



Strengthening UK military investigations into civilian harm:

Towards compliance, mitigation and accountability

Elizabeth Stubbins Bates



Cover photo:

A member of 156 Provost Company Royal Military Police gathering evidence at the scene of a 'crime' during a training exercise.

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Ceasefire Centre for Civilian Rights

The Ceasefire Centre for Civilian Rights is an international initiative to develop civilian-led monitoring of violations of international humanitarian law or human rights in armed conflict; to secure accountability and reparation for violations; and to develop the practice of civilian rights.

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Abbreviations

AP I	Additional Protocol I 1977
AP II	Additional Protocol II 1977
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts 2001
BDA	battle damage assessment
CCM	civilian casualty mitigation
DDO	deliberate detention operations
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
ECtHR	European Court of Human Rights
EWIPA	explosive weapons in populated areas
FOI	Freedom of Information
GC I	First Geneva Convention 1949
GC II	Second Geneva Convention 1949
GC III	Third Geneva Convention 1949
GC IV	Fourth Geneva Convention 1949
HRA	Human Rights Act 1998
IAC	international armed conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
IFI	Iraq Fatality Investigations
IHAT	Iraq Historic Allegations Team
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IIA	Independent Inquiry relating to Afghanistan
ILA	International Law Association
ILC	International Law Commission
ISAF	International Security Assistance Force (Afghanistan)
MOD	Ministry of Defence (UK)
NGO	non-governmental organizations
NIAC	non-international armed conflict
OOA	Overseas Operations (Service Personnel and Veterans) Act 2021
OTP	Office of the Prosecutor
RMP	Royal Military Police
SIWG	Systemic Issues Working Group
SAS	Special Air Service
SPLI	Service Police Legacy Investigations
UN	United Nations



Executive summary

Civilian protection is in crisis globally, with the UN recording a 72 per cent increase in civilian casualties in armed conflict in 2023 compared with 2022. When incidents of civilian harm occur or violations of the laws of war are suspected, prompt and effective military investigations are essential. Such investigations enhance accountability, ensure state compliance with international investigatory obligations, and contribute to improved civilian harm mitigation in future operations. To be effective, investigations should be holistic and comprehensive, focused on uncovering the facts and causes of harm, as well as accounting for the dead and missing, addressing direct civilian harm from military operations and the reverberating effects of attacks on civilian populations. This report sets out the international legal framework, examines recent and current UK investigations into civilian harm, and makes recommendations.

Thus far, the UK's investigations into civilian harm in military operations have been delayed yet recurrent, well-financed but politically criticized. They have failed to acknowledge the full breadth of international humanitarian law (IHL)'s specified investigatory obligations, the importance of operational investigations to 'respect and ensure respect' for IHL 'in all circumstances', and the centrality of state responsibility for IHL violations. Where a state fails comprehensively to investigate civilian harm, including IHL violations and international crimes, there will be a systemic inability to hold those responsible to account, ensure victims' access to reparation, or implement measures to prevent recurrence.

Investigations in international law and practice

This report argues that operational investigations are integral to civilian protection in armed conflict, and to states' full compliance with IHL, international human rights law (IHRL) and international criminal law (ICL). Investigations are mandatory where criminal conduct is suspected; however, they should not be limited to criminal proceedings. Investigations also serve as a crucial tool to facilitate states' broader international law obligations that apply in armed conflict, including the duty to 'suppress' all IHL violations. To suppress all breaches of IHL, parties to a conflict must exercise 'constant care' to spare civilians and civilian objects, verify that targets are military objectives, and take 'all feasible precautions' in their choice of weapons and targeting practices.

The principle of precautions in attack is logically consistent with civilian casualty tracking and investigation as part of the civilian protection toolkit. Beyond the IHL principle of precautions and consistent with emerging standards on civilian protection, civilian casualty tracking must be comprehensive – documenting data on casualties and disaggregating it by sex and age – to address the cumulative and reverberating effects of attacks. These effects surpass the 'incidental' harm directly caused by military operations, encompassing environmental impacts, malnutrition, and disease spread through attacks on healthcare and sanitation systems.

Battle-damage assessment (BDA), routinely conducted following every military attack, should automatically include civilian casualty tracking. BDAs, along with credible external allegations of civilian harm, should trigger investigations that contribute to understanding the targeting cycle, enable patterns of conduct to be monitored and, when necessary, be evaluated by military legal advisers. This process is essential to ensure that subsequent kinetic engagements fully comply with the IHL principles of distinction, proportionality and precautions, thereby minimizing and avoiding civilian harm in later attacks and future deployments.

The UK's record on investigations

This report examines UK investigatory mechanisms on civilian harm, offering a critical account of recent investigatory practice, with a focus on Iraq and Afghanistan. In both contexts, there have been numerous operational, criminal and judicial investigations, as well as public inquiries, into civilian deaths resulting from UK military operations. Yet serious weaknesses in investigating alleged violations, particularly in the initial stages of an investigation, have been a common feature in cases involving civilian harm by UK forces from Camp Breadbasket and the Baha Mousa case; through the experience of the Iraq Historic Allegations Team, Operation Northmoor and subsequent legacy investigations; to the Iraq Fatality Investigations and Haddon-Cave Inquiry.

Several significant shortcomings have emerged. In addition to failing to acknowledge the breadth of IHL's investigatory obligations, there is a defensive and restrictive practice in relation to the investigatory obligations under the European Convention on Human Rights (ECHR). Criminal investigations are prioritised and are only supplemented by inquisitorial and coronial-style investigations when the criminal investigations have been found to be inadequate. Lastly, there are weaknesses in initial investigations, including in forensic data and record-keeping soon after the relevant attack, and a lack of transparency in the UK's investigatory practice.

Improving the UK's approach to investigating civilian harm goes beyond remedying specific flaws in official practice, including in the armed services and the Ministry of Defence (MOD). The recommendations in this report will enable ongoing monitoring of civilian harm (including cumulative and reverberating effects), and facilitate IHL, IHRL and ICL compliance.

This report makes the following recommendations:

To the UK government:

- Support the MOD to move towards holistic, comprehensive investigations of civilian harm, including the cumulative and reverberating effects of operations, and facilitate parliamentary oversight of these investigations.
- Report with transparency on civilian casualties from UK military deployments and enable FCDO and Ministry of Justice briefings on the treatment of civilian detainees in UK military custody.
- Consider repealing the Overseas Operations (Service Personnel and Veterans) Act 2021 or, at minimum, amend it to enable civil litigation or criminal prosecution of historic cases involving arguable violations of IHL, IHRL or ICL.

To the MOD:

- Employ comprehensive civilian casualty tracking throughout a deployment, considering the IHL principles of distinction, proportionality, and precautions; acknowledging the cumulative and reverberating effects of armed conflict on civilians; and using the data to rectify within the chain of command any targeting practices which fail to respect IHL.
- Implement in full IHL obligations to locate the dead and the missing and to enquire into the deaths of detainees; and conduct prompt, independent, and impartial investigations of any alleged torture or ill-treatment of civilians and those hors de combat.
- Improve forensic investigations and record-keeping in all initial investigations, sharing data with personnel from the Defence Serious Crime Unit whenever serious violations of international or domestic law are suspected.
- Train service personnel in the importance of investigations and sanction any personnel who obstruct an investigation. Report (within the chain of command and to the Defence Select Committee) any closing of ranks and attempts to obstruct (criminal, civil or public inquiry) investigatory procedures.
- Establish clear and transparent criteria for assessing the credibility of alleged violations of international law, enabling appropriate investigation and rendering recurrent litigation unnecessary.

Introduction

Globally, the protection of civilians is in crisis. ‘The United Nations recorded at least 33,443 civilian deaths in armed conflicts in 2023, a 72 per cent increase as compared with 2022.’¹ The crisis in civilian protection is caused by intentional violations and a failure to prevent their repetition, careless targeting, bad faith interpretations of what international humanitarian law (IHL) permits;² and increasingly reckless reinterpretations of its core prohibitions.³

Civilian harm includes but is not limited to ‘loss of civilian life, injury to civilians, and damage to civilian objects.’⁴ Beyond direct physical damage, it can extend to include mental or moral harm. Civilians are harmed not only by violations of the IHL principles of distinction and proportionality but also by the environmental impacts of war, from malnutrition, and from disease spread through attacks on healthcare and sanitation systems.⁵ Civilian harm includes the effects of war crimes in international armed conflict (IAC) and non-international armed conflict (NIAC) but is broader, including ‘foreseeable’ indirect harms to civilians,⁶ and ‘reverberating’ effects of kinetic operations in urban settings, especially where explosive weapons are used.⁷ Although the ILA Study Group in 2017 found that ‘foreseeable’ reverberating effects must be taken into account while operationalizing the IHL principle of proportionality, scholars note a ‘dual legal blind spot’ in IHL on the ‘cumulative’ civilian harm of multiple attacks and the indirect effects of ‘infrastructure collapse, societal trauma, or socio-economic decline.’⁸ This failure to recognize the breadth and extent of civilian harm ‘hampers military and political decision-making’ and ‘devastates civilian populations.’⁹

1 A Guterres, ‘Protection of Civilians in Armed Conflict – Report of the Secretary-General’ (S/2024/385, 14 May 2024), para. 6.

2 International Committee of the Red Cross (ICRC), *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Building a Culture of Compliance for IHL to Protect Humanity in Today’s and Future Conflicts* (34IC/24/10.6, September 2024), p. 6.

3 C Droege, ‘War and What We Make of the Law’, *Just Security*, 10 July 2024.

4 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I), Art. 57(2)(a)(ii).

5 Guterres, ‘Protection of Civilians in Armed Conflict’, paras 2, 7.

6 International Law Association (ILA) Study Group on the Conduct of Hostilities in the 21st Century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare, Final Report* (2017), p. 23, cited in M Kanetake, ‘The Hawija Airstrike: Reverberating Effects on Civilians under International Humanitarian Law’ (2022) 35 *Leiden Journal of International Law* 735, n. 44.

7 Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas (henceforth Political Declaration EWIPA), 2022. Para. 1.3 defines reverberating effects as: ‘severe and long-lasting indirect effects ... [often] from damage to or destruction of civilian infrastructure’.

8 N Lubell, J Dill et al., ‘Cumulative Civilian Harm in War: Addressing the Hidden Human Toll of the Law’s Blind Spot’, ongoing research project (University of Essex, University of Oxford et al., funded by UKRI, ESRC and NSF, 2023–2026).

9 Ibid.

This report argues that operational investigations are integral to civilian protection in armed conflict, and to states' full compliance with IHL, international human rights law (IHRL) and international criminal law (ICL). These investigations are not limited to criminal proceedings. Ongoing investigation and monitoring of civilian harm assists states in their Common Article 1 obligation to 'respect and ensure respect' for the Four Geneva Conventions and their Additional Protocols 'in all circumstances'.¹⁰ Common Article 1 is an obligation directed to the High Contracting Parties of the Geneva Conventions, emphasizing that IHL, like IHRL, primarily involves state responsibility. IHL compliance requires all violations to be 'suppressed and all those who commit serious violations prosecuted',¹¹ but the duty to 'repress' grave breaches in IAC is distinct from and in addition to the duty to 'suppress' all other IHL violations.¹²

operational investigations are integral to civilian protection and to states' full compliance with international law

Investigations (in their broadest definition as a duty to establish facts and their causes) are obvious preconditions for the duty to 'repress', but they are also necessary to implement the broader duty to 'suppress' all IHL violations. IHL imposes obligations to identify and account for the dead and the missing,¹³ and these necessitate investigatory processes. IHL compliance requires criminal investigation or prosecution if torture, inhuman treatment, or wilful killing is suspected. Finally, and most importantly for a report on civilian harm, the principle of precautions in attack logically requires civilian casualty tracking and investigations as part of the civilian protection toolkit – not only when violations are suspected.¹⁴ Investigations are a tool to facilitate states' implementation of the international law applicable in armed conflict as well as an obligatory step where criminal conduct is suspected.

10 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (GC I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (GC II); Geneva Convention III Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (GC III); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (GC IV); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS (AP I), Common Article 1.

11 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, cited above n. 2, p. 68.

12 GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; AP I Arts 85(1), 86(1); N Lubell, J Pejic and C Simmons, *Guidelines on Investigating Violations of IHL: Law, Policy, and Good Practice* (Geneva Academy and ICRC, 2019), para. 15, n. 11.

