutz Oette *International Human Rights: Law and Practice* (Cambridge University Press, New York, 2013).

Alison Bisset *Truth Commissions and Criminal Courts* (Cambridge United Press, New York, 2012).

Antonio Cassese, Paola Gaeta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, New York, 2002).

Richard Clayton and Hugh Tomlinson (eds) *The Law of Human Rights* (2nd ed, Oxford University Press, Oxford).

Paul Craig *Administrative Law* (7th ed, Sweet & Maxwell, London).

Mark A Drumbl *Atrocity, Punishment and international law* (Cambridge University Press, New York, 2007).

Marc Elliot, Jack Beatson and Martin Matthews (eds) *Administrative Law: Text and Materials* (4th ed, Oxford University Press, Oxford, 2011).

Christine Evans *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press, Cambridge, United Kingdom, 2012).

Caroline Fournet "Mass Atrocity: Theories and Concepts of Accountability – On the Schizophrenia of Accountability" in Ralph Henham and Mark Findlay (eds) *Exploring the Boundaries of International Criminal Justice* (Ashgate, United Kingdom, 2011).

K De Feyter and others (eds) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, Antwerp, 2005).

David Harris and others (eds) *Law of the European Convention on Human Rights* (2nd ed, Oxford University Press, Oxford, 2009).

Brian F Havel "Public Law and the Construction of Collective Memory" in M Cherif Bassiouni (ed) *Post-Conflict Justice* (Transnational Publishers, New York, 2002).

Priscilla B Hayner *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2ed, Routledge, New York, 2011).

Claude Jorda and Jerome de Hemptinne "The Status and the Role of the Victim" in Antonio Cassese, Paola Gaeta, John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, New York, 2002).

Alistair Mowbray *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, Oxford, 2004).

Manfred Nowak "Reparations by the Human Rights Chamber for Bosnia and Herzegovina" in K De Feyter and others (eds) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, Antwerp, 2005).

Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, NP Engel, Germany).

Naomi Roht-Arriaza "Civil Society Processes in Accountability" in M Cherif Bassiouni (ed) *Post-Conflict Justice* (Transnational Publishers, New York, 2002).

Anja Seibert-Fohr *Prosecuting Serious Human Rights Violations* (Oxford University Press, New York, 2009).

William A Schabas *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press, Oxford).

Christian Tomuschat *Human Rights: Between Idealism and Realism* (Oxford University Press, Oxford, 2008).

Pieter van Dijk and others (eds) *Theory and Practice of the European Convention on Human Rights* (4th ed, Intersentia, Oxford (UK), 2006).

E Journal Articles

Thomas M Antkowiak "An Emerging Mandate for International Court: Victim-Centred Remedies and Restorative Justice" (2011) 47 Stan J Int'l L 279.

Thomas M Antkowiak "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond" (2007–2008) 46 Colum J Transnat'l L 351.

Fionnuala Ni Aolain “Truth telling, accountability and the right to life in Northern Ireland” (2002) 5 EHRLR 572.

Joseph Barrett “Chechnya’s Last Hope? Enforced Disappearances and the European Court of Human Rights” (2009) 22 Harv Hum Rts J 133.

M Cherif Bassiouni “International Recognition of Victims’ Rights” (2006) 6(2) HRL Rev 203.

Elisabeth Baumgartner “Aspects of participation in the proceedings of the International Criminal Court” (2008) 90 International Review of the Red Cross 409.

Louis Blom-Cooper “What Went Wrong on Bloody Sunday: A Critique of the Saville Inquiry” [2010] PL 61.

Bill Bowring “What reparation does a torture survivor obtain from international litigation? Critical reflections on practice at the Strasbourg Court” (2012) 16(5) IJHR 755.

Carla Buckley “The European Convention on Human Rights and the Right to Life in Turkey” (2001) 1(1) HRL Rev 35.

Antonio Cassese “Clemency Versus Retribution in Post-Conflict Situations” (2007–2008) 46 Colum J Transnat’l L.

Juliet Chevalier-Watts “Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to life or an Onerous Burden on a State?” (2010) 21(3) EJIL 701.

Juliet-Chevalier-Watts “Has human rights law become lex specialis for the European Court of Human Rights in right to life cases arising from internal armed conflict?” (2010) 14(4) IJHR 584.

Christine H Chung “Victims’ Participation at the International Criminal Court: Are Concessions fo the Court Clouding the Promise? (2008) 6 Nw U J Int’l Hum Rts 459.

