‘Impossible or Disproportionate Burden’: The UK’s Approach to the Investigatory Obligation under Articles 2 and 3 ECHR

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ABSTRACT

In this article, I argue for a rigorous engagement by the UK executive and domestic courts with the European Court of Human Rights’ development of the positive investigatory obligation under Articles 2 and 3 of the European Convention on Human Rights (“ECHR”). The UK has sought to expand the dicta from *Osman v UK* that positive obligations should not be interpreted to impose an ‘impossible or disproportionate burden’ on domestic authorities, while under-emphasising the criteria for effective investigations. There are frequent, inappropriate references to ‘proportionality’ in the Ministry of Defence’s decisions to close hundreds of investigations of alleged unlawful killings, torture and ill-treatment in Iraq. The ECHR’s positive investigatory obligations do not allow the closure of investigations on unscrutinised proportionality grounds. This article highlights inconsistencies in domestic cases, and an undesirable divergence between these and the European Court’s jurisprudence. ‘Impossible or disproportionate burden’ must be evidenced and narrowly construed.

KEYWORDS: Articles 2 and 3 ECHR, positive obligations, effective investigation, proportionality, ‘impossible or disproportionate burden’.

1. INTRODUCTION

This article examines the UK’s approach to the obligation to conduct an effective investigation into alleged breaches of the right to life and the prohibition of torture, inhuman or degrading treatment or punishment. This positive investigatory obligation has been developed by the European Court of Human Rights from Articles 2 and 3 of the European Convention on Human Rights (“ECHR”),[1] read together with Article 1.[2] [3] The obligation to investigate is triggered where there is an ‘arguable case’ of a serious violation of either Article 2 or 3: states must investigate of their own motion: the onus is not on victims to bring a case to their attention.[4] Investigations must be prompt, reasonably expeditious, independent (‘a lack of hierarchical or institutional connection but also a practical independence’),[5] and ‘capable of leading to the identification and punishment of those responsible’ (prosecution is not an absolute requirement);[6] with public scrutiny of the investigation and its results,[7] to the extent necessary to safeguard the next-of-kin’s legitimate interests,[8] with reasons given and challenge possible if prosecutions do not result.[9] In Article 2 investigations only, there must be an investigation into whether the force used was justified in the circumstances.[10] For Article 3 cases, there is instead a presumption

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[1] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms 1950, E.T.S. 5.

[2] *McCann and Others v United Kingdom* (1996) 21 E.H.R.R. 95 [161]; *Kelly and Others v UK* (App. No.30054/96), judgment of 4 May 2001 [94-98].

[3] *Assenov v Bulgaria* (1999) 28 E.H.R.R. 652 [101-102].

[4] *Assenov v Bulgaria* (1999) 28 E.H.R.R. 652 [101-102].

[5] *Kelly and Others v UK* (App. No.30054/96) [97, 95], citing *Ergi v Turkey* (2001) 32 E.H.R.R. 18 [83-84].

[6] *McCann and Others v United Kingdom* (1996) 21 E.H.R.R. 95.

[7] *McKerr v United Kingdom* (2002) 34 E.H.R.R. 553 [131, 115, 129, 141]; *Anguelova v Bulgaria* (2004) 38 E.H.R.R. 31 [140].

[8] *Kelly and Others v UK* (App. No.30054/96) [98].

[9] *McKerr v United Kingdom* (2002) 34 E.H.R.R. 553 [141].

[10] *Kelly and Others v UK* (App. No.30054/96) [96].

that for persons deprived of liberty, any 'recourse to physical force which has not been made strictly necessary' by the detainee's own conduct is in principle' a violation.[11] Investigators must seek relevant evidence. The Court has found violations of the investigatory obligation where the authorities have not interviewed witnesses;[12] and where there are shortcomings in forensic evidence.[13]

There is a limited margin of appreciation for all ECHR positive obligations. In *Osman v UK,* there was no violation of Article 2 on the facts, but the European Court ruled that 'in certain well-defined circumstances', ECHR states parties must take 'preventive operational measures to protect an individual whose life is at risk from the acts of another.'[14] The Court held that:

> …bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose *an impossible or disproportionate burden* on the authorities…[15]

The first two factors (on difficulties in policing and the unpredictability of human conduct) make sense in relation to prospective obligations, such as the positive operational obligation in *Osman.* They are less obviously applicable to the retrospective investigatory obligation. The third factor ('operational choices… priorities and resources') also seems couched in preventive action by police forces. Indeed, 'impossible or disproportionate burden' does not appear prominently in cases on the Article 2 investigatory obligation. States including the UK have invoked it in Article 2 cases, but in general, the European Court of Human Rights is reluctant to permit arguments based on resource constraints to set the scope of the investigatory obligation;[16] and the investigatory obligation remains intact despite the Court's acknowledgement that 'concrete constraints' in armed conflicts might 'delay' or render 'less effective' immediate investigations.[17] '[I]mpossible or disproportionate burden' is absent from HUDOC database searches on Article 3 cases on 'effective investigation' and on Article 3 'positive obligations'.[18]

In this article, I synthesise jurisprudence with recent investigatory practice. I argue that the executive and domestic courts should engage rigorously with all the criteria for effective investigations; and that if 'impossible or disproportionate burden' is argued, it should be evidenced and narrowly construed. The argument proceeds in the following steps. Part 2 shows how the UK has repeatedly invoked 'impossible or disproportionate burden', preferring to minimise its investigatory obligations under Article 2. Part 3 begins with background on the Ministry of Defence ("MOD") operational legacy investigations on Iraq, and their frequent references to 'proportionality'. 'Proportionality' appears as a reason to close criminal investigations, or not to hold quasi-coronial inquiries into alleged breaches of Articles 2 or 3, where the Iraq Historic Allegations Team ("IHAT", 2010-2017), its successor the Service Police Legacy Investigations ("SPLI", 2017-present),[19] or the Service

[11] *Assenov v Bulgaria* (1999) 28 E.H.R.R. 652 [104].
[12] *Guleç v Turkey* (1999) 28 E.H.R.R. 121 [82].
[13] *Guleç v Turkey* (1999) 28 E.H.R.R. 121 [82]; *Kaya v Turkey* (1999) 28 E.H.R.R. 1 [82]; *Esmukhambetov and Others v Russia* (App. No.23445/03), judgment of 29 March 2011 [166];
[14] *Osman v United Kingdom* (1998) 29 E.H.R.R. 245 [115].
[15] *Osman v United Kingdom* (1998) 29 E.H.R.R. 245 [116] (emphasis added).
[16] S. Wallace, *The Application of the European Convention on Human Rights to Military Operations* (Cambridge: CUP, 2019) p.115, citing *Burdov v Russia* (2009) 49 E.H.R.R. 2 [70].
[17] *Al-Skeini and Others v the United Kingdom* (2011) 53 E.H.R.R. 18 [152, 168].
[18] HUDOC Advanced Search: *https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}* [accessed 19 August 2020]
[19] IHAT, *https://www.gov.uk/government/groups/iraq-historic-allegations-team-ihat* [Accessed 19 August 2020]; SPLI, *https://www.gov.uk/guidance/service-police-legacy-investigations* [Accessed 19 August 2020].