13 J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (ICRC, Cambridge University Press 2005) (henceforth ICRC Customary IHL Study) Rule 116 (IAC and NIAC: 'With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves'); GC I, Arts 16–17; GC II, Arts 19–20; GC III, Arts 120–122; GC IV, Arts 16, 121–131, 136–139, AP I, Arts 33–34. Rule 117 (IAC and NIAC: 'Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate'); AP I, Art. 33.

14 M Lattimer, 'The Duty in International Law to Investigate Civilian Deaths in Armed Conflict', in Lattimer and Sands (eds), *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War* (Bloomsbury, 2018), pp. 41–72.

Investigations are integral to civilian protection in armed conflict

Parties to a conflict must take ‘constant care’ to spare the civilian population and civilian objects from the effects of their attacks: by doing ‘everything feasible’ to verify that their targets are military objectives; taking ‘all feasible precautions’ in their choice of weapons and targeting practices to ‘avoid ... and in any event to minimiz[e], incidental’ civilian harm; refraining from launching an attack which is expected to cause civilian harm in breach of the IHL principle of proportionality; and cancelling and suspending an attack if their ‘constant care’ shows that their target is not a military objective or if incidental harm to civilians and/or civilian objects might result that is excessive in relation to the anticipated military advantage of the attack.¹⁵ While this phrasing appears in Additional Protocol I to the Four Geneva Conventions, binding states which have ratified it in IAC to which Additional Protocol I applies, the ICRC’s Customary IHL Study finds evidence from military manuals and international case law that the IHL principle of precaution binds states and non-state armed groups in IAC and NIAC alike. Customary IHL further requires parties to the conflict to assess the effects of attacks to ensure that they do not cause disproportionate civilian casualties.¹⁶ This assessment process requires investigation and record-keeping within the chain of command.

Each of these precautions requires knowledge of target identification, the location of civilians and civilian objects, and of the means and methods of warfare that will avoid and minimize civilian harm. The IHL principle of precautions requires civilian protection in its narrow sense. However, the cumulative and reverberating effects of attacks are broader than the ‘incidental’ civilian harm which requires a party to cancel and suspend an attack.

Comprehensive civilian casualty tracking can address civilian harm in a broader sense, including cumulative and reverberating effects of attacks. It is consistent with emerging standards on civilian protection. The Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas (Political Declaration EWIPA) recommends that civilian casualties be recorded and tracked, with data ‘disaggregated by sex and age’, ‘shared and made publicly available’ ‘where possible’ as an important tool in implementing IHL’s principle of precautions in attack.¹⁷ Comprehensive civilian casualty tracking can reveal patterns of conduct, choice of weapons or targeting practices which suggest a failure to take ‘constant care’ or ‘all feasible precautions’ to avoid and minimize civilian harm. These data can then contribute to improved civilian protection in later attacks and future deployments.

This report locates investigatory obligations in IHL and IHRL as an integral part of civilian protection in armed conflict, and seeks to strengthen UK accountability and justice mechanisms for civilian harm in part through this pragmatic lens. Battle damage assessments (BDA) or credible external allegations of civilian harm can trigger investigations. These investigations can feed back into knowledge of the targeting cycle, which can then be evaluated by military legal advisers to ensure that subsequent kinetic engagements fully comply with the IHL principles of distinction, proportionality, and precautions.

15 AP I, Art. 57 (1)–(2); ICRC Customary IHL Study, Rule 15 (principle of precautions in attack, applicable in IAC and NIAC).

16 ICRC Customary IHL Study, Rule 18 (applicable in IAC and NIAC, citing military manuals and the International Criminal Tribunal for the former Yugoslavia, *Kupreškić case*, Judgment, para. 362).

17 Political Declaration EWIPA (cited above n. 7), para. 1.8.

A critical account of the UK's investigatory practice

The UK's investigations into civilian harm on military operations have been delayed yet recurrent, well-financed but politically criticized. They have failed to acknowledge the full breadth of IHL's specified investigatory obligations, the importance of operational investigations to 'respect and ensure respect' for IHL 'in all circumstances', and the centrality of state responsibility for IHL violations. Investigations need not be limited to criminal proceedings. Most Ministry of Defence (MOD) investigations focused on whether or not a named defendant could be brought to trial at court martial for offences under domestic or (exceptionally) international law. IHL does require that those suspected of perpetrating grave breaches in IAC be prosecuted or extradited;¹⁸ and IHRL requires effective investigations into alleged violations of the right to life and prohibition of torture with the aim that individual responsible can be identified,¹⁹ but IHL and IHRL primarily engage state responsibility. In practice, the MOD's narrow, criminal focus has led to political defensiveness, so that investigations were closed and victims' right to truth barely respected. The public inquiry into the death of

Iraqi civilian Baha Mousa in British military custody, the Iraq Fatality Investigations (intended to produce coronial-style reports in particular cases once criminal prosecution has been ruled out) and the ongoing Independent Inquiry relating to Afghanistan are counter-examples to this trend, but each of them became necessary because of insufficient investigations prior to their establishment.

the MOD's narrow focus on criminal investigations has led to political defensiveness, so that investigations were closed and victims' right to truth barely respected

For the UK's deployment to Afghanistan, there were 36 investigations into alleged crimes in international and domestic law from 2010 to 2014,²⁰ resulting in four convictions (one of murder of a wounded insurgent, where the conviction was reduced to manslaughter on appeal;²¹ another for assault occasioning actual bodily harm after a soldier was found to have stabbed a child;²² and two guilty pleas to an offence of conduct to the prejudice of good order and service discipline, and a racially aggravated offence likely to cause harassment, alarm or distress after service personnel were alleged to have sexually assaulted two children).²³ This was followed by Operation Northmoor from 2014 to 2019, which investigated 675 allegations at a cost of less than £10 million, and resulted in no referrals for criminal prosecution.²⁴

18 Hague Convention IV Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land 18 October 1907, Art. 3; GC I, Arts 49–50; GC II, Arts 50–51; GC III, Arts 129–130; GC IV, Arts 146–147; AP I, Arts 11(4), 85(3); Amended Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects 10 October 1980, Art. 14; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, Arts 15, 22.

19 See inter alia *Brecknell v UK* (2008) 46 EHRR (European Human Rights Reports) 42, paras 65–67.

20 Ministry of Defence (MOD), Investigation into Allegations of UK Forces Mistreatment of Afghan Nationals (FOI response) 2014.

21 *R v Blackman* [2017] EWCA 190 (Court of Appeal (Criminal Division)).

22 Investigation into Allegations of UK Forces Mistreatment of Afghan Nationals, FOI serial no. 1.

23 Ibid., FOI serial no. 21.

24 Operation Northmoor 2014–2019 Final Narrative (on file with the Independent Inquiry relating to Afghanistan, 27 October 2023).

Operation Northmoor included investigations into allegations that ‘one [Special Forces] squadron had killed dozens of unarmed men, detainees and civilians’; while Operation Cestro ‘investigated the killing of four young people in Loy Bagh village in Helmand on 18 October 2012’, again by Special Forces: three soldiers were referred to the Service Prosecution Authority, but no prosecutions were brought.²⁵ Following revelations by the *Sunday Times* and BBC *Panorama* into alleged killings of unarmed men of fighting age by Special Forces, Sir Charles Haddon-Cave was appointed to lead the Independent Inquiry relating to Afghanistan (IIA), which was established on 15 December 2022 and is ongoing.

The UK’s operations in Iraq have led to a larger number of MOD-led criminal investigations, civil litigation, and public inquiries. There were four court-martial convictions for the abuse of looters at Camp Breadbasket;²⁶ seven acquittals following failures of evidence in *R v Evans* (involving the use of force against suspected smugglers who tried to avoid a checkpoint);²⁷ and the UK’s only conviction under the International Criminal Court (ICC) Act 2001 (for the crime of inhuman treatment, relating to the death of Iraqi civilian Baha Mousa in British military custody) in *R v Payne*.²⁸ Subsequently, the Baha Mousa Public Inquiry reported in 2011, finding evidence of violations of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) on the prohibition of torture and inhuman treatment, and making recommendations to prevent future harm to detainees;²⁹ and the Al-Sweady Inquiry in 2014, finding evidence of ill-treatment but not of the unlawful killings alleged following the Battle of Danny Boy.³⁰ The MOD established the Iraq Historic Allegations Team (IHAT, 2010–2017),³¹ and the Service Police Legacy Investigations (SPLI, 2018–2021).³² These investigations have been highly politicized, with pressure from central government and the Defence Select Committee to close pending investigations.³³

IHRL requires that effective (prompt, independent, impartial, and thorough) investigations be conducted in response to allegations of breaches of the right to life or the prohibition of torture or inhuman or degrading treatment or punishment. Earlier research has established that IHAT and SPLI closed cases where ill-treatment was alleged on the basis that the treatment alleged was ‘lower’ or ‘medium’ level, which is defined once as being less than grievous bodily harm. These terms and thresholds are unknown to IHRL, and fail to implement the investigatory duties in IHRL, IHL and ICL.³⁴ Following the judgment of

25 H Jones and H O’Grady, ‘Afghanistan: UK Special Forces “Killed 9 People in Their Beds”’, *BBC News*, 9 October 2023.

26 A Gillan, ‘Four Guilty, but Questions Remain’, *The Guardian*, 24 February 2005.

27 *R v Evans et al.* (General Court Martial at Colchester, Decision following Submission of No Case to Answer 2005/59).

28 *R v Payne* [2007] (General Court Martial held at Military Court Centre Bulford, UK, H DEP 2007/411).

29 W Gage, *The Baha Mousa Public Inquiry Report* (The Stationery Office, 2011).

30 T Forbes, *Report of the Al-Sweady Public Inquiry* (MOD, 2014).

31 Iraq Historic Allegations Team (IHAT); Work Completed Table; Quarterly Updates; A Lang, ‘Iraq Historic Allegations Team’ (House of Commons Library, 2016), Briefing Paper 7478; D Calvert-Smith, ‘Review of Iraq Historic Allegations Team’ (Attorney-General’s Office and MOD, 2016).

32 Service Police Legacy Investigations (SPLI); Final Quarterly Update, Sept.–Dec. 2020; Work Completed Table; Information for Complainants.

33 MOD News, ‘IHAT to Close at the End of June’, April 2017; ‘Discredited Iraq War Probe to Be Shut Down’, *Sky News*, 10 February 2017.

34 E Stubbins Bates, ‘Distorted Terminology: The UK’s Closure of Investigations into Alleged Torture and Inhuman Treatment in Iraq’ (2019) 68 *International & Comparative Law Quarterly* 719.

Leggatt J (as he then was) in *Al-Saadoon*,³⁵ IHAT and then the SPLI closed many more pending investigations of alleged unlawful killings and ill-treatment on dubious ‘proportionality’ grounds, when ECHR proportionality relates only to qualified rights, and does not apply to the investigatory obligation in Articles 2 or 3 ECHR.³⁶ Importantly, IHL’s principle of proportionality is irrelevant here. This reference to ‘proportionality’ instead reflected *Al-Saadoon*’s emphasis on cost-effectiveness and the quality of evidence so far collected, as a problematic interpretation of European Court of Human Rights (ECtHR) case law from *Osman v UK* onwards, that positive obligations under the ECHR should not impose an ‘impossible or disproportionate burden’ on the national authorities.³⁷

The then Prosecutor of the International Criminal Court (ICC) closed her preliminary examination in December 2020, having evaluated whether the investigations by IHAT and SPLI constituted a ‘genuine’ investigation by the UK into alleged war crimes committed against detainees in British military custody in Iraq.³⁸ In her statement, Prosecutor Bensouda concluded that the IHAT and SPLI investigatory activity was evidence that the investigation had not become inactive, and that there was no evidence of an intentional shielding of perpetrators from criminal justice that would indicate the UK’s unwillingness to conduct a genuine investigation.³⁹ However, it was common ground between the UK’s representatives and the ICC that investigatory processes had been flawed. Specifically, ‘a significant and recurrent weakness in the cases investigated was the dearth of forensic evidence and inconsistencies in witness testimony given the historical nature of the investigations, years after the events ... in large part due to the inadequacies of the initial investigations conducted by the British military in theatre’.⁴⁰ The Office of the Prosecutor (OTP) reserved the right to reopen the preliminary investigation if what was then the Overseas Operations (Service Personnel and Veterans) Bill did not exempt from the presumption against prosecution crimes within the jurisdiction of the ICC. War crimes, crimes against humanity and genocide, as criminalized in the ICC Act 2001, and the offence of torture under the Criminal Justice Act 1988 were belatedly exempted from the Act’s presumption against prosecution just before it was passed in 2021.⁴¹

Focus and structure of this report

This report explores UK investigatory mechanisms on civilian harm, with a focus on the need for holistic and comprehensive investigations of civilian rights violations by UK military forces. There are four systemic shortcomings in UK investigatory practice:⁴²

35 *Al-Saadoon & Ors (No. 2) v The Secretary of State for Defence & Ors* (2016) 1 WLR 3625.