Louise Doswald-Beck “The Right to life in armed conflict: Does International Humanitarian law provide all the answers?” (2006) 88 International Review of the Red Cross 881.

Jean Galbraith “The Pace of International Criminal Justice” (2009) 31 Mich J Int’l L 79.

Michael Humphrey “From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing” (2003) 14(2) Australian Journal of Anthropology 171.

Lisa J Laplante “On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development” (2007) 10 Yale Hum Rts & Dev LJ 141.

Philip Leach “The Chechen conflict: analysing the oversight of the European Court of Human Rights” (2008) 6 EHRLR 732.

Neil Martin “*Bubbins v United Kingdom*: Civil Remedies and the Right to Life” (2006) 69(2) MLR 242–261.

Conor McCarthy “Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice” (2012) 10 JICJ 351.

Sam McIntosh “Fulfilling their purpose: inquests, article 2 and next of kin” [2012] PL 407.

Alistair Mowbray “The Creativity of the European Court of Human Rights” (2005) 5(1) HRL Rev 57.

Yasmin Naqvi “The right to truth in international law: fact or fiction?” (2006) 88 International Review of the Red Cross 245.

Jordan J Paust “The Right to Life in Human Rights Law and the Law of War” (2002) 65 Sask L Rev 411.

Helen Quane “Challenging the report of an independent inquiry under the Human Rights Act” [2007] PL 529.

Marny Requa “Truth, transition, and the Inquiries Act 2005” (2007) 4 EHRLR 404.

Bill Rolston “Dealing with the Past: Pro-State Paramilitaries, Truth and Transition in Northern Ireland” (2006) 28 Hum Rts Q 3.

Francoise Tulkens “The Paradoxical Relationship between Criminal Law and Human Rights” (2011) 9 JICJ 577.

Richard Ashby Wilson “Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia” (2005) 27 Hum Rts Q.

Christine Van den Wyngaert "Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge" (2011) 44 Case W Res J Int'l L 475.

Salvatore Zappala "The Rights of Victims v. the Rights of the Accused" (2010) 8 JICJ 137.

F Parliamentary and Government Materials

William Gage *The Baha Mousa Public Inquiry Report* (HC 1452–I, 8 September 2011).

William Gage *The Baha Mousa Public Inquiry Report* (HC 1452–II, 8 September 2011).

William Gage *The Baha Mousa Public Inquiry Report* (HC 1452–III, 8 September 2011).

United Kingdom Public and Administration Select Committee *Government by Inquiry* (HC51-I, 2003–2004).

G Reports

Douglas Cassel and others *Report of the Independent International Panel on Alleged Collusion in Sectarian Killings in Northern Ireland* (Centre for Civil and Human Rights, Notre Dame Law School, 2006).

H International Materials

United Nations Materials

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 GA Res 60/147, A/Res/60/147 (2005).

Convention on the Rights of Persons with Disabilities, GA Res 61/106 UN Doc A/Res/106 (Jan 24 2007).

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power GA Res 4034, A/Res/40/34 (1985).

International Convention for the Protection of All Persons from Enforced Disappearance GA Res 61/177, UN Doc A/Res/61/177 (12 January 2007)

Resolution on Assistance and Co-operation in accounting for persons who are missing or dead in armed conflicts GA Res 3220 XXIX (1974).

Theo van Boven *Revised Draft Basic Principles and Guidelines on the right to reparation for victims of (gross) violations of human rights and humanitarian law"* UN Doc E/CN.4/1997/104 (1997).

United Nations Economic and Social Council *Promotion and Protection of Human Rights: Study on the right to the truth* (2006) E/CN.4/2006/91.

United Nations Human Rights Committee *Concluding observations: Algeria* CCPR/C/79/Add.95 (1998).

United Nations Human Rights Committee *Concluding observations: Uruguay* CCPR/C/79/Add.90 (1998).

United Nations Human Rights Committee *General Comment 31* CCPR/C/21/Rev.1/Add.13 (2004).

United Nations Human Rights Committee *Lyashkevich v Belarus* Communication CCPR/C/77/D/950/2000 (2003).

United Nations Security Council *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* S/2004/616 (2004).

Universal Declaration of Human Rights, GA Res 217, III (1948).

Extraordinary Chambers in the Courts of Cambodia *Internal Rules (Rev 8)* (12 June 2007).