Prosecuting Authority ("SPA") had determined that there would be no criminal investigation.[20] Part 3 also demonstrates the broader policy context for these curious references to 'proportionality': the Overseas Operations (Service Personnel and Veterans) Bill 2019-2021;[21] and the International Criminal Court ("ICC") Office of the Prosecutor ("OTP")'s ongoing preliminary examination into alleged war crimes against detainees in British military custody in Iraq.[22] Part 4 demonstrates inconsistencies in domestic case-law; with some cases prescribing particular standards for public scrutiny and the examination of witnesses,[23] while others emphasise evidential sufficiency prerequisites and resource management,[24] narrowing the investigatory obligation in practice. The narrowest approach is found in a case on the MOD legacy investigations, where there is an emphasis on efficiency instead of an investigatory imperative. These inconsistencies are normatively undesirable, as is the divergence between domestic courts and the European Court of Human Rights on the requirements for an effective investigation, especially in Article 3 cases. Domestic courts' 'indigenous' approach has not only 'crack[ed]' the *Ullah* principle (by which judges should not apply ECHR rights beyond the factual circumstances delineated by the European Court);[25] but also risks undermining the investigatory obligation. Part 5 concludes. The criteria for effective investigations must be applied consistently. If 'impossible or disproportionate burden' is argued, it must be evidenced and narrowly construed.

2. THE UK'S ARGUMENTS BEFORE THE EUROPEAN COURT

Before the European Court of Human Rights, the UK has sought to expand the margin of appreciation offered by 'impossible or disproportionate burden', and to extend it from the operational to the procedural/investigatory obligation under Article 2. The phrase does not appear in *McCann* (which predates *Osman),* or in *Kelly* (which acknowledges 'obstacles or difficulties' that nonetheless require thorough record-keeping, forensics, a prompt response and public scrutiny) but the UK invoked it in *Brecknell.*[26] In that case, the applicant had argued that the investigatory obligation should be revived 24 years after a death, because new evidence had come to light.[27] The UK argued that 'with the passage of time' it would be more difficult to identify those responsible for an historic Article 2 violation, so that it would eventually become '*disproportionate* to expect the State to devote scarce *resources* to undertake investigations unlikely to yield any significant gains'.[28] The UK's submissions seem to rely on a predictive assertion, instead of providing evidence of why the investigatory

[20] *R (Ali Zaki Mousa and Others) v Secretary of State for Defence* [2013] EWHC 1412 (Admin); Iraq Fatality Investigations ("IFI"), *https://www.gov.uk/government/collections/iraq-fatality-investigations* [Accessed 19 August 2020]; MOD Decisions on Alleged Human Rights Breaches during Operation Telic *https://www.gov.uk/guidance/mod-decisions-on-alleged-human-rights-breaches-during-operation-telic* [Accessed 19 August 2020].

[21] Ministry of Defence, Overseas Operations (Service Personnel and Veterans) Bill 2019-2021 ("Overseas Operations Bill") *https://services.parliament.uk/bills/2019-21/overseasoperationsservicepersonnelandveterans.html* [Accessed 19 August 2020].

[22] ICC OTP, 'Report on Preliminary Examination Activities' (December 2019).

[23] *MA, BB v Secretary of State for the Home Department (Equality and Human Rights Commission, intervening)* [2019] EWHC 1523 (Admin).

[24] *Al-Saadoon and Others (No. 2) v The Secretary of State for Defence and Others* [2016] 1 WLR 3625.

[25] J. Wright, 'The Operational Obligation under Article 2 of the European Convention on Human Rights and Challenges for Coherence: Views from the English Supreme Court and Strasbourg' (2016) 7(1) *Journal of European Tort Law* 58.

[26] *McCann and Others v United Kingdom* (1996) 21 E.H.R.R. 95; *Kelly and Others v UK* (App. No.30054/96) [96-98]; *Brecknell v United Kingdom* (2008) 46 E.H.R.R. 42.

[27] *Brecknell v UK* (2008) 46 E.H.R.R. 42 [60-61].

[28] *Brecknell v UK* (2008) 46 E.H.R.R. 42 [62] (emphasis added).

obligation would be 'disproportionate'. Calls to balance resources and the investigatory obligation are inconsistent with the European Court's jurisprudence, but recur in UK practice.

The European Court of Human Rights rejected the UK's contention that the investigatory obligation should cease after six months, finding a violation in respect of the lack of independence in the initial investigation.[29] The Court reiterated the importance of a 'prompt response' by the authorities to any 'obstacles' that appear in an investigation, of criminal proceedings to identify potential perpetrators,[30] and notes the 'public interest' in prosecutions for suspected 'war crimes and crimes against humanity.'[31] The Court cites the first and third of *Osman*'s contextual considerations.[32] In *Brecknell,* lapse of time is an objective limitation on an ability to locate witnesses, and on the likelihood of accurate recall by those witnesses.[33] That lapse of time requires that new evidence be 'very weighty… compelling… [offering] a serious or realistic prospect of a successful prosecution', in case the obligation to investigate historic crimes might detract from the investigation of recent crimes and crime prevention.[34] *Brecknell* offers a limited margin of appreciation based on 'impossible or disproportionate burden', but it is not authority for blanket policies to close historic allegations,[35] especially if those allegations were not fully investigated at the time.