36 E Stubbins Bates, ‘Impossible or Disproportionate Burden’: The UK’s Approach to the Investigatory Obligation under Articles 2 and 3 ECHR’ (2020) 5 *European Human Rights Law Review* 499.

37 *Osman v United Kingdom* (1998) 29 EHRR 245 (ECtHR); Stubbins Bates, ‘Impossible or Disproportionate Burden’ (cited above n. 36).

38 International Criminal Court (ICC) Office of the Prosecutor (OTP), ‘Situation in Iraq/UK - Final Report’, 9 December 2020.

39 F Bensouda, ‘Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Iraq/United Kingdom’, 9 December 2020.

40 Ibid.

41 Overseas Operations (Service Personnel and Veterans) Act 2021, Schedule 1.

42 ‘Systemic’ means recurring or likely to recur, and includes policy matters: definition adapted from Lubell, Pejic and Simmons (cited above n. 12), p. 12.

First among these flaws is a failure to acknowledge the breadth of IHL's investigatory obligations. It is not only necessary to criminalize, and to prosecute or extradite those suspected of involvement in grave breaches as defined in the Four Geneva Conventions and Additional Protocol I (AP I).⁴³ High Contracting Parties must repress grave breaches and suppress all other violations of IHL. IHL requires parties to a conflict to search for the missing,⁴⁴ identify the dead and locate the graves (with post mortem investigatory obligations relating to prisoners of war and civilian protected persons),⁴⁵ and to take 'constant care ... to spare the civilian population, civilians and civilian objects.'⁴⁶ Read together with Common Article 1 to the Four Geneva Conventions and AP I, this obligation to take 'constant care' is part of a broader duty to 'respect and ensure respect' for IHL 'in all circumstances.'⁴⁷ State responsibility may be engaged if armed forces fail to track civilian harm from their deployments, learning lessons and improving IHL compliance as a result.

The second flaw in UK practice is defensive and restrictive practice in relation to the investigatory obligations in Articles 2 and 3 of the ECHR. Investigations have been closed on questionable grounds.⁴⁸ There is a positive obligation in IHRL to conduct an effective investigation where unlawful killings, torture or inhuman or degrading treatment or punishment is alleged to have been perpetrated.⁴⁹ Effective investigations into alleged unlawful killing or torture and ill-treatment should be prompt, thorough, independent and impartial, with sufficient transparency to allow victims to participate, and to know the fate of their relatives. Investigations under IHRL should lead to the identification of the person responsible: this presumes that prosecutions will follow if sufficient evidence can be found. In contrast, the UK's approach is defensive and lacking in transparency, where investigatory processes are closed if there is insufficient evidence of a serious criminal offence, or insufficient evidence to link a particular defendant to the crime. Since the first instance judgment in *Al-Saadoon*, domestic law now diverges from the jurisprudence of the ECtHR and this has discouraged effective investigations by the MOD.⁵⁰

The third flaw is an initial focus on criminal investigations only; supplemented by inquisitorial and coronial-style investigations only when the criminal investigations have been found to be inadequate. Where state practices breaches IHL or IHRL, state responsibility results; with individual criminal responsibility relevant for war crimes, including torture and inhuman treatment. It distorts the international legal framework to put criminal investigations first; and closing cases if individual defendants cannot be

43 GC I, Arts 49–50; GC II, Arts 50–51; GC III, Arts 129–130; GC IV, Arts 146–147; AP I, Arts 11(4), 85(3).

44 AP I, Art. 33; ICRC Customary IHL Study, Rule 117 (applicable in IAC and NIAC): 'Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate.'

45 GC III, Art. 120; GC IV, Art 130; ICRC Customary IHL Study, Rule 116 (applicable in IAC and NIAC, and 'reinforced by the requirement of respect for family life (Rule 105) and the right of families to know the fate of their relatives (Rule 117)').

46 AP I Art. 57 (1).

47 GC I–GC IV, Common Art. 1; AP I, Art. 1.

48 Stubbins Bates (cited above n. 34 and n. 36).

49 *Al-Skeini & Others v the United Kingdom* [2011] ECtHR (Grand Chamber) Application no. 55721/07, [2011] ECHR 1093; *Hanan v Germany* [2021] ECHR (Grand Chamber) Application no. 4871/16; *Mocanu and Others v. Romania* [2014] ECHR Grand Chamber.

50 *Al-Saadoon & Ors (No. 2) v The Secretary of State for Defence & Ors* (2016) 1 WLR 3625; Calvert-Smith (cited above n. 31); R Henriques, *Review Report on Strengthening the Service Justice System* (MOD, 2021).

identified with certainty will miss the opportunity to identify problems with state responsibility. In IHL, all acts of the armed forces are attributable to their state and result in state responsibility; and states must not absolve themselves from liability and state responsibility for violations of IHL.⁵¹ Holistic and comprehensive investigations of civilian harm are an integral part of civilian casualty mitigation,⁵² while comprehensive records and supervision of the treatment of detainees can prevent torture and other ill-treatment which violates both IHL and IHRL. Ongoing comprehensive investigations of state practice in armed conflict can identify systemic issues to prevent their recurrence. Investigations are a valuable tool, serving to prevent practices which might result in individual criminal responsibility or state responsibility for failures to comply with international law.

The fourth flaw surrounds weaknesses in initial investigation, including in forensic data and record-keeping soon after the relevant attack. Weaknesses in investigating alleged violations, particularly in the initial stages of an investigation, have been a common feature in the UK's investigatory practice. This is costly in funds and in accuracy, as it leads to recurrent investigations, often decades after the event. These initial weaknesses have been worsened by a closing of ranks, particularly in the Camp Breadbasket and Baha Mousa cases; and an unwillingness by witnesses to give evidence frankly. This has led to criminal investigations which terminate in conditions of uncertainty, and allegations which have to be re-examined, whether in the ongoing Iraq Fatality Investigations or in the current Independent Inquiry relating to Afghanistan. The lack of transparency in the UK's investigatory practice is a problem for compliance with the ECHR criteria for procedural and investigatory obligations. It also limits democratic and civil society engagement with UK state practice on civilian protection.⁵³

The next section (section 2) sets out the applicable legal framework; section 3 examines UK investigatory practice in depth, finding four systemic failures; section 4 suggests new approaches to fact-finding and investigation, while section 5 concludes and makes recommendations to the UK government and the MOD.

51 GC I, Art. 51; GC II, Art. 52; GC III, Art. 131; GC IV, Art. 148.

52 US Department of Defense, Civilian Harm Mitigation and Response Action Plan (25 August 2022), Action 7.g.; Written evidence submitted by Airwars, 'Credibility Gap: UK Civilian Harm Assessments for the Battles of Mosul and Raqqa' (Defence Committee OMR0013, 18 July 2018); E Cameron, M Spagat and M Hicks (2009) 'Tracking Civilian Casualties in Combat Zones using Civilian Battle Damage Assessment Ratios' (2009) *British Army Review* 147.

53 E Graham-Harrison, 'Ministry of Defence Lacks "Effective Oversight" of Civilian Casualties, Tribunal Hears', *The Guardian*, 30 November 2023.

2

The applicable legal framework

International humanitarian law

Parties to the four Geneva Conventions and Additional Protocols must ‘repress’ grave breaches, criminalizing them in their domestic law, searching for suspected perpetrators and prosecuting or extraditing them. Customary IHL and AP I provide obligations to provide assistance in criminal matters.⁵⁴ Investigations into those grave breaches are implicit in this obligation to ‘repress’ them and are logically prior to prosecution or extradition.⁵⁵ There is a rarely cited obligation in the four Geneva Conventions not to absolve from liability itself or any other High Contracting Party which is responsible for a grave breach.⁵⁶ This prevents states from relying on a peace settlement or armistice which might offer amnesties for grave breaches:⁵⁷ the obligations to search for perpetrators, prosecute or extradite them (and logically also investigate their crimes) persists regardless of any peace treaty which might purport to disapply these IHL obligations.

A broader obligation to ‘suppress’ all other violations of the Geneva Conventions and their Additional Protocols includes a ‘wide range’ of measures to ensure that these violations cease and do not recur. ‘[A]dministrative investigations’ can be included in this duty to ‘suppress’.⁵⁸ There are duties to ‘repress’ grave breaches including wilful killing and torture in violation of IHL, and indiscriminate attacks against civilians and civilian objects; but there is a broader duty to ‘suppress’ violations of the IHL principle of precautions. Such administrative investigations can include civilian casualty tracking, and tracking systemic failings in the handling of detainees. A duty to suppress violations can be facilitated by

proper record-keeping, by CCTV of interrogations and comprehensive training of armed forces personnel in IHL and IHRL.

the duty to suppress violations can be facilitated by proper record-keeping, by CCTV of interrogations and comprehensive training of armed forces personnel

IHL has additional investigatory obligations: to search for the missing,⁵⁹ identify the dead and locate the graves (with post mortem investigatory obligations relating to prisoners of war and civilian protected persons).⁶⁰ As Lattimer points out, the ICRC Commentary

54 ICRC Customary IHL Study, Rule 161.

55 Lubell, Pejic and Simmons (cited above n. 12), para. 12.

56 GC I, Art. 51; GC II, Art. 52; GC III, Art. 131; GC IV, Art. 148.

57 ICRC, Updated Commentary to GC III (2020), Art. 131, paras 5292–5293.

58 Lubell et al. (cited above n. 12), paras 15–16.

59 AP I, Art. 33; ICRC Customary IHL Study, Rule 117 (applicable in IAC and NIAC): ‘Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate.’

60 GC III, Art. 120; GC IV, Art 130; ICRC, Customary IHL Study, Rule 116 (applicable in IAC and NIAC, and ‘reinforced by the requirement of respect for family life (Rule 105) and the right of families to know the fate of their relatives (Rule 117)’).

on IHL's investigatory duties in respect of the missing in Article 33 of AP I requires a 'real investigation,' and sub-paragraph 2.(b) applies "in particular to the registration of the missing and the dead after bombardments."⁶¹

IHL's specific investigatory obligations and the principle of precautions can be read together with Common Article 1 to the four Geneva Conventions and AP I to 'respect and ensure respect' for IHL 'in all circumstances'.⁶² Investigations are implicit in this obligation, so that the chain of command can check subordinates are taking all feasible precautions to prevent civilian harm, and to remedy any practices which fall short of this obligation. Common Article 1 is also relevant to investigatory obligations in partnered warfare. As Sexton points out, Common Article 1 has a broader concept of complicity than the 2011 Articles on Responsibility of States for Internationally Unlawful Acts (ARSIWA), which only counts aiding and abetting breaches of international law. He argues that Common Article 1 'may require states to opt out of an ad hoc military coalition if its partner states have a clear and demonstrated history of violating the obligation to investigate'.⁶³ It is clear that investigatory duties follow from IHL itself and do 'not depend on the application of human rights law'.⁶⁴

International human rights law

Articles 2 and 3 ECHR impose positive obligations: to prevent and investigate violations of the right to life and the prohibition on torture or inhuman or degrading treatment or punishment. The obligation to investigate is triggered where there is an 'arguable case' of a serious violation of either Article. States must initiate the investigation; victims are not obliged to bring the case to their attention.⁶⁵ Investigations must be prompt, reasonably expeditious, independent (hierarchically, institutionally and practically),⁶⁶ and 'capable of leading to the identification and punishment of those responsible'.⁶⁷ These criteria in peacetime are closely matched by the ECtHR's approach in armed conflict: investigations must be prompt, independent, effective and have a 'sufficient element of public scrutiny' or transparency.⁶⁸ Importantly though, prosecution is assumed to be part of an effective investigation but it is not an absolute requirement. There must be sufficient transparency to allow public scrutiny of the investigation

and its results, to the extent necessary to safeguard the next-of-kin's legitimate interests.⁶⁹ Reasons must be given, with the next-of-kin having the opportunity to challenge decisions in which prosecution

there must be sufficient transparency to allow public scrutiny of the investigation and its results

61 M Lattimer, 'The Duty to Investigate Civilian Deaths in Armed Conflict: Looking Beyond Criminal Investigations,' *EJIL: Talk*, 22 October 2018, citing ICRC *Commentary of 1987*, AP I Art. 33.

62 GC I–GC IV, Common Art. 1; AP I, Art. 1.

63 JP Sexton, 'How Does the Obligation to Investigate Alleged Serious Violations of International Humanitarian Law Apply in Ad Hoc Military Coalitions?' (2022) 60 *The Military Law and the Law of War Review* 188, 217.

64 Lattimer (cited above, n. 14), p. 71.

65 *Assenov v Bulgaria* (1999) 28 EHRR 652, paras 101–102.

66 *Ergi v Turkey* (2001) 32 EHRR 18, paras 83–84.

67 *McCann v UK* (1996) 21 EHRR 95.

68 *Isayeva et al v Russia* (Application no. 57947/00) ECtHR, 24 February 2005, para. 836.

69 *Kelly v UK* (Application no. 30054/96), ECtHR, 4 May 2001, para. 98.

does not occur.⁷⁰ The Court has found violations of the investigatory obligation where the authorities have not interviewed witnesses; and where forensic evidence has flaws.⁷¹

Article 2 investigations (where someone has lost their life as a result of use of force by a state actor) must include an inquiry as to whether force used was justified in the circumstances.⁷² Article 3 case law requires investigation where a detainee has been subject to ‘any recourse to force which has not been made strictly necessary’ by a detainee’s conduct.⁷³ The threshold for a substantive violation of Article 3 is low, with a single slap to a juvenile detainee by a police officer being considered sufficient for the threshold of inhuman or degrading treatment.⁷⁴ The investigatory obligation applies in that and in all more serious cases of arguable Article 3 violations. It is strongly arguable that IHAT and the SPLI’s use of extra-legal categories of ‘lower’ and ‘medium’ level ill-treatment, then closing investigations on that basis, constitutes a violation of the Article 3 investigatory obligation; and that such practice ignores similar prohibitions in IHL and ICL.⁷⁵

While positive obligations must not impose an ‘impossible or disproportionate burden’ on the national authorities, this does not mean that ECHR states parties can close investigations because of the sheer burden of allegations received, imposing, as in the *Al-Saadoon* case, inappropriate ‘proportionality’ criteria or high thresholds for signed, corroborated witness statements. The investigatory obligation applies and persists, despite earlier evidential failings by the state, and earlier failings to collect the relevant evidence suggest a violation of the investigatory obligation and not a cessation of that obligation.⁷⁶

Case law acknowledges the practical difficulties of conducting investigations during armed conflicts where the ECHR applies extraterritorially. In the *Al-Skeini* case, the Article 2 investigatory obligation was intact, even though the Grand Chamber recognized the ‘practical problems’ caused by the UK being an occupying power in Iraq ‘in the immediate aftermath of invasion and war’. Among these practical problems were:

*the breakdown in the civil infrastructure, leading inter alia to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time.*⁷⁷

These are contextual facts, not excuses for persistent failures in initial investigations and record-keeping. The Court found the investigatory obligation applicable, using a broad approach to Article 1 jurisdiction, even though ‘the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators’.⁷⁸

70 *McKerr v UK* (2002) 34 EHRR 553, para. 141.

71 *Guleç v Turkey* (1999) 28 EHRR 121, para. 82; *Kaya v Turkey* (1999) 28 EHRR 1, para. 82.

72 *Kelly*, para. 96.

73 *Assenov*, para. 104.

74 *Bouyid v Belgium*, ECtHR (Grand Chamber) Application no. 23380/09, 28 September 2015.

75 *Stubbins Bates* (cited above n. 34).

76 *Ibid.* (cited above n. 36).

77 *Al-Skeini & Others v the United Kingdom* [2011] ECtHR (Grand Chamber) Application no. 55721/07, [2011] ECHR 1093, para. 168.

78 *Ibid.*

In *Hanan v Germany*, an airstrike in Kunduz ordered by a German colonel killed numerous civilians, including the applicant's two sons. Germany had retained exclusive criminal jurisdiction over its service personnel who formed part of ISAF in Afghanistan. Although there was no violation of the investigatory obligation on the facts of the case, *Hanan v Germany* confirms the extraterritorial application of Article 2's investigatory obligation, on the basis of 'special features', because Germany had obligations to investigate the relevant conduct under IHL and domestic law.⁷⁹ *Hanan* is primarily a case about the Court's expansive reading of the extraterritorial effect of the ECHR in relation to the investigatory obligation, but it also affirms the importance of that obligation, with all of its criteria for effectiveness outlined above.

International criminal law

The Rome Statute of the ICC establishes individual criminal responsibility for war crimes, crimes against humanity, genocide and the crime of aggression.⁸⁰ Civilian harm in its broadest sense might be caused by any or all of these crimes, but Article 8's lists of war crimes in IAC and NIAC are the most relevant to this report. Investigations under ICL aim solely at establishing individual criminal responsibility either of the primary perpetrator, the commander or superior, or those who order, aid or abet the commission of ICL crimes.⁸¹ ICL investigations are therefore factually limited and evidentially specific. They are not operational investigations in the broader sense, that include civilian casualty tracking and ongoing monitoring of state practice in IHL. Investigations are a precondition for the prosecution of all crimes within the jurisdiction of the ICC; and an effective investigation must be undertaken by domestic authorities in order to preclude the ICC's jurisdiction under the complementarity provisions of Article 17 of the Rome Statute. The next section (section 3) considers the ICC OTP's preliminary examination of the UK in Iraq, where the Prosecutor had found 'reasonable grounds to believe' that war crimes against detainees in British military custody had been perpetrated in Iraq. The preliminary examination was closed in December 2020, despite the OTP's concerns about the UK's flawed investigations, because there was no evidence of an intentional shielding of perpetrators from criminal justice that would indicate the UK's unwillingness to conduct a genuine investigation.⁸² Investigations (in a narrow sense) are necessary for a state's full compliance with ICL. Arguably (see section 3), the UK's focus on investigating crimes under domestic criminal law insufficiently complies with ICL. The Blackman case was prosecuted as murder and the defendant belatedly convicted of manslaughter when it might have been investigated and prosecuted as a war crime.

⁷⁹ *Hanan v Germany*, ECtHR (Grand Chamber), 16 February 2021.

⁸⁰ Rome Statute of the ICC, UNTS 2187, 17 July 1998 (entered into force 1 July 2002), Arts 6–8 bis.

⁸¹ Rome Statute, Art. 25.

⁸² F Bensouda, 'Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Iraq/United Kingdom', 9 December 2020.

3

Evaluating the UK's investigatory practice

Afghanistan

Following the deployment of UK troops in Afghanistan in 2001, a freedom of information (FOI) request revealed 36 investigations from 2010 to 2014 into alleged criminal offences (including the war crime of outrages upon personal dignity, murder, assaults, and threatening behaviour) by British troops.⁸³ There is a gap in the public record about alleged incidents prior to 2010. Most of these investigations did not result in prosecutions, owing to decisions by the Service Prosecuting Authority or insufficient evidence under section 116 of the Armed Forces Act 2006.⁸⁴ Of the 36 investigations, in 20 there was apparently 'insufficient evidence' for the case to be referred to the Service Prosecuting Authority. In four further cases, the Service Prosecuting Authority declined to prosecute 'after carefully considering the case'. There is no further detail on the evidence that was available in those 20 cases, why it was considered insufficient; nor the criteria the Service Prosecuting Authority used in deciding not to prosecute the four cases referred to it.

However, one service member was convicted of assault occasioning actual bodily harm for the 2010 stabbing of a child;⁸⁵ and former Marine Alexander Blackman was convicted of the murder of a wounded Afghan fighter (Blackman's conviction was reduced to manslaughter on appeal).⁸⁶ A Royal Air Forces airman was disciplined within the chain of command for threatening behaviour and disobeying an order, having pointed his pistol at a local male driver.⁸⁷ Three more soldiers were prosecuted at a court martial for two incidents involving the sexual touching of Afghan children.⁸⁸ These were not apparently prosecuted as sexual assaults, nor as offences against children. One soldier pleaded guilty to two charges of conduct to the prejudice of good order and service discipline; while a second soldier pleaded guilty to a racially aggravated offence likely to cause harassment, alarm, or distress. A third soldier was cleared of failing to perform a duty.⁸⁹ Subsequently, Operation Northmoor was established.

Operation Northmoor

Operation Northmoor was led by the Royal Military Police (RMP) from October 2015, with the MOD announcing in July 2017 that the RMP 'had found no evidence of criminal behaviour by the Armed Forces in Afghanistan to date' and that 'over 90% of the 675 allegations made' had been discontinued.⁹⁰ Operation Northmoor's launch was accompanied by a blog post on the MOD website, from the Armed Forces Minister, noting the government's manifesto commitment to 'ensure our armed forces overseas are not

83 MOD, Investigation into Allegations of UK Forces Mistreatment of Afghan Nationals (FOI response), 2014.

84 Ibid.

85 Ibid.

86 *R v Blackman* [2017] EWCA 190 (Court of Appeal (Criminal Division)).

87 MOD, Investigation into Allegations of UK Forces Mistreatment of Afghan Nationals.

88 Ibid., FOI serial no. 21, incident of 12 December 2011.

89 Ibid.

90 HC Deb. 10 July 2017, col. 21.

subject to persistent and sometimes ludicrous legal claims.⁹¹ This politicized rejection of investigations and accountability was influenced by the idea that the UK armed forces were ‘under legal siege’ from the extraterritorial application of the ECHR,⁹² and the consequent litigation under the Human Rights Act (HRA) 1998, where alleged victims sought compliance with the investigatory (procedural) obligation under Articles 2 and 3 ECHR. In early 2017, the then chair of the Defence Subcommittee, Johnny Mercer MP, had spoken of his disgust at the existence of an inquiry into troops’ actions in Afghanistan, and called for Operation Northmoor to close.⁹³ In July 2017, the RMP was said to be investigating members of the Special Air Service (SAS) for the alleged murder of civilians and subsequent fabrication of evidence to suggest that the victims were Taliban insurgents.⁹⁴

Operation Northmoor’s investigative activity was closed on 17 July 2019, following consultation with the Director of Service Prosecutions; the Provost Marshall (Army) ‘decided not to refer any service personnel for prosecution, as the Evidential Sufficiency Test has not been met; a decision which has also been subject to external assurance.’⁹⁵ Reference to the ‘evidential sufficiency test’ as at 2019 suggests that the judgment of Leggatt J in *Al-Saadoon* had influenced the MOD’s investigatory practice on cases relating to Afghanistan as well as Iraq. Leggatt J had applied the following conjunctive criteria for any case to proceed at IHAT, adding a cost-effectiveness or proportionality caveat to the investigatory obligation under Articles 2 and 3 ECHR:

*[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.*⁹⁶

The high threshold for evidential sufficiency places a significant burden on claimants, who may no longer have access to representation or translation services; or who may have been affected by ongoing political violence and instability in Afghanistan, or subsequent migration. It also misunderstands the Article 2 and 3 ECHR 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 either the right to life or the prohibition of torture or inhuman or degrading treatment or punishment.

Operation Cestro

Operation Cestro related to an allegation from 18 October 2012, which was separately investigated by the RMP. Three soldiers were referred to the Service Prosecuting Authority but ‘[i]n 2014, after careful consideration, the Director of Service Prosecutions took the

91 Minister of State for the Armed Forces, Penny Mordaunt MP, cited in MOD News, ‘Defence in the Media’, 25 October 2015.

92 HL Deb. 14 July 2005, vol. 672, col. 1236.

93 R Mendick, ‘Anger as Three Soldiers Warned They Face Prosecution over Iraqi Teenager’s Death’, *The Telegraph*, 17 September 2016.

94 G Wilford, ‘SAS Soldiers “Suspected” of Covering up Potential War Crimes against Civilians’, *The Independent*, 2 July 2017.

95 Operation Northmoor 2014–2019 Final Narrative (on file with the IIA).

96 *Al-Saadoon* [2016] 1 WLR 3625, para. 289.

decision not to prosecute’ them.⁹⁷ The Independent Inquiry relating to Afghanistan (IIA) (see next sub-section) is reinvestigating the subject matter of Operation Cestro under its work on Deliberate Detention Operations (DDO). The IIA has a heavily redacted document on its website relating to Operation Cestro, in which it is stated that ‘4 military aged males located engaged in a guest house under Card-A. After clearing the room 1 PKM, 1 AK-variant and 1 chest rig were recovered from enemy dead.’⁹⁸ There is no further information available in the public domain about Operation Cestro, and the IIA is currently examining whether Operation Northmoor and Operation Cestro were effective investigations.