The UK invoked 'impossible or disproportionate burden' in its submissions in *Al-Skeini*,[36] but the Grand Chamber did not repeat it in its judgment, confining itself to acknowledging that the investigatory obligation 'must be applied realistically, to take account of specific problems faced by investigators' in 'a foreign and hostile region in the immediate aftermath of invasion and war.'[37] Similar phrasing is also found in *Jaloud v Netherlands* ('reasonable allowances for … relatively difficult conditions' on deployment), but the Grand Chamber was insistent that the state's failure to make documents available to the applicant and judicial authorities, to conduct an adequate autopsy, to retain bullet fragments, and to prevent witness collusion was a violation of Article 2's investigatory obligation.[38]

There is emerging evidence that the UK sees 'impossible or disproportionate burden' as a putative on/off switch for the investigatory obligation, and a cost/benefit test as to whether to proceed with an investigation. This cost/benefit balancing is less stringent than public law proportionality, where the infringement of an applicant's qualified rights (including but not limited to Articles 8-11 ECHR, and Article 1 of Protocol No 1) must be justified by a four-stage proportionality test.[39] In the UK's arguments, resources are invoked as if the investigatory obligation should not apply in a particular case. In contrast, 'impossible or disproportionate burden' is a margin of appreciation. The European Court of Human Rights acknowledges genuine, evidenced obstacles to investigations while reiterating each of the criteria for an effective investigation. If criminal investigations are closed, civil proceedings do not fulfil the investigatory obligation.[40] Judges were unwilling to reduce the criteria to a 'bare check list', but will be 'particular[ly] vigilan[t]' where there are 'indispensable and

[29] *Brecknell v UK* (2008) 46 E.H.R.R. 42 [67].
[30] *Brecknell v UK* (2008) 46 E.H.R.R. 42 [65-67].
[31] *Brecknell v UK* (2008) 46 E.H.R.R. 42 [69].
[32] *Brecknell v UK* (2008) 46 E.H.R.R. 42 [70].
[33] *Brecknell v UK* (2008) 46 E.H.R.R. 42 [71].
[34] *Brecknell v UK* (2008) 46 E.H.R.R. 42 [63].
[35] Overseas Operations Bill, above n 21.
[36] *Al-Skeini and Others v the United Kingdom* (2011) 53 E.H.R.R. 18 [152].
[37] *Al-Skeini and Others v the United Kingdom* (2011) 53 E.H.R.R. 18 [168].
[38] *Jaloud v Netherlands* (2015) 60 E.H.R.R. 29 [226-228].
[39] *Bank Mellat v HM Treasury (No.2)* [2014] AC 700 [20, 74].
[40] *Kolyadenko and Others v Russia,* (App. No. 17423/05), judgment of 28 February 2012 [202].

obvious investigative steps' missing.[41] The European Court has found violations for failures in forensic examination,[42] the qualification of pathologists,[43] adequate recording of data, retention of case files,[44] interviewing witnesses,[45] the critical evaluation of allegations, and participation of victims or next-of-kin.[46] The investigatory obligation is 'not … of result, but of means', but is nonetheless essential to avoid 'any appearance of collusion in or tolerance of unlawful acts.' Public scrutiny of the investigation is essential for the same reason, and 'to safeguard [the] legitimate interests' of the victim.[47]

The European Court regularly acknowledges situational 'difficulties' or 'obstacles' in relation to the investigatory obligation. Where 'impossible or disproportionate burden' appears in the case law, it is a narrow, contextual margin of appreciation, which leaves intact the established criteria for an effective investigation. In contrast, the UK frequently invokes 'proportionality' and 'impossible or disproportionate burden' in investigatory contexts, and introduces cost/benefit, resource-based arguments as to whether the investigatory obligation should apply to particular cases.

3. MINISTRY OF DEFENCE INVESTIGATIONS CLOSED ON 'PROPORTIONALITY' GROUNDS

In 2019, I published on the MOD's closure of many hundreds of investigations on the basis that the ill-treatment alleged was 'lower-level' or at a 'medium' range of severity: terms unknown in international law. I argued that this practice failed substantively and procedurally to implement the UK's obligations in international human rights law, international humanitarian law and international criminal law.[48] In that article, I acknowledged evidence that the MOD legacy investigations applied a 'novel proportionality standard' as a second reason for closing investigations.[49] In the text that follows, I analyse the background; examine the references to 'proportionality', and give context from the Overseas Operations (Service Personnel and Veterans) Bill, and the pending preliminary examination by the ICC OTP into alleged war crimes against detainees in British military custody in Iraq.

a. Background

IHAT (2010-2017) investigated alleged torture and inhuman or degrading treatment in Iraq,[50] later adding allegations of unlawful killing to its caseload. IHAT had the power to refer cases to the Director of Service Prosecutions ("DSP") for potential prosecution.[51] Ministerial statements at IHAT's launch echoed those when its closure was announced in

[41] *Velikova v Bulgaria* (App. No. 41488/98), judgment of 18 May 2000 [82].
[42] *Tagayeva and Others v Russia* (App. No. 26562/07), judgment of 13 April 2017 [510-516].
[43] *Tanli v Turkey,* (App. No. 26129/95) judgment of 10 April 2001, cited in Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 37.
[44] *Kelly and Others v UK* (App. No.30054/96), judgment of 4 May 2001 [96].
[45] *Mahmut Kaya v Turkey* (App. No. 22535/93), judgment of 28 March 2000 [106].
[46] *Tagayeva and Others v Russia* (App. No. 26562/07) [530 *et seq*].
[47] *Kelly and Others v UK* (App. No.30054/96) [96-98].
[48] E. Stubbins Bates, 'Distorted Terminology: The UK's Closure of Investigations into Alleged Torture and Inhuman Treatment in Iraq' (2019) 68(3) *International and Comparative Law Quarterly* 719.
[49] ibid., 720.
[50] *R (on the application of Ali Zaki Mousa) v Secretary of State for Defence and Anr* [2011] EWCA Civ 1334.
[51] Armed Forces Act 2006, ss 113, 116 (providing that the Service Police refer cases either to the chain of command or the DSP where there is evidence that a Service offence, defined in Schedules 1 or 2, had been committed and where there is sufficient evidence to charge an individual in respect of that offence).

2017: that the majority of claims were false and the investigations harm service personnel.[52] Following the Solicitors Disciplinary Tribunal's decision to strike off Phil Shiner in February 2017,[53] the government required that IHAT close 90% of its caseload (from 250 cases,[54] down to approximately 20)[55] prior to its closure in June 2017, when residual cases were passed to the SPLI (2017-present).[56]

The Strasbourg jurisprudence requires prompt investigations, not a target-led approach to close them. Litigation successfully challenged IHAT's independence,[57] and judges noted concerns as to delayed investigations.[58] Yet the emphasis on delay led judges to call for a 'timely, cost-effective, and proportionate' approach,[59] instead of reiterating the European Court's criteria. A Designated Judge was appointed to oversee the investigations;[60] with an inquisitorial process (the Iraq Fatality Investigations ("IFI"), modelled on a coroner's inquest, established to investigate the lawfulness of each death where IHAT had decided there would be no criminal prosecution.[61] In 2014, following a substantial increase in caseload, IHAT initiated a pre-investigation screening process to sift out cases where a reasonable person would not think a service offence had been committed (a test which hints at a lay standard instead of one informed by the domestic and international crimes included in the Schedules to the Armed Forces Act 2006); and began to set up a 'problem profile' to consider ill-treatment cases in groups, with the exception of allegations of rape and serious sexual assault, which were to be investigated individually.[62] There were three investigations involving allegations of rape and serious sexual assault in British military custody at the time of the Divisional Court's judgement in *Al-Saadoon* in 2015; none of these were subsequently closed by IHAT, but a freedom of information ("FOI") response stated that three such allegations were all 'closed by lack of evidence' by the SPLI.[63]

[52] HC 1 March 2010, col 93W; 'Discredited Iraq War Probe to Be Shut Down within Months' (10 February 2017) *Sky News https://news.sky.com/story/discredited-iraq-war-probe-should-be-shut-within-months-say-mps-10762655* [Accessed 19 August 2020].

[53] Solicitors Regulation Authority, 'News Release - Professor Phil Shiner and the Solicitors Disciplinary Tribunal' ("SDT"), 2 February 2017. The proceedings against Shiner, his firm Public Interest Lawyers, and unsuccessful proceedings against Leigh Day, were begun when the then Secretary of State for Defence passed a 'dossier' to the Solicitors Regulation Authority: House of Commons Defence Committee 'Who Guards the Guardians? MoD Support for Former and Serving Personnel' (HC 2016-2017 109, 7 February 2017) *https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/109.pdf* [Accessed 19 August 2020] para. 23.

[54] O. Boycott, 'Phil Shiner: Iraq Human Rights Lawyer Struck off over Misconduct' (2 February 2017) *The Guardian https://www.theguardian.com/law/2017/feb/02/iraq-human-rights-lawyer-phil-shiner-disqualified-for-professional-misconduct* [Accessed 19 August 2020].

[55] 'IHAT to Close at the End of June' (5 April 2017) *Ministry of Defence News* https://www.gov.uk/government/news/ihat-to-close-at-the-end-of-june [Accessed 19 August 2020].

[56] ibid.

[57] *R (on the application of Ali Zaki Mousa) v Secretary of State for Defence and Anr* [2011] EWCA Civ 1334 [24-34, 36]; *Al-Saadoon and Ors v The Secretary of State for Defence and Ors* [2015] EWHC 1769 (Admin), para 23; *Al-Saadoon and Others (No. 2) v The Secretary of State for Defence and Others* [2016] 1 WLR 3625 [15, 24, 26-27, 30, 37].

[58] *R (on the application of Ali Zaki Mousa) v Secretary of State for Defence and Anr* [2011] EWCA Civ 1334 [187].

[59] *R (on the application of Ali Zaki Mousa) v Secretary of State for Defence and Anr* [2011] EWCA Civ 1334 [6, 213-221].

[60] *R (on the application of Ali Zaki Mousa) v Secretary of State for Defence and Anr* [2011] EWCA Civ 1334 [6, 222-225].

[61] IFI, above n 20.

[62] *Al-Saadoon and Ors v The Secretary of State for Defence and Ors* [2015] EWHC 1769 (Admin) [28].

[63] *Al-Saadoon and Ors v The Secretary of State for Defence and Ors* [2015] EWHC 1769 (Admin) [24]; FOI response (on file with the author), 21 December 2018.

The quality of evidence supplied to IHAT was reportedly 'sparse, often inaccurate as to identities, dates, times etc.' with some statements 'unsigned'.[64] There are questions about the quality of the pre-investigation screening process. Travel restrictions that prevented 'vulnerable or intimidated' witnesses from being interviewed in a third country (Operation MENSA)[65] correlated with the greatest number of investigations closed.[66] By the first Quarterly Report of 2017, of the 'more than 3390' investigations received by IHAT, 1666 had been rejected, and a further 696 were either recently closed or about to be closed.[67] If courts had analysed each of these areas of concern in light of the European Court of Human Rights' criteria for investigations, the scrutiny of IHAT and the SPLI would have been significantly better.[68]

The SPLI, created in 2017 and still in progress, offers Quarterly Updates with merely the total number of current and past Full Investigations and Directed Lines of Enquiry, and intermittent cumulative updates to a Table for Complainants. As at 31 March 2020 (the latest update available), 1204 allegations had been closed or were being closed, out of a total of 1287 received or identified. The remaining 82 allegations have been grouped into 9 pending full investigations and 5 directed lines of enquiry, with one allegation remaining in case assessment.[69] These Quarterly Updates offer no detail on the facts or criminal conduct alleged, so these numbers are of limited analytical value. The analysis below of 'proportionality' and 'lack of evidence' comes from the SPLI's Table for Complainants, which offers no factual context: only a number for each investigation which has been closed, tallied with the reason for closure (either 'proportionality' or 'lack of evidence', as defined below).[70]

When the SPA has decided that there will be no criminal investigation,[71] the MOD then decides whether an 'inquisitorial inquiry' will take place. These decisions are taken by the Secretary of State following the 2013 judgment of Silber J in *Ali Zaki Mousa* which called for the establishment of the IFI. The IFI considers Article 2 inquiries, and there no established body for Article 3 cases. Where "MOD decisions" appears below, this refers to an intermittently updated dataset with IHAT case number, a précis of alleged facts, and a decision either to refer a case to the IFI, or in the case of Article 3, not to hold an inquiry.

b. 'Proportionality' in the MOD Legacy Investigations

IHAT's references to 'proportionality' are undefined, but occur alongside text on 'lower-level' ill-treatment,[72] evidential gaps in alleged unlawful killings ('no reasonable or

[64] D. Calvert-Smith, 'Review of Iraq Historic Allegations Team' (Attorney-General's Office and Ministry of Defence, 2016), pp.12-13.

[65] *Al-Saadoon and Others (No. 2) v The Secretary of State for Defence and Others* [2016] 1 WLR 3625 [259].

[66] IHAT, Quarterly Updates, November 2016, July 2016.

[67] 'Who Guards the Guardians? above n 53, reports a total of 3368 allegations. There is no explanation for this discrepancy.

[68] While the *Al-Saadoon* litigation is ongoing on the papers, claimants reportedly have no representation. European Center for Constitutional and Human Rights ("ECCHR"), 'Follow-up communication by the European Center for Constitutional and Human Rights to the Office of the Prosecutor of the International Criminal Court' (31 July 2019) *https://www.ecchr.eu/fileadmin/Juristische_Dokumente/ECCHR_Follow_Up_Communication_to_OTP_War_crimes_by_UK_forces_in_Iraq_July_2019.pdf* [Accessed 19 August 2020] p.36. There have been no judgments considering the investigations closed and ongoing by the SPLI.

[69] SPLI, Quarterly Update, 1 Jan 2020-31 March 2020.

[70] SPLI, Table for Complainants, 23 April 2020, *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880804/20200423-Info_for_complainants_PDF.pdf* [Accessed 19 August 2020].