Independent Inquiry relating to Afghanistan (IIA)

On 12 July 2022, BBC Panorama reported that Special Forces in Afghanistan unlawfully and ‘repeatedly killed detainees and unarmed men’ in Afghanistan, suggesting that one unit operating in Helmand province in 2010–2011 had killed 54 individuals in ‘kill or capture’ raids, and that a senior military officer was made aware of the allegedly unlawful killings but did not pass on information to the RMP,⁹⁹ even when the RMP was investigating similar allegations in Operation Cestro.¹⁰⁰ It was alleged that UK Special Forces ‘had a policy of executing males of “fighting age” who posed no threat.’¹⁰¹ In October 2023, the inquiry heard that the RMP had ordered the preservation of a server which contained evidence from earlier investigations into allegedly unlawful killings by Special Forces, but that the RMP was subsequently told to ‘take no action’ when this server was deleted.¹⁰² In early July 2024, it was reported that back-ups of this deleted server had been found.¹⁰³

In September 2022, Sir Charles Haddon-Cave was appointed to chair the IIA. At the time of writing, Phase 1 of its evidence gathering into DDO is complete, with hearings held in spring 2024. Under the Terms of Reference, the IIA will ‘investigate and report on alleged unlawful activity’ by Special Forces in DDO in Afghanistan from 2010 to 2013; ‘identify and review concerns expressed’ within the MOD about Special Forces’ actions; ‘consider and determine the adequacy and appropriateness of the MOD’s response to those concerns’; and ‘determine whether’ prior RMP investigations (particularly Operation Northmoor and Operation Cestro) were ‘timely, rigorous, comprehensive, properly conducted and effective.’¹⁰⁴ The IIA is tasked expressly with examining whether there is credible information of unlawful killings from a range of these DDOs; to decide if further investigation is necessary, what form it should take, and either to carry out those reinvestigations or to ‘recommend others to do so.’¹⁰⁵ While the still-pending IIA is not evidence of proven shortcomings in past RMP investigations on Afghanistan, it highlights the recurrent nature of investigations in the past two decades; with funding given several times to reinvestigate the same conduct.

97 HL 823 14 July 2022 (Minister of State, MOD, Baroness Goldie).

98 IIA, Deliberate Detention Operations (DDO)-Phase 1-Summary-Objective-1-Cestro, 25 April 2024.

99 ‘SAS Unit Repeatedly Killed Afghan Detainees, BBC Finds’, *BBC News*, 12 July 2022.

100 ‘Afghanistan Inquiry Hears Senior Officers Hid SAS Killings’, *BBC News*, 11 October 2023.

101 J Payne, ‘Royal Military Police Told to “Take No Action” over Special Forces Data Deletion’, *The Independent*, 10 October 2023.

102 Ibid.

103 H O’Grady, *BBC Radio 4 Today*, 3 July 2024.

104 IIA, Terms of Reference (last updated 17 July 2024).

105 Ibid.

Iraq

Investigations relating to alleged unlawful acts during the conflict in Iraq (2003–2009) have led to significantly more litigation and political debate than those in Afghanistan.

Investigations have been delayed yet recurrent, expensive and politically criticized. Much of the political discourse has emphasized the investigatory obligation under Articles 2 and 3 ECHR, with the implication that the ECHR should not apply extraterritorially to the actions of troops on overseas deployments, and that civil litigation against the MOD for these same alleged acts under the HRA is somehow illegitimate: asserting that it places the armed forces ‘under legal siege’ or that the allegations are themselves groundless.¹⁰⁶ The Human Rights Act provides individuals with a potential cause of action; IHL does not. An emphasis on the ECHR and HRA distracts from an appropriate level of public, parliamentary and civil society scrutiny of MOD investigations and IHL obligations; and leads the political debate away from the plight of victims and members of their families, whether they have access to legal representation or not. The bulk of allegations found proven in relation to the UK’s deployment to Iraq concerned abuses against detainees (including civilians), and inhuman treatment, causing the death of civilian detainee Baha Mousa; rather than alleged violations of IHL on the conduct of hostilities. Torture and inhuman treatment are prohibited in IHL, IHRL and as war crimes in ICL.

the political debate on the ECHR and Human Rights Act distracts from appropriate public and parliamentary scrutiny of MOD investigations and IHL obligations

Chilcot Report

The Independent Iraq Inquiry (chaired by Sir John Chilcot) examined the UK’s involvement in the conflict in Iraq from 2003 to 2009 and reported in 2016.¹⁰⁷ Chilcot found that prior to the invasion, the then Prime Minister ‘emphasised the need to minimise the number of civilian casualties’. The MOD ‘offered reassurance’ via ‘only a broad estimate ... based on previous operations’,¹⁰⁸ refusing to provide civilian casualty estimates for proposed operations in Basra and offering only Second World War era estimates.¹⁰⁹ An MOD minister stated early in the Iraq conflict that there were ‘no means of ascertaining the numbers of military or civilian lives lost during the conflict in Iraq to date’.¹¹⁰ Chilcot found that the government’s approach to civilian casualty mitigation was insufficient, and ‘greater efforts should have been made ... to determine the number of civilian casualties and the broader effects of military operations on civilians’. Sir John Chilcot found a defensive approach, a ‘concern to rebut accusations that Coalition Forces were responsible for the deaths of large numbers of civilians’, and ‘to sustain domestic support for operations in Iraq’. This approach was insufficient from an investigatory and a civilian protection perspective: the Chilcot Inquiry concluded: ‘a [g]overnment has a responsibility to make every

106 HL Deb. 14 July 2005, vol. 672, col. 1236; MOD News, ‘IHAT to Close at the End of June’, April 2017; ‘Discredited Iraq War Probe to Be Shut Down’, *Sky News*, 10 February 2017.

107 J Chilcot, *The Report of the Iraq Inquiry* (Iraq Inquiry and the Cabinet Office, 2016).

108 Ibid., Executive Summary, pp. 128–129, para. 824.

109 Chilcot, p. 178, cited in T Gregory, ‘The Chilcot Inquiry on Civilian Casualties’, *Duck of Minerva*, 18 July 2016.

110 HC 738W, 2 April 2003, cited in Gregory, ‘The Chilcot Inquiry on Civilian Casualties’.

111 Chilcot, Executive Summary, pp. 128–129, para. 824.

the Chilcot report found that the government's approach to civilian casualty mitigation was insufficient

reasonable effort to understand the likely and actual effects of its military actions on civilians.¹¹² This barely reported aspect of the Chilcot Report links IHL on the protection of civilians, the need for investigations and record-keeping about civilian casualties, and governmental transparency.

R v Evans

In May 2003, British troops used force against suspected smugglers who had tried to avoid a checkpoint. Seven defendants were charged with unlawful assault with the intention of causing at least actual bodily harm, violent disorder and murder (following the death of Nadheem Abdullah, who died from blows to the head, and whose death was also investigated by the Iraq Fatality Investigations).¹¹³ The court martial found that the soldiers' armed patrol was justified and that they could use proportionate force (invoking a law enforcement paradigm, not proportionality in IHL). As evidence was considered flawed, with fabrication or collective memory on the part of the victims or their families, Judge Advocate General Blackett directed the acquittal of all seven defendants. He criticized the witnesses' practice of seeking 'blood money' from UK armed forces.¹¹⁴

Camp Breadbasket

In May 2003, soldiers received an order to round up looters at the humanitarian aid depot nicknamed Camp Breadbasket, and to 'work them hard', as a deterrent and punishment. More than 70 soldiers failed to challenge this unlawful order.¹¹⁵ The looters were stripped naked, forced to simulate sexual acts,¹¹⁶ subjected to forced exercise in high temperatures, and beaten.¹¹⁷ One man was hoisted on the forks of a forklift truck; an act for which one soldier was found guilty at court martial for 'disgraceful conduct of a cruel kind'.¹¹⁸ The acts were not subject to proactive MOD investigation and the case only came to light when the soldiers' trophy photographs were developed in a UK pharmacy,¹¹⁹ but none of the soldiers present reported the abuse they witnessed. The chain of command saw those responsible as a 'few bad apples',¹²⁰ or the violence as a result of deficits in training, and failed to acknowledge that IHL's prohibitions on inhuman treatment, including sexually degrading acts, could be prosecuted as war crimes.

There were two courts martial, resulting in the conviction, imprisonment and dismissal from the army of all four defendants. In each case, these investigations and court-martial

112 Ibid.

113 G Newman, 'The Iraq Fatality Investigations: Consolidated Report into the Death of Nadheem Abdullah and the Death of Hassan Abbas Said' (2015), Cm 9023.

114 *R v Evans et al.*, 2005/59, 3 November 2005, para. 30, cited in Asser Institute, International Crimes Database.

115 A Gillan, 'Four Guilty, but Questions Remain', *The Guardian*, 24 February 2005.

116 J Welland, 'Militarised Violences, Basic Training, and the Myths of Asexuality and Discipline' (2013) 39 *Review of International Studies* 881.

117 Gillan (cited above n. 115).

118 Ibid.

119 *BBC News*, 'Iraq Abuse Case Soldiers Jailed', 25 February 2005.

120 Welland (cited above n. 116), 882.

prosecutions might have invoked the Geneva Conventions Act 1957 or the International Criminal Court Act 2001, but the soldiers were prosecuted under domestic criminal law and the Armed Forces Act. The criminal acts themselves show systemic problems with the soldiers' response to an unlawful order and a willingness to degrade Iraqi civilians.

*R v Payne*¹²¹

Iraqi civilian Baha Mousa was detained, tortured and died in British military custody from 14–15 September 2003. He was hooded in high temperatures using a hessian sack, forced to sustain painful stress positions, and beaten, sustaining 93 'external injuries',¹²² including fractures to his ribs and nose. Baha Mousa died from positional asphyxia, potentially caused by beatings and/or prohibited stress positions. His nine fellow detainees sustained serious physical and mental injuries:¹²³ one 'was kicked repeatedly to the kidney area,¹²⁴ abdomen, ribs and genitals whenever his arms dropped, and he had his eyes gouged'. Corporal Payne was found to have beaten detainees until they cried out, in a sadistic game he called the 'choir'.¹²⁵ He admitted using stress positions, hooding and handcuffing the detainees, including Baha Mousa, near a generator in the heat of a temporary detention facility.¹²⁶

The death of Baha Mousa and the inhuman treatment of his fellow detainees led to a court-martial prosecution of seven soldiers, in the first (and to date, only) prosecutions under the International Criminal Court Act 2001.¹²⁷ Three senior officers were charged with negligently performing a duty, a charge relating to the IHL doctrine of command responsibility; while the remaining four were charged with manslaughter, inhuman treatment, assault and battery.¹²⁸ One of the defendants, Corporal Donald Payne, was convicted (following a guilty plea) for the offence of inhuman treatment in violation of the laws of war. Payne was acquitted of manslaughter and perverting the course of justice.¹²⁹ No-one was convicted of murder in relation to Baha Mousa's death. The Judge Advocate observed that there was insufficient evidence to charge other personnel who had been guarding the detainees, because there had been a 'more or less obvious closing of ranks'.¹³⁰ This suggests a degree of collusion between the witnesses to prevent the court martial establishing criminal responsibility.

The Baha Mousa Public Inquiry

The Baha Mousa Public Inquiry was a statutory public inquiry under the Inquiries Act 2005. It was established in 2008, five years after Baha Mousa's death, and reported in

121 *R v Payne* [2007] (General Court Martial held at Military Court Centre Bulford, UK, H DEP 2007/411).

122 *Baha Mousa Public Inquiry Report* (2011), Part XVIII, Summary, para. 1.

123 *Ibid.*

124 *Ibid.*, para. 30.

125 *Ibid.*, paras 24, 53, 78.

126 *R v Payne* [2007] (General Court Martial held at Military Court Centre Bulford, UK, H DEP 2007/411), Sentencing Hearing Transcript, 30 April 2007, p. 15.

127 Asser Institute, International Crimes Database, *R v. Payne*.

128 N Rasiyah, 'The Court-Martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice' (2009) 7 *Journal of International Criminal Justice* 177, 180.