[71] SPLI Quarterly Report, 1 April – 30 June 2019, paras 3, 3.1 (on the referral of three individuals to the SPA in relation to a death in custody. The SPA decided not to prosecute).

[72] Stubbins Bates, above n 48, 719.

proportionate lines of enquiry'),[73] a combination of lack of evidence and lapse of time (recalling *Brecknell),* and conclusions that 'the death occurred during the war-fighting phase and there was no evidence of a breach of international humanitarian law.'[74] No derogation 'in time of war or public emergency threatening the life of the nation' is permitted to Article 3 ECHR; nor to Article 2, 'except in respect of deaths resulting from lawful acts of war'.[75] As the UK has never derogated from Article 2 on these grounds, the deaths in question might still require an Article 2-compliant investigation.

The SPLI Table for Complainants definitions are as follows:

> CLOSED (proportionality): You made a complaint about the conduct of UK Armed Forces in Iraq. This complaint has been carefully considered by SPLI, an independent investigative unit. It has been decided to close your case, without further action, as there is a lack of evidence of a serious criminal offence. It is also not considered proportionate to investigate further given the length of time that has passed.
>
> CLOSED (Lack of evidence): You made a complaint about the conduct of UK Armed Forces in Iraq. This complaint has been carefully considered by SPLI, an independent investigative unit. It has been decided to close your case, without further action, as there is a lack of sufficient, credible evidence of a criminal offence. This decision also took into the account findings against UK solicitors involved in legal proceedings concerning military operations in Iraq.[76]

There are overlaps here: 'proportionality' relates to 'lack of evidence of a *serious* criminal offence' (my previous work showed that the SPLI ranked ill-treatment as 'lower' or 'medium' severity if it was less than grievous bodily harm, which does not reflect the threshold for inhuman or degrading treatment in Article 3);[77] while 'lack of evidence' refers to evidential sufficiency and credibility, the final sentence implying that clients represented by Phil Shiner's Public Interest Lawyers and perhaps Leigh Day would be likely to have their cases dismissed.[78] In the 23 April 2020 Table for Complainants, a cumulative total of 489 complainants had their cases closed for 'proportionality', while 504 cases were closed for 'lack of evidence'. The total does not amount to 1204 (the number of allegations closed or being closed) as at 31 March 2020. There is nothing in the SPLI's definition of 'proportionality' that suggests a proportionality in the public law *Bank Mellat* sense. The reference to 'length of time' recalls the UK's arguments in *Brecknell*, where the European Court of Human Rights construed 'impossible or disproportionate burden' more narrowly than the UK government would have liked.

The MOD Decisions on whether to hold inquisitorial (non-criminal) inquiries under Articles 2 and 3 offer similar references to proportionality and insufficient evidence. The IFI has completed reports in relation to seven deaths and there is one investigation pending.[79] There are 9 cases marked 'no inquiry' where the first of two paragraphs refers to the existence of IHAT/SPLI investigations and High Court oversight as sufficient to fulfil the Article 2 investigatory obligation and the second paragraph predicts:

> The possibility that an inquiry could answer key questions pertaining to the death of this individual is so low that it does not justify the substantial financial and human costs which a further inquiry would likely involve.[80]

So far all of the Article 3 cases have been marked 'no inquiry', including 442 in the most recent update from June 2019. In Article 3 cases, investigators balance their perception of the seriousness of an allegation or the issues it raises against the feasibility, costs or benefits

[73] IHAT Work Completed Table, October 2017 cases 102, 122, 127, 128, 133, 134, 136, 148, 149, 177, 280, 312 and 367, 596.
[74] IHAT, Work Completed Table, cases 326 and 328.
[75] ECHR, Article 15(1)-(2).
[76] SPLI, Table for Complainants, 23 April 2020.
[77] Stubbins Bates, above n 48
[78] SDT, above n 53
[79] IFI, above n 20.
[80] MOD Decisions on Article 2, 5 April 2019, cases 135, 157, 619.01, 1069, 1357, 1389.01, 1416, 1417.02, 1515.

of further investigation.[81] Then it is implied that further investigation would be disproportionate (in the SPLI's sense).[82] 163 cases were marked 'no inquiry' on 5 April 2019 alone because of a perceived lack of 'seriousness or ongoing importance' and a cost/benefit calculation. [83] We cannot know in how many cases this 'seriousness or ongoing importance' reflects an understanding of the substantive threshold and criteria for effective investigations in Articles 2 and 3 ECHR. There are no facts, details of prior investigations, or evidential analysis in the MOD Decisions on Articles 2 and 3, so public scrutiny as required by the European Court of Human Rights case law is impossible.

Taken together, IHAT, the SPLI and MOD decisions to close investigations on 'proportionality' grounds reflect a) investigators' perceptions of the severity of the conduct alleged,[84] b) the quality of evidence available,[85] and/or c) a cost/benefit or feasibility statement.[86] These are unscrutinised assertions, not a structured proportionality test. *Bank Mellat* proportionality is in any case incongruous when applied to 'specifically qualified' and 'unqualified' rights, such as Articles 2 and 3 ECHR.[87] Articles 2 and 3 do not involve the assessment of the necessity and proportionality of a proposed legislative measure which might interfere with individual rights.[88] Nor does the case law approach Articles 2 and 3 in terms of a 'fair balance' between the rights of an individual and the interests of a community.[89]

Do the MOD investigations misunderstand the European Court's jurisprudence on the investigatory obligation? It seems so. Releasing numbers of investigations closed, in IHAT's case subject to government-set targets, is quite different from insisting on 'prompt' effective official investigations. There has been no court scrutiny of the independence of the SPLI and the MOD Decisions are ratified by the Secretary of State for Defence. The cost/benefit and feasibility assessments sweep more broadly than the margin of appreciation acknowledged in *Brecknell* and *Al-Skeini*. The decisions to close investigations lack public scrutiny, because of the numbered ciphers and limited or lacking factual details in the documents available. The SPLI Table for Complainants is in English and Arabic, and notifies complainants of the closure of their case, with no appeal or review.[90] This lack of public scrutiny recalls broader institutional practices, including the destruction of court-

[81] Systemic Issues Working Group ("SIWG"), 'Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas', August 2018, ftn. 3; IHAT Work Completed Table.
[82] ibid.; MOD Decisions on Article 3, 5 April 2019, 163 examples of cumulative reasoning for 'no inquiry' based on 1) the availability of IHAT/SPLI and judicial review or civil proceedings, 2) the issues are perceived not to be of 'such seriousness or ongoing importance' as to justify further inquiry, and 3) the opinion of the Secretary of State that 'the costs of further inquiry outweigh the potential benefits'.
[83] MOD Decisions on Article 3 cases, 30 April 2019.
[84] SIWG, ftn. 3 (referring to the SPLI's practice); SPLI, Table for Complainants, 3 September 2019: 488 cases closed for reasons of 'proportionality'; IHAT Work Completed Table, October 2017, referring to the closure in September and October 2016 of 68 and then 489 cases of 'lower-level ill-treatment because it was not proportionate to continue' to investigate them; MOD Decisions on Article 3 cases, 30 April 2019: 163 cases marked 'no inquiry' on 5 April 2019 alone because of a perceived lack of 'seriousness or ongoing importance' and a cost/benefit calculation.
[85] IHAT Work Completed Table, October 2017, cases 133, 134, 149, 177 (references to 'no reasonable or proportionate lines of enquiry' which invoke both the feasibility of further investigations and insufficient evidence so far as a reason to close criminal investigations into alleged unlawful killings).
[86] MOD Decisions, above n 80.
[87] A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: CUP, 2009) 257.
[88] *De Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 [80], cited in *Bank Mellat v HM Treasury (No.2)* [2014] AC 700 [72].
[89] *Bank Mellat v HM Treasury (No.2)* [2014] AC 700.
[90] SPLI, 'Making a Complaint', 19 February 2020: a paper-based complaints process (reviewed by a commanding officer) for any military or civilian who has had contact with the SPLI.

martial records,[91] 'closing of ranks',[92] and recurring 'No comment' responses.[93] The Table does not give sufficient details of the reasoning involved in closing investigations, so it is unlikely that alleged victims and their relatives have sufficient opportunity to defend their interests, as required by *Kelly,*[94] and *Tagayeva* which finds a breach of public scrutiny when victims and their families were denied access to investigatory reports.[95]

c. Overseas Operations (Service Personnel and Veterans) Bill 2019-2021

At this writing, the second reading for the Overseas Operations Bill has not yet been set. It creates a presumption against prosecution for nearly all criminal offences alleged committed by armed forces deployed outside the UK more than five years ago (clause 2); applies this to investigations which have 'ceased to be active' regardless of whether charging decisions have been made (clause 4(1)); fetters judicial discretion on limitation periods in for death and personal injury claims in tort and the Human Rights Act (clauses 8-11); while seeking to impose a duty to consider derogation from the ECHR prior to future military operations (clause 12: a redundant clause for non-derogable Article 3: Article 2 is derogable only for 'lawful acts of war'). Schedule 1 lists sexual offences, including those amounting to war crimes and crimes against humanity, as excluded from the presumption against prosecution.

The Bill is problematic for three reasons: first, investigatory obligations would persist in international law (the ECHR, international humanitarian law and international criminal law); [96] second, clauses 2 and 4(1) create incentives for the MOD to leave incomplete past investigations; third, Schedule 1's omissions mean that the crime of torture under the Criminal Justice Act 1988, and all other war crimes and crimes against humanity, plus murder and assaults of varying severity would be subject to the presumption against prosecution. It seems from clauses 1(5) and 5(5)'s calculation of time limits for offences 'alleged to have continued over a period of days' that torture and other ill-treatment against detainees would be included within the presumption against prosecution. This would render permanent IHAT and the SPLI's closure of investigations based on the perceived severity of ill-treatment allegations and on 'proportionality' grounds.

In March 2020, the government proposed 'swift, final investigations', and an '[e]nd to the cycle of reinvestigations' into 'unresolved deaths' during the Troubles in Northern Ireland. The government's announcement seeks to ensure 'that Northern Ireland veterans receive equal treatment to their counterparts who served overseas.'[97] These proposals' compliance with the Article 2 investigatory obligation has been questioned by McEvoy et al.[98] Further analysis is beyond the scope of this article.

[91] IFI, 'Consolidated Report into the Death of Nadheem Abdullah and the Death of Hassan Abbas Said', Cm 9023, March 2015, para. 11.12, cited in C. Ferstman, T. Obel Hansen and N. Arajärvi, 'The UK in Iraq: Efforts and Prospects for Accountability for International Crimes Allegations: A Discussion Paper' (University of Essex Human Rights Centre and Ulster University Transitional Justice Initiative, 1 October 2018) 37.

[92] *R v Payne* (Sentencing Hearing Transcript) 30 April 2007 (unreported).

[93] IFI, In the Matter of an Investigation into the Death of Mr Saeed Radhi Shabram Wahi Al-Bazooni, 12 April 2019.

[94] *Kelly and Others v UK* (App. No.30054/96).

[95] *Tagayeva and Others v Russia* (App. No. 26562/07) [530 *et seq*].

[96] S. Wallace, E. Stubbins Bates and N. Quénivet, 'Legal Protections for Armed Forces Personnel and Veterans Serving in Operations Outside the United Kingdom: Response to Public Consultation Questionnaire' (2019), 1.

[97] Northern Ireland Office, 'UK Government Sets out Way Forward on the Legacy of the Past in Northern Ireland' (18 March 2020) <*https://www.gov.uk/government/news/uk-government-sets-out-way-forward-on-the-legacy-of-the-past-in-northern-ireland*> [Accessed 19 August 2020].

[98] McEvoy and others, 'Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland' (Committee on the Administration of Justice, 2020) <*https://caj.org.uk/2020/04/09/prosecutions-imprisonment-and-the-sha/*> [Accessed 19 August 2020].

d. International Criminal Court Preliminary Examination

A possible investigation by the Office of the Prosecutor ("OTP") of the International Criminal Court ("ICC") is mentioned as context only in public documents on IHAT:[99] there is no publicly available reasoning as to how IHAT sought to conduct a 'genuine investigation' under Article 17 of the Rome Statute for the International Criminal Court, to preclude the exercise of jurisdiction by the ICC. The OTP re-opened a preliminary examination into the UK's actions in Iraq in 2014, and as at December 2018, had found 'reasonable grounds to believe' that members of the UK armed forces had committed:

> … the following war crimes against at least 61 victims in their custody in the context of armed conflicts in Iraq: wilful killing/murder (article 8(2)(a)(i)) or article 8(2) (c)(i)); torture and inhuman/cruel treatment (article 8(2)(a)(ii) or article 8(2)(c)(i)); outrages upon personal dignity (article 8(2)(b)(xxi) or article 8(2)(c)(ii)); rape and other forms of sexual violence (article 8(2)(b)(xxii) or article 8(2)(e)(vi)).[100]

The preliminary examination is now in its third admissibility phase, applying Article 17(2) (a)-(c) of the Rome Statute to assess the UK's willingness to conduct a genuine investigation, and also assessing the gravity ('scale, nature, manner of commission of the crimes, and their impact, bearing in mind the potential cases that would likely arise from an investigation…'.[101] 'Positive complementarity' (encouraging states to conduct a genuine investigation) is one of the aims of a preliminary examination.[102] Since the preliminary examination began, the MOD has closed many pending investigations. Articles 15(3)-(4) of the Rome Statute provide that a full investigation might proceed only if the Prosecutor finds a 'reasonable basis to proceed with an investigation' and if the Pre-Trial Chamber agrees, having examined the Prosecutor's request for authorisation of an investigation. Further action by the ICC in relation to alleged war crimes in Iraq is therefore contingent, possibly remote.