129 Asser Institute, International Crimes Database (cited above n. 127).

130 *R v. Payne*, Judge Advocate's Ruling on the Submission of No Case, 13 February 2007, para. 25.

2011.¹³¹ Unlawful orders had been given to deprive the detainees of sleep, and to enforce unlawful stress positions. A military chaplain voiced his concerns and was silenced.¹³² Military medical personnel, chaplains and the chain of command all failed to respond lawfully to the evidence of torture and inhuman treatment of detainees.¹³³ A major who testified to the inquiry believed that the conditioning techniques were lawful, a private had been subjected to stress positions as punishment in his basic training, and a Territorial Army officer believed he might not have the right to intervene when he witnessed violations against Baha Mousa.¹³⁴ Witnesses had differing understandings of what constitutes ‘humane treatment’,¹³⁵ although all witnesses agreed that detainees must be treated ‘humanely’.¹³⁶ The inquiry found that deficient IHL training contributed to the inhuman treatment of the detainees, and to Baha Mousa’s death, in part because soldiers responsible for detainees had been brutalized by being exposed to similar ill-treatment in conduct-after-capture training.¹³⁷ There was both tolerance of inhuman treatment and poor training, doctrine and understanding about prohibited stress positions.¹³⁸ The inquiry report made recommendations on improving law of armed

there was both tolerance of inhuman treatment and poor training, doctrine and understanding about prohibited stress positions

conflict training, on the treatment of military detainees, on the videotaping and auditing of interrogations, and on procedures to follow if there is a death in custody (‘prompt checks must be made’ on other detainees’ welfare, preserving the scene of the death and if practical the body until the RMP arrive).¹³⁹

The Al-Sweady Public Inquiry

The Al-Sweady Public Inquiry (2009–2014) was another public inquiry established under the Inquiries Act 2005.¹⁴⁰ There had been disputed allegations that British military personnel had murdered and tortured up to 20 Iraqi detainees following the Battle of Danny Boy in al-Majar, Iraq, in May 2004.¹⁴¹ In judicial review proceedings, the uncle of one of the deceased (Mr Al-Sweady) alleged that his nephew may have been taken alive from the battlefield, subsequently to die in British military custody at Camp Abu Naji, raising a possible violation of Article 2 of the ECHR; while the five other claimants alleged violations of Articles 3 and 5 of the ECHR in British military custody at Camp Abu Naji

131 This section of the report draws on the author’s PhD thesis, E Stubbins Bates, *Solving the Conundrum between Military Training, Prevention and Compliance in International Humanitarian Law*, SOAS, University of London, 2017.

132 A Williams, *A Very British Killing: The Death of Baha Mousa* (Jonathan Cape, 2012), pp. 257–258.

133 T Wood, *Detainee Abuse During Op TELIC: ‘A Few Rotten Apples’?* (Palgrave, 2015).

134 H Bennett, ‘Baha Mousa and the British Army in Iraq’, in Paul Dixon (ed.), *The British Approach to Counterinsurgency* (Palgrave Macmillan, 2012), pp. 195, 194, 199.

135 *Baha Mousa Public Inquiry Report*, Summary, para. 302.

136 *Ibid.*, Part I, para. 1.81.

137 *Ibid.*, Part VI, paras 6.360–6.361.

138 *Ireland v. United Kingdom*, ECtHR (Application No. 5310/71), Judgment, 18 January 1978; *Baha Mousa Public Inquiry Report*, Summary, paras 302, 205, Part I, I.81.

139 *Baha Mousa Public Inquiry Report*, Recommendations 47 et seq., paras 16, 10, 27.

140 HC Deb. 25 November 2009, col. 81WS.

141 HC Deb. 17 December 2014, col. 1407.

and at the Divisional Temporary Detention Centre at Shaibah.¹⁴² In those proceedings, the Administrative Court criticized the then Secretary of State for Defence for his ‘disturbing’ and ‘attitudinal’ failure to disclose required materials,¹⁴³ his concession that required materials might not be disclosed,¹⁴⁴ and the earlier misuse of public interest immunity (PII) certificates to resist the disclosure of redacted information on the ‘limits of tactical questioning’.¹⁴⁵ A colonel from the RMP is also criticized for disclosure failures and unreliable evidence.¹⁴⁶

At a late stage in the public inquiry, it was established that some of the Iraqi witnesses had lied, causing their counsel to withdraw allegations of murder. Some of the Iraqi participants were members of an armed group fighting the British occupation.¹⁴⁷⁻⁹ Following the publication of the report, the then Secretary of State for Defence called it an ‘incontrovertible’ rejection of ‘completely baseless allegations’.¹⁵⁰

The inquiry chair did find proven allegations of ‘ill-treatment’ against detainees. The chair used this term without reference to IHL or IHRL; indeed, the question of ECHR compliance was outside the inquiry’s Terms of Reference. Despite this, in the inquiry’s Executive Summary, he dismissed the findings of ‘ill-treatment’ as ‘trivial’, and opined without further discussion that they would not reach the threshold of Article 3 ECHR.

Iraq Historic Allegations Team (IHAT)

The Iraq Historic Allegations Team (IHAT, 2010–2017) examined alleged unlawful killing, torture and ill-treatment by British troops in Iraq, and assessed whether any of the findings of the Baha Mousa Public Inquiry Report should lead to the prosecution of service personnel.¹⁵¹ IHAT was a set of criminal investigations, with the possibility of prosecution (by referral to the Director of Service Prosecutions). IHAT was established as a result of judicial review proceedings seeking a public inquiry into alleged violations of Article 3 ECHR.¹⁵² The RMP was initially in charge of IHAT, but was replaced by the Military Provost (Navy) when the Court of Appeal ruled that the RMP (which had been involved in detention operations in Iraq) lacked the requisite independence for an effective investigation.¹⁵³ When the case was remitted to the Divisional Court, these changes were found to fulfil the independence criterion.¹⁵⁴

142 *R (on the Application of Al-Sweady and Others) v The Secretary of State for Defence* [2009] EWHC 2387 (Admin.) paras 2–5, 8.

143 *Ibid.*, paras 2, 8–14, 30–44, 46–51, 65–67.

144 *Ibid.*, paras 29–34.

145 *R (on the Application of Al-Sweady and Others) v The Secretary of State for Defence* [2009] EWHC 1689 (Admin.) paras 7–11.

146 *Ibid.*, paras 55–60.

147 *Report of the Al-Sweady Public Inquiry* (2014, hereinafter *Report*) Chairman’s Statement, 3; *Baha Mousa Public Inquiry Report*.

148 O Bowcott, ‘Law Firm Leigh Day Cleared over Iraq Murder Compensation Claims’, *The Guardian*, 9 June 2017.

149 O Boycott, ‘Phil Shiner: Iraq Human Rights Lawyer Struck Off over Misconduct’, *The Guardian*, 2 February 2017; J Grierson, ‘Former Human Rights Lawyer Admits Fraud over Iraq War Claims’, *The Guardian*, 1 October 2024.

150 HC Deb. 17 December 2014, col. 1407.

151 Iraq Historic Allegations Team.

152 *R (Ali Zaki Mousa and Others) v Secretary of State for Defence and Legal Services Commission* [2010] EWHC 1823 (Admin.).

153 *R (on the application of Ali Zaki Mousa) v Secretary of State for Defence and Anr* [2011] EWCA Civ. 1334, paras 24–34, 36.

154 *R (Ali Zaki Mousa and Others) v Secretary of State for Defence* [2013] EWHC 1412 (Admin.), paras 108–125.

Courts found recurrent delays in IHAT's work.¹⁵⁵ Four test cases were selected to study the effects of delayed investigation. On these four, the two relating to Article 2 were so delayed that evidence relating to the death was no longer available, making the investigatory obligation impossible, while credible allegations of Article 3 violations could continue.¹⁵⁶ IHAT's caseload on Article 3 increased considerably in late 2014, at which point it initiated a pre-investigation screening process to sift out cases where a reasonable person would not think a service offence had been committed, 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.¹⁵⁷

In 2016–2017, the remaining thousands of cases were rapidly closed,¹⁵⁸ with a precipitous decrease from 1,050 to fewer than 250 cases reported in February 2017,¹⁵⁹ prior to IHAT's hurried and politicized closure in June 2017, after which residual cases were passed to the SPLI (see below). The MOD set targets for the closure of cases, without reference to the substance or gravity of the acts alleged.¹⁶⁰ The Secretary of State for Defence repeated assertions that greeted IHAT's establishment¹⁶¹ when he announced its closure: that the majority of claims are false and the investigations harm service personnel.¹⁶² The assertion of a majority of false allegations was made without transparent criteria to assess the credibility of allegations. These numbers raise questions about the quality of the evidence supplied to IHAT,¹⁶³ the reasons for such rapid rejection of alleged violations of IHL and IHRL, and the quality of the pre-investigation screening process, made worse by difficulties establishing Operation MENSA, which was intended to allow 'vulnerable or intimidated complainants' or witnesses to be interviewed in a third country.¹⁶⁴ No such visits took place in the six months before November 2016, which correlates with the largest number of cases closed.¹⁶⁵ Given the lack of Operation MENSA visits, it is

unsurprising that the review of IHAT described witness statements as 'sparse' and often 'unsigned'.¹⁶⁶ It is suggested that cases with such 'sparse' documentation were closed without sufficient investigatory rigour.

A lack of international law knowledge could also be behind the rapid closure of

the assertion that a majority of allegations were false was made without transparent criteria to assess the credibility of allegations

155 *Al-Saadoon and Ors v The Secretary of State for Defence and Ors* [2015] EWHC 1769 (Admin.), paras 23, 24, 35; *Al-Saadoon and Ors v The Secretary of State for Defence and Ors* [2016] EWHC 773 (Admin.), paras 15, 24, 26–27, 30, 37.

156 *Ibid.*, paras 204–255.

157 *Ibid.*, para. 28.

158 Defence Select Committee, *Who Guards the Guardians? MoD Support for Former and Serving Personnel* (HC 2016–2017 109) reports a total of 3,368 allegations. There is no explanation for this discrepancy.

159 IHAT Quarterly Update, Feb. 2017.

160 MOD News, 'IHAT to Close at the End of June', 5 April 2017.

161 HC 1 March 2010, col. 93W.

162 *Who Guards the Guardians?* (cited above n. 158); 'Discredited Iraq War Probe to Be Shut down', *Sky News*, 10 February 2017.

163 Calvert-Smith (cited above n. 31), pp. 12–13.

164 *Al-Saadoon and Ors v The Secretary of State for Defence and Ors* [2016] EWHC 773 (Admin.), para. 259.

165 IHAT, Quarterly Updates, November 2016, July 2016.

166 Calvert-Smith (cited above n. 31), pp. 12–13.

investigations, especially in the Article 3 cases, for example the closure of 68 and then 489 ‘lower-level allegations of ill-treatment’.¹⁶⁷ This terminology is not found in IHL, IHRL or ICL, and fails to acknowledge the case law on the threshold of Article 3 to which an obligation to conduct an effective investigation applies. Previous research has shown that this practice ignored the UK’s obligations under IHL, IHRL and ICL.¹⁶⁸

IHAT’s quarterly updates and tables of work completed lack transparency. They are thin, numerical data, lacking context such as the name of the alleged victims or the substance of an allegation.¹⁶⁹ Obscure methodology, a lack of transparency, politicization, and rapid closure of investigations are cumulative concerns.

Service Police Legacy Investigations (SPLI)

The Service Police Legacy Investigations (SPLI) was established to process the residual cases left incomplete by IHAT, and to investigate ‘allegations made by Iraqi civilians of serious criminal behaviour by UK Armed Forces in Iraq’.¹⁷⁰ It was operational between 2017 and 2021, assessing ‘1291 allegations, of which 178 were pursued through 55 separate investigations’.¹⁷¹ The SPLI released pithy statistical updates every three months, an updated table for complainants (explaining which cases had been closed for ‘lack of evidence’ and which for ‘proportionality’), and a final work-completed table. SPLI released even less information for public scrutiny than IHAT. The Tables for Complainants consist of three columns: the words ‘lack of evidence’ or ‘proportionality’ as reasons for the closure of investigations in the first, the same concepts translated to Arabic in the second, and a case number in the third, with no contextual information or justification for the decision. Previous research has shown that ‘lack of evidence’ relates to the high threshold of quality imposed for witness statements by the first instance judgment in *Al-Saadoon*, while ‘proportionality’ reflects that case’s arguable misunderstanding of the ECtHR jurisprudence on ‘impossible or disproportionate burden’: the ECtHR’s limited caveat to positive obligations, including the procedural or investigatory obligation under Articles 2 and 3 ECHR.¹⁷²

As for IHAT, no individuals were referred for prosecution as a result of the SPLI’s investigations. The then Secretary of State for Defence, the Rt Hon Mr Ben Wallace, saw SPLI’s closure as ‘the completion of remaining investigations stemming from operations in Iraq’, with any ‘historical criminal allegations’ arising in the future being referred to the new Defence Serious Crime Unit.¹⁷³ This suggests a recognition that the closure of IHAT and SPLI has not fully ‘draw[n] a line under the legacy of our operations in Iraq’.¹⁷⁴ Ben Wallace acknowledged that in some cases, RMP investigations ‘conducted in arduous, battlefield conditions, with limited resources and under strict Force Protection measures –

¹⁶⁷ IHAT, Work Completed, December 2016.