4. THE DOMESTIC CASE LAW

a. Inconsistencies

Domestic case law on the investigatory obligation is inconsistent; and often inaccurate on 'impossible or disproportionate burden'. Citing this phrase, Lord Hope asserted that Article 3's positive obligations are not absolute,[103] a concept that recurs in cases on IHAT,[104] where priority-setting and resource management has been encouraged.[105] There is scholarly debate on whether Article 3's positive obligations are as absolute as its negative prohibition. Mavronicola's view that the positive obligations are 'not boundless', but must be carefully specified and cannot be 'overridden' is a more persuasive reading of the European Court of Human Rights case law than domestic courts' approach.[106] '[I]mpossible or disproportionate

[99] Calvert-Smith, above n 64, para. 3.12, para. 6.1.iii (on sifting priority offences, including 'ill-treatment which may amount to a "war crime"' under Pillar 1).
[100] ICC OTP, Report on Preliminary Examination Activities (2018) para. 195. ICC OTP, Report on Preliminary Examination Activities (2019).
[101] ICC OTP (2018) para 7.
[102] H. Takemura, 'Positive Complementarity', *Max Planck Encyclopedia of International Law* (Oxford: OUP, 2018) <*https://opil.ouplaw.com/view/10.1093/law-mpeipro/e2507.013.2507/law-mpeipro-e2507*> [Accessed 19 August 2020].
[103] *R v Ashworth Hospital (Now Mersey Care NHS Trust) ex parte Munjaz* [2005] 2 WLR 695, para. 78 (per Lord Hope).
[104] *R (Ali Zaki Mousa and Others) v Secretary of State for Defence* [2013] EWHC 1412 (Admin) para 201, citing *R (JL) v Home Secretary* [2009] 1 AC 588, para. 56.
[105] *Al-Saadoon and Others (No. 2) v The Secretary of State for Defence and Others* [2016] 1 WLR 3625.
[106] N. Mavronicola, 'What Is an "Absolute Right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12(4) *Human Rights Law Review* 723, 734.

burden' is a contextual margin of appreciation; it does not make the investigatory obligation optional.

Closest to the European Court's approach is *MA, BB,* on the investigation by the Prisons and Probation Ombudsman into allegations of serious ill-treatment at an immigration removal centre.[107] Emphasising public scrutiny, this judgment infers three requirements which are not found in the European Court's jurisprudence: the power to compel witnesses, to hold hearings in public, and to ensure properly funded representation so that claimants might review and comment on witnesses' evidence and provide lines of inquiry.[108] *MA, BB* refers neither to 'impossible or disproportionate burden', nor does it prioritise efficiency.

Mid-way between the European Court of Human Rights' approach and case law on IHAT is the *DSD* judgment, which invokes 'impossible or disproportionate burden',[109] but acknowledges that 'an investigation which is seriously defective in purely operational [not systemic] terms' might violate the investigatory obligation.[110] This is a mediate solution: 'only conspicuous or substantial errors in investigation qualify'; 'simple errors or isolated omissions' would not violate Article 3.[111] There is no hint of a cost/benefit balancing in this judgment.

Smith and *Long* are at a similar point on the spectrum.[112] In both cases, the investigatory obligation still bound the Secretary of State for Defence, although the positive operational obligation was subject to 'impossible or disproportionate burden'. Judges could adjudicate cases which fell in the 'middle ground' between matters of procurement and the conduct of hostilities. In *Smith,* soldiers had died from an explosion close to a Snatch Land Rover, which offered insufficient protection. The Supreme Court held that judges should not impose impossible or disproportionate positive obligations in relation to the planning of military operations, but Article 2 required that the relatives' claim should not be struck out. In *Long,* the 'systems failure' of disregarding an order to provide iridium satellite phones to soldiers was implicated in the deaths of the claimants' relatives. The Court of Appeal held that Article 2 investigatory obligations applied; that it was neither unreasonable nor disproportionate to have required an investigation into that systemic failure; but on the facts, there was little scope for further lessons to be learned.

More problematic is the April 2016 judgment in *Al-Saadoon,*[113] which is still good law despite the Court of Appeal's subsequent judgment with the same name which considered other questions.[114] Leggatt J (as he then was) expands 'impossible or disproportionate burden' to state that *Brecknell* 'only requires the authorities to take such steps as it is reasonable in all the circumstances to take to investigate the allegation',[115] and emphasises priority-setting, '…in order to manage [IHAT's] workload and deal with the vast influx of allegations in a proportionate way.[116] *Al-Saadoon* hints that the 'vast influx of allegations' itself risks an 'impossible or disproportionate burden' on the domestic authorities, so that it

[107] *MA, BB v Secretary of State for the Home Department (Equality and Human Rights Commission, intervening)* [2019] EWHC 1523 (Admin).
[108] ibid., note that 'few Article 3 cases' may require the power to compel witnesses at [60].
[109] *Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11 [96-99].
[110] *Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11 [92].
[111] *Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11 [29].
[112] *Smith and Others v Ministry of Defence* [2013] UKSC 41; *R (Long) v Secretary of State for Defence* [2015] EWCA Civ 770;
[113] *Al-Saadoon and Others (No. 2) v The Secretary of State for Defence and Others* [2016] 1 WLR 3625.
[114] *Al-Saadoon and Others v The Secretary of State for Defence and Ors* [2016] EWCA Civ 811.
[115] *Al-Saadoon and Others (No. 2) v The Secretary of State for Defence and Others* [2016] 1 WLR 3625 [198].
[116] *Al-Saadoon and Others (No. 2) v The Secretary of State for Defence and Others* [2016] 1 WLR 3625 [289 (iv)].

is plainly impossible' to complete 'within a reasonable time'.[117] The judgment misreads 'impossible or disproportionate burden', and seems to suggest an inapplicable reasonableness threshold for the investigatory obligation. It emphasises 'expedition', 'practicality' and 'proportionate cost'[118] more prominently than the European Court's criteria for an effective investigation.

Al-Saadoon recommends that 'IHAT … should only devote its investigative resources to allegations which meet defined minimum standards of evidential support.'[119] In practice, this means that IHAT was permitted to close investigations into allegations unless they meet all of the following conjunctive criteria (the evidential sufficiency test):

> … a witness statement which is (i) signed by the claimant, (ii) gives the claimant's own recollection of the relevant events, (iii) identifies any other relevant witness known to the claimant and the gist of the evidence which the witness may be able to give, and (iv) explains what, if any, steps have been taken or attempts made since the incident occurred to bring it to the attention of the British authorities.[120]

These criteria would be unattainable for an unrepresented claimant who previously gave a short statement through an interpreter. The insistence on signed witness statements is unusual. The Civil Procedure Rules allow a party to serve an unsigned version of a witness statement (a witness summary) with permission of the court.[121] *Al-Saadoon* places obligations on the claimants promptly to litigate if the state fails to investigate,[122] and to adduce forensic and independent witness statements, which may not have been collected or made available to civilian claimants during an armed conflict or belligerent occupation.[123] This misunderstands the investigatory obligation, which requires states to investigate of their own motion as soon as they are aware of an 'arguable case' of a serious violation of Articles 2 or 3. Although IHAT's prior failures in public scrutiny were one reason for the establishment of the IFI, Leggatt J finds sufficient public scrutiny from IHAT and judicial review where the Secretary of State for Defence disclosed IHAT's report and the documentation it reviewed.[124] SPLI appears to offer only its Table to complainants.

As terminology from the judgment on evidential sufficiency and proportionality appear in Calvert-Smith's review of IHAT,[125] the dataset from IHAT and SPLI,[126] and public remarks by the DSP,[127] *Al-Saadoon* has influenced subsequent MOD practice. Yet IHAT and the SPLI have gone further than permitted by *Al-Saadoon,* rejecting cases where 'we cannot reach the evidence required for beyond reasonable doubt.'[128] The Crown Prosecution

[117] *Al-Saadoon and Others (No. 2) v The Secretary of State for Defence and Others* [2016] 1 WLR 3625 [203].
[118] *Al-Saadoon and Others (No. 2) v The Secretary of State for Defence and Others* [2016] 1 WLR 3625 [213].
[119] *Al-Saadoon and Others (No. 2) v The Secretary of State for Defence and Others* [2016] 1 WLR 3625 [213].
[120] *Al-Saadoon and Others (No. 2) v The Secretary of State for Defence and Others* [2016] 1 WLR 3625 [289].
[121] Civil Procedure Rule 32.9.
[122] *Al-Saadoon and Others (No. 2) v The Secretary of State for Defence and Others* [2016] 1 WLR 3625 [180, 183, 189-190].
[123] *Al-Saadoon and Others (No. 2) v The Secretary of State for Defence and Others* [2016] 1 WLR 3625 [197-199].
[124] *Al-Saadoon and Others (No. 2) v The Secretary of State for Defence and Others* [2016] 1 WLR 3625 [115] re. death of Husam Salih Owait.
[125] Calvert-Smith, above n 64, paras 289-290.
[126] *Al-Saadoon and Others (No. 2) v The Secretary of State for Defence and Others* [2016] 1 WLR 3625 [198].
[127] The DSP stated that the Designated Judge 'has approved of the process' used by IHAT and the SPLI in relation to evidential sufficiency: Andrew Cayley QC, panel discussion organised by the ECCHR, The Hague, 1 October 2019.
[128] ibid.

Service ("CPS") Full Code Test uses 'realistic prospect of conviction' ('more likely than not'), explicitly distinct from 'beyond reasonable doubt.'[129]

b. Divergence between Domestic Courts and Strasbourg

Domestic courts' autonomous interpretation of the investigatory obligation is not only inconsistent between cases with different subject matter, but also deviates from Strasbourg case law. This is normatively undesirable, and risks undermining the investigatory obligation. I argue that the executive and domestic courts should instead engage rigorously with the criteria for an effective investigation of alleged breaches of Articles 2 and 3. Where 'impossible or disproportionate burden' applies (as it arguably should not to Article 3 investigations, as it was developed with prospective criteria in relation to the positive operational obligation in Article 2), the government should be required to evidence it carefully, and judges should construe it narrowly. The absence of 'impossible or disproportionate burden' from the Article 3 case law, from *Al-Skeini* and *Jaloud* suggests that it does not set the scope of investigatory obligations to the extent that the UK might wish. *Al-Saadoon*'s emphasis on resource management, and the shifting of responsibilities to claimants to prove evidential sufficiency is the most obvious deviation from Strasbourg case law.

5. CONCLUSION

'[I]mpossible or disproportionate burden' is a concession to the practical difficulties involved in implementing positive obligations. Where it is argued, it must be evidenced and narrowly construed. The phrase appears occasionally in the European Court's jurisprudence on Article 2, yet the UK government has invoked it in Strasbourg and in domestic courts, extending it to Article 3 investigations in the latter. The UK government appears to have misunderstood this narrow margin of appreciation, using it to argue that the investigatory obligation no longer applies. It is perhaps no coincidence that domestic jurisprudence involves repeated challenges to the promptness or independence of official investigations; although domestic cases consider impartiality, forensic investigations, and public scrutiny in less depth than the European Court.

The frequent references to 'proportionality' in the MOD investigations do not suggest that the UK has misunderstood these rights as rights with qualifying paragraphs, conflating Articles 2 and 3 ECHR with Articles 8-11 for example. Articles 2 and 3 ECHR are (respectively) specifically qualified and unqualified rights,[130] to which structured proportionality and unscrutinised cost/benefit reasoning are inapplicable. Instead, these investigations draw cumulatively on 'impossible or disproportionate burden' in *Osman* and *Brecknell*; and a narrow, efficiency-based approach, with an unscrutinised balance between the evidence available and the costs or feasibility of further investigation, from *Al-Saadoon*. MOD practice has not changed since the very different judgments on the investigatory obligation in *DSD* and *MA, BB*: investigations continue to close without public scrutiny, and probably without claimants being represented.

The investigatory obligation does not permit the closure of investigations on unscrutinised proportionality grounds; and the criteria for effective official investigations remain intact. This article has argued that the UK executive and domestic courts should engage rigorously with the European Court's jurisprudence on the investigatory obligation. The inconsistent domestic case-law is normatively undesirable. The divergence between domestic and ECHR jurisprudence has led to the premature closure of MOD investigations

[129] CPS Full Code Test, 4.1, 4.2.
[130] Kavanagh, above n 87, 257.

without the requisite public scrutiny. At this writing, the government has introduced the Overseas Operations (Service Personnel and Veterans) Bill, which attempts inter alia to introduce a presumption against prosecution for crimes allegedly committed more than five years ago by members of the armed forces deployed overseas. This is a significant concern for future practice; and raises questions as to the willingness of UK authorities to conduct a genuine investigation into war crimes allegedly committed against detainees in British military custody in Iraq, which are currently subject to a preliminary examination by the ICC Office of the Prosecutor.