¹⁶⁸ Stubbins Bates (cited above n. 34).

¹⁶⁹ IHAT Quarterly Update, July–September 2016.

¹⁷⁰ Service Police Legacy Investigations (SPLI), Work Completed Table, October 2021.

¹⁷¹ B Wallace, ‘Closure of the Service Police Legacy Investigations’, Statement of the Secretary of State for Defence, 18 October 2021.

¹⁷² Stubbins Bates (cited above n. 36); *Al-Saadoon & Ors (No. 2) v The Secretary of State for Defence & Ors* (2016) 1 WLR 3625.

¹⁷³ Wallace (cited above n. 171).

¹⁷⁴ Ibid.

did not manage to secure all the required evidence.¹⁷⁵ This admission of flaws in initial forensic investigations and of the ‘unacceptable’ ill-treatment found marks a noticeable change of tone from an earlier Secretary of State’s statements at the closure of IHAT.

Iraq Fatality Investigations (IFI)

In 2013, the Divisional Court noted its concern on ‘recurring slippage’ (delays) in, and the inadequate resources devoted to, IHAT’s work,¹⁷⁶ but dismissed the claimants’ call for a public inquiry into alleged Article 2 violations.¹⁷⁷ Instead, the Court ruled that an inquisitorial process, modelled on a coroner’s inquest, should be held to investigate the lawfulness of each death where IHAT had decided there would be no criminal prosecution. There would be narrative reports produced by each inquiry, examining contextual factors, including deficiencies in the training troops had received.¹⁷⁸ The families of the deceased can participate in these inquiries, while military witnesses are often referred to by anonymous ciphers, as they are in the IIA. The IFI were established in January 2014, and so far, have had three Inspectors, to whom the MOD (at its discretion) refers selected cases (see MOD Decisions below). The IFI do not focus on the criminal guilt or innocence of any individual, and no criminal or civil liability can follow from the evidence heard. At the start of each case, the Inspector requests undertakings from the Attorney-General and the Prosecutor of the ICC that no prosecutions will follow as a result of evidence that comes to light in the IFI.¹⁷⁹ A case is only referred to the IFI after the closure of criminal investigations into the relevant case.

To date, there have been eight concluded cases, and seven concluded reports. Hearings in April and August 2023 considered the pending cases into the deaths of Radhi Nama and Mousa Ali shortly after their May 2003 detention at Camp Stephen, and the second part of the report into the death of 15-year-old Ahmed Jabbar Kareem Ali, which has been pending since 2016. The latter will:

*include consideration of the extent to which any practice of placing looters into water as a deterrent or punishment was known about and/or sanctioned by the military chain of command.*¹⁸⁰

Several of the individuals who died had been forced to exercise in high temperatures or forced into a river as a punishment for looting. These practices might have been systemic, failures of command responsibility, and violations of Articles 2 and 3 ECHR combined.

**MOD investigations recur,
partly because of poor investigatory
practice at earlier stages**

As the IFI only operates following the end of IHAT, SPLI or (in the case of the death by drowning of teenager Said Shabram in 2003) court-martial proceedings which have resulted in acquittal, it is evidence that MOD investigations recur, partly because of poor

¹⁷⁵ Ibid.

¹⁷⁶ *R (Ali Zaki Mousa and others) v Secretary of State for Defence (No. 2)* [2013] EWHC 1412 (Admin.) para. 187.

¹⁷⁷ Ibid., para. 211.

¹⁷⁸ Ibid., paras 192, 222.

¹⁷⁹ Iraq Fatality Investigations.

¹⁸⁰ IFI, Investigation into the death of Ahmed Jabbar Kareem Ali (last updated 17 May 2016).

investigatory practice at earlier stages. The comprehensive contextual reports to date, and the transcripts of oral evidence available on the IFI website are counter-examples to IHAT's and SPLI's lack of transparency.

MOD decisions on Articles 2 and 3 ECHR

In addition to the criminal investigations run by IHAT and SPLI, the inquisitorial process of the IFI, and the two public inquiries discussed above, the MOD also released tables to explain its decisions either to refer selected cases (in which there would not be criminal investigations or prosecutions) to the IFI or to hold that no such inquiry will take place. The latest such tables were released in June 2019.¹⁸¹ Importantly, every case referred for consideration of further inquiry under Article 3 has been marked 'no inquiry', and there is no MOD mechanism established for inquisitorial inquiries under Article 3. This is despite an earlier Court of Appeal judgment (prior to the removal of the RMP from IHAT) which held the Secretary of State should not delay until IHAT had completed its work before establishing a public inquiry into alleged torture and ill-treatment in Iraq.¹⁸²

In the latest set of MOD Decisions under Article 2, published in 2019,¹⁸³ there are nine instances of text asserting that 'the possibility that an inquiry could answer key questions ... is so low that it does not justify the substantial financial and human costs which a further inquiry would likely involve.' This could relate to flawed initial investigations shortly after the death, to poor record-keeping, and to a cost-benefit calculation set at a high threshold. This text usually appears with reference to the IHAT/SPLI criminal investigation and the ongoing oversight by the High Court whether in civil litigation or judicial review, suggesting that the MOD would prefer civil litigation to an IFI in these cases. There are 49 instances of the MOD concluding that the death was in 'self-defence' or in accordance with the rules of engagement (ROE), but no factual context is shared, and only a numerical cipher is used for the case at hand. There are 12 instances of text referring to 'no credible allegation' of a breach of Article 2, but again, no further contextual information is available to supplement this assertion and to allow public or parliamentary scrutiny of the decision. Without clear and transparent criteria for assessing the credibility of allegations, parliamentary committees, scholars, and civil society cannot scrutinize MOD investigatory decision-making.¹⁸⁴

In the latest set of MOD Decisions under Article 3, published in June 2019,¹⁸⁵ there are seven instances of 'no credible allegation', with video evidence, medical evidence, or no evidence cited to support specified in three of these. Paragraphs identical to the Article 2 decisions on cost-benefit analysis and the available jurisdictions of the High Court, IHAT and SPLI also appear in the case W30, but again, there is no contextual information on that particular case. There is one reference to a grenade having been used in line with the ROE. In one case (W42) there are questions whether the alleged treatment can be attributed to UK forces, and in another (W43) 'it is not possible to ascertain whether the witness was detained by UK

181 MOD decisions on alleged human rights breaches during Operation Telic (last updated 18 June 2019).

182 *R (on the application of Ali Zaki Mousa) v Secretary of State for Defence and Anr* [2011] EWCA Civ. 1334, para. 43.

183 MOD Decisions on Article 2, April 2019.

184 Center for Civilians in Conflict (CIVIC) and Essex Armed Conflict and Crisis Hub, 'Investigations into Civilian Harm in Armed Conflict' (2022) 9 (Key Issue 1); see Recommendations below.

185 MOD Decisions on Article 3, June 2019.

forces'. This suggests not a violation for which the UK is responsible, but significant deficits in record-keeping to the detriment of detainees and investigatory processes.

Systemic Issues Working Group (SIWG)

The Systemic Issues Working Group (SIWG) is not an investigatory body, but had the responsibility of reviewing IHAT, Operation Northmoor and judicial or public inquiry reports to 'identify ... review ... and correct ...'

areas where its doctrine, policy or training has been insufficient to prevent practices or individual conduct that breach its obligations under domestic and/or international law.
and:

*shortcomings of doctrine, policy, training, or supervision that result in unintentional breaches ...*¹⁸⁶

The first report, released in 2014, reviewed three IHAT reports, and documented 19 possible 'gaps in doctrine, policy and training'.¹⁸⁷ The three SIWG reports (2014–2016) are a useful source on the implementation of the Baha Mousa Public Inquiry Report's recommendations, especially those on training. Subsequent reports examine approaches to interrogation, the blindfolding revealed in the Al-Sweady Public Inquiry, and one IHAT case where a detainee was denied water.

Despite the valuable contextual information in the SIWG reports, and their opportunity to re-examine concerning practices and deficits in doctrine and training revealed in earlier inquiries, the SIWG lacked independence from the MOD and demonstrated a 'concerning path-dependence', assuming that training reforms were sufficient to prevent similar violations recurring in the future.¹⁸⁸

ICC preliminary examination

Having previously found 'reasonable grounds to believe' that war crimes against detainees in British military custody had been perpetrated in Iraq, the ICC Prosecutor closed her preliminary examination in December 2020 on complementarity grounds.¹⁸⁹ The IHAT and SPLI investigations were considered evidence that the domestic investigation had not become inactive, and there was no evidence of an intentional shielding of perpetrators

from criminal justice that would indicate the UK's unwillingness to conduct a genuine investigation.¹⁹⁰ However, both the UK and OTP agreed that previous investigations had been flawed. The OTP signalled 'significant and recurrent' failures in 'forensic evidence

**both the UK and the ICC Prosecutor
agreed that previous investigations
had been flawed**

186 MOD, 'Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: September 2016'.

187 MOD, Systemic Issues: July 2014, n. 78.

188 Stubbins Bates, PhD thesis (cited above n. 131), pp. 209–212.

189 ICC OTP (cited above n. 38).

190 F Bensouda, 'Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Iraq/United Kingdom', 9 December 2020.

191 Ibid.

and inconsistencies in witness testimony’, exacerbated by the delay in many investigations, where testimony was sought ‘years after the events’. Early investigations ‘in theatre’ were considered especially inadequate,¹⁹¹ and need to be a topic for future investigatory reform.

Operations against ISIS in Syria and Iraq

There has been minimal to no transparency as to the UK’s investigations into civilian harm in its participation in coalition operations against the Islamic State of Iraq and Al-Sham (ISIS) in Iraq and Syria, which began in 2014 and are ongoing. The organization Airwars sought FOI releases on civilian deaths as a result of UK participation in the coalition, and the MOD refused to provide information about the single civilian death it acknowledged causing in an incident in March 2018. In contrast, the US-led coalition acknowledges the deaths of ‘at least 1,437 civilians’ during the campaign. In subsequent litigation, ‘the MOD admitted that the March 2018 airstrike was missing from its publicly released records of attacks in Syria and Iraq, and the death had not been registered with coalition officials tracking civilian casualties.’¹⁹² In earlier work, Airwars had criticized a change of methodology by the MOD in reporting civilian casualties between the battles of Mosul and Raqqa, a ‘[s]ystematic over-reliance on the observable’, ‘inconsistent quality of Coalition casualty assessments’, and a ‘failure to investigate on the ground’.¹⁹³ It seems that even in recent deployments, and in litigation as recently as November 2023, the MOD’s investigations of civilian harm are deficient and lacking in transparency. As argued in section 4, the UK could learn from recent reforms in civilian casualty tracking and civilian protection in the USA and the Netherlands.

Systemic failures

These investigations reveal at least four themes, which amount to recurrent or systemic shortcomings in the UK’s investigatory practice when unlawful acts have been alleged to have been perpetrated by the armed forces overseas.

First among these is a failure to recognize the breadth of IHL’s investigatory duties and the breadth of the civilian harm to be investigated. IHL imposes procedural investigatory obligations in respect of the missing and the dead. Investigations can be an integral part of the duty to take ‘constant care’ and to take ‘all feasible measures’ to avoid and in any event to minimize civilian casualties. This obligation is not solely one of means: the threshold of ‘constant care’ and ‘all feasible measures’ is high; and the aim to avoid (reduce to 0) and minimize civilian casualties sets high expectations for compliance. The argument can be made that precautions are not only prospective, and they are not confined to a single attack. High Contracting Parties must ‘respect and ensure respect’ for Geneva law ‘in all circumstances’ and they must take constant care to avoid and minimize civilian casualties. Rule 18 of the Customary IHL Study includes the duty to ‘do everything feasible to assess’ the effects of an attack. Systematic and ongoing civilian casualty tracking is one of these feasible measures. Carefully tracking multidimensional measures of civilian harm can allow the command chain to monitor and correct any institutional practices which might violate the IHL on the conduct of hostilities, or which foreseeably cause cumulative and reverberating civilian harm.¹⁹⁴

192 E Graham-Harrison, ‘Ministry of Defence Lacks “Effective Oversight” of Civilian Casualties, Tribunal Hears’, *The Guardian*, 30 November 2023.

193 Written evidence submitted by Airwars, ‘Credibility Gap: UK civilian harm assessments for the battles of Mosul and Raqqa’ (Defence Committee OMR0013, 18 July 2018).

194 ILA Study Group (cited above n. 6); Lubell, Dill et al. (cited above n. 8).

IHL prohibits torture and inhuman treatment (just as IHRL does), and requires the prosecution or extradition of those suspected of perpetrating such grave breaches in IAC (now recognized to be a more extensive list of war crimes applicable in IAC and NIAC). Command responsibility and state responsibility arise from failures to prevent and repress IHL violations. To avoid this, best practice and Common Article 1 combined suggest that states should investigate alleged unlawful orders, and failures to report IHL violations and war crimes.

Second, IHAT and the SPLI closed many hundreds of investigations on dubious cost-benefit grounds, or on the inaccurate grounds that alleged ill-treatment was at a 'lower' or 'medium' level: terms unknown in IHRL. Domestic courts showed a lack of understanding of ECtHR case law on the investigatory obligation, and the MOD came to rely on these inaccurate approaches, closing many investigations with insufficient transparency and public scrutiny. Arguably, failures of transparency in a different sense explain the creation of the IIA (as commanding officers did not promptly report concerns about alleged unlawful killings by Special Forces) and Camp Breadbasket (where the court martial only took place because a civilian shop was alarmed by the content of photographs it was asked to process). MOD practice has tended towards settlements instead of final judgments in civil cases. Ceasefire reported in December 2020 that 'the MoD has approved payments totalling £20 million to settle over 300 cases of alleged violations committed by UK service personnel in Iraq alone'.¹⁹⁵ These settlements deprive the public record of investigatory depth, although they do provide victims with a form of compensation.

Third, MOD practice prefers criminal investigations (which very rarely result in prosecution, and has done so only once for international crimes). Detailed, contextual inquiries (such as the IFI, the Baha Mousa Public Inquiry and the Al-Sweady Public Inquiry) follow only after the completion or closure of these investigations, and often follow failures of initial forensic examinations, poor record-keeping, a 'closing of ranks' at court martial, or failures of disclosure during judicial review proceedings. This means broader questions are asked many years after the event, with resulting evidential uncertainty, and long delays in implementing reforms when systemic practices have

MOD practice prefers criminal investigations – which very rarely result in prosecution

been revealed. This approach needs to be revised because all violations of IHL lead to state responsibility. Only grave breaches and serious violations of IHL result in individual criminal responsibility under ICL.

Fourth and finally, there are recurring institutional obstacles to MOD investigations, including deficient forensic data (as the ICC Prosecutor acknowledged), poor record-keeping and reluctant witnesses. Coupled with scant releases of the reasoning used by IHAT, the SPLI and the MOD Decisions on Articles 2 and 3, only one FOI release on investigations relating to Afghanistan in 2010–2014, and still less information on Operations Northmoor and Cestro, these institutional failures appear systemic and require urgent reform. Best practice in investigations can include enquiries into these systemic issues.

¹⁹⁵ Ceasefire, 'Official Figures Reveal Only One Prosecution of UK Armed Forces Personnel for War Crimes Overseas since 2001', 9 December 2020.

4

Methodologies for fact-finding and investigation

Civilian casualty tracking and casualty recording

Civilian casualty tracking (as distinct from casualty recording)¹⁹⁶ is an integral part of civilian protection; much as operational investigations are implicit in IHL's principle of precaution: the duty in Additional Protocol I and customary IHL to take 'constant care' and 'all feasible precautions' to 'avoid' and 'minimize' civilian casualties and damage to civilian objects. Civilian casualty tracking is the practice of 'systematically gather[ing] data on civilian deaths and injuries, property damage or destruction, and other instances of harm to civilians'.¹⁹⁷ It is more comprehensive than the civilian or collateral component of battle damage assessments (BDA), which primarily assess damage to enemy targets. Relying on existing BDA is insufficient for civilian protection. The Political Declaration EWIPA recommends that civilian casualties be recorded and tracked, with data 'disaggregated by sex and age', 'shared and made publicly available' 'where possible' as an important tool in implementing IHL's principle of precautions in attack.¹⁹⁸ This report therefore recommends a systematic focus on civilian casualty tracking to alleviate the gaps in UK state practice on estimating and transparently reporting on civilian casualties from its deployments.

In contrast, casualty recording focuses on identifying individual victims, and can be conducted by armed actors or civil society. An approach focusing on individual victims is just as essential as civilian casualty tracking, but is more suited to criminal investigations, transitional justice, and memorialization¹⁹⁹ than to operational civilian protection obligations. Civilian casualty recording is closer to the methodology of the Every Casualty project, which 'calls upon states, in partnership with other actors, to ensure that all casualties are promptly recorded, correctly identified and publicly acknowledged'.²⁰⁰ This report's review of UK state practice suggests a reactive approach to investigations, where the state has waited for litigation or civil society allegations before launching mostly criminal investigations. These investigations have been both delayed and recurrent (involving belated re-examination of the same alleged facts). Centring the prevention of civilian harm in its broadest sense leads logically to *both* casualty recording and civilian casualty tracking. The Every Casualty project argued that casualty recording and civilian casualty tracking are 'complementary ... [and] can facilitate evidence-based discussions between military and non-military actors in conflict environments'. Casualty recording is intended to 'inform ... political debates and action', 'support ... victims' rights', 'prevent ... and reduc[e] armed violence', and 'inform and support accountability', as well as tracking injuries and other (economic) harm from all forms of violence against civilians.²⁰¹

196 S Bagshaw, *Committing to Civilian Casualty Tracking in the Future Political Declaration on the Use of Explosive Weapons in Populated Areas*, Policy Briefing, Article 36, April 2022.

197 Ibid.

198 Political Declaration EWIPA (cited above n. 7), para. 1.8.

199 Ibid.

200 Action on Armed Violence (AOAV) and Oxford Research Group (ORG), *Casualty Recording: Assessing State and United Nations Practices Joint Summary of Findings and Recommendations*, April 2014.

201 Ibid.

Tracking broader aspects of civilian harm

Civilian harm is broader than just the direct effects of kinetic operations. It extends beyond acts in breach of the IHL principles of distinction and proportionality to cumulative and reverberating effects (e.g. from the environmental impacts of war, malnutrition, and disease spread through attacks on healthcare and sanitation systems). In Muhammedally's view, states and armed groups should apply the principle of precautions not only to attacks, but to the full breadth of military operations.

For best practice, civilian protection should be integrated in 'all strategic, operational, and tactical decision-making to reduce risk to civilians'.²⁰² The UK could be a leader in its tracking efforts by encompassing broader tracking of civilian harm, and rapidly intervening once alleged unlawful killings, torture or ill-treatment were alleged. Preventing such violations is a matter of state responsibility; but civilian casualty tracking also has value in policy and diplomacy. Where its political allies have caused civilian harm through the environmental impacts of war, malnutrition or disease spread through attacks on healthcare and sanitation systems, the UK might use its good offices to 'ensure respect' for IHL in recognition of these broader civilian harms.²⁰³

Other states' practice on civilian casualty mitigation

Civilian harm tracking has precedents in relation to kinetic operations. NATO International Security Assistance Force (ISAF) in Afghanistan established a Civilian Casualty Tracking Cell in 2008, which was followed by a Civilian Casualty Mitigation Team in 2011. In a critical account, Gregory argued that the data collected 'was deployed by coalition officials to minimise civilian harm where possible and to rationalise this harm where necessary', facilitating military effectiveness.²⁰⁴ In 2009, Cameron et al. recommended that military and humanitarian entities adopt Civilian Battle Damage Assessment Ratios (CBDAR) to track civilian harm. Their approach could 'track proportions of civilians, women, or children among casualties [and] ... be used for monitoring, and to make comparisons between time periods, geographic areas, combatant forces, and between weapons, tactics or rules of engagement'. The authors suggested that the Commander International Security Assistance Force in Afghanistan adopt CBDAR 'to minimize civilian casualties in Afghanistan'.²⁰⁵

More recently in 2022, the United States Department for Defense established a Civilian Harm Mitigation and Response Action Plan. This initiative is not limited to investigations but integrates civilian protection in 'strategy, doctrine, plans, professional military education, training, and exercises'; developing 'standardized civilian harm operational reporting and data management processes'; addressing 'target misidentification' and 'cognitive bias'; and incorporating guidance on civilian protection in all multinational and

202 S Muhammedally, 'Preparedness in Urban Operations: a Commander's Planning Checklist to Protect Civilians', ICRC Law and Policy Blog, 11 May 2021.

203 Four Geneva Conventions 1949, Common Article 1; ICRC, *Updated Commentary to the Four Geneva Conventions*, 2016–ongoing, Common Article 1.

204 T Gregory, 'Calibrating Violence: Body Counts as a Weapon of War', *European Journal of International Security* 7 (2022) 479–507.

205 Cameron et al. (cited above n. 52).

coalition operations.²⁰⁶ In late 2023, the US Department for Defense issued its Instructions on Civilian Harm Mitigation and Response.

If adopted by the UK and fully implemented in the US, this approach to civilian harm mitigation will improve a holistic approach to civilian harm and offer good record-keeping that is integrated in all aspects of military decision-making. The US example would begin to address the UK's shortcomings in investigations in relation to the breadth of IHL's obligations, the breadth of civilian harm to be remedied, forensic data and record-keeping on civilian harm. It does not consider coexistent obligations in IHRL or ICL.

In 2024, the Netherlands completed a four-year Roadmap Process, including academics and civil society, on civilian harm mitigation. This process's 16 recommendations include a recognition of the breadth of civilian harm to include reverberating effects (on livelihoods, education, healthcare, and water treatment facilities), and the need to 'adopt, publish and operationalise' this recognition; the transparent publication of the Dutch MOD civilian harm mitigation and response baseline study; and the need to push for a baseline of civilian protection as a prerequisite for Dutch involvement in any coalition operations.²⁰⁷

the US example would begin to address the UK's shortcomings in relation to IHL obligations, the breadth of civilian harm and investigatory practices

The remaining recommendations offer an even stronger blueprint for democratic accountability and thorough record-keeping. The Dutch MOD is asked to 'release detailed statistics at least monthly on lethal force practices'; to 'establish' and 'promote' or advertise 'an accessible civilian harm reporting mechanism' (following a commitment by the government in 2023); to establish a Cell to 'track, analyse and investigate' instances of civilian harm caused by Dutch troops; and to respond sufficiently to cases where the Dutch armed forces have caused civilian harm.²⁰⁸

If these recommendations are fully implemented, they will provide a valuable example for the UK MOD to follow in civilian protection and the investigation of civilian harm. They would address the first and fourth shortcomings identified in this report on UK MOD investigations, with the breadth of attention to civilian harm and systemic issues also beginning to address the third shortcoming.

206 US Secretary of Defense, Memorandum to Senior Pentagon Leadership, Commanders of the Combatant Commands, Defense Agency and DOD Field Activity Directors (US Department of Defense, *Civilian Harm Mitigation and Response Action Plan*), 25 August 2022.

207 M Karlshøj-Pedersen and J Dorsey, 'Policy Recommendations to Meaningfully Mitigate Civilian Harm in Military Operations: A View from the Netherlands (Part I)', *Opinio Juris*, 24 May 2024.

208 M Karlshøj-Pedersen and J Dorsey, 'Policy Recommendations to Meaningfully Mitigate Civilian Harm in Military Operations: A View from the Netherlands (Part II)' (*Opinio Juris*, 24 May 2024).

Improving investigations into alleged unlawful killings, torture, and ill-treatment

This report urges the UK to move towards holistic, comprehensive investigations of civilian harm; to facilitate compliance with IHL and IHRL on overseas operations, and swift resolution of alleged criminal activity or civil litigation relating to civilian harm. Criminal investigations are presumed from the ECHR obligation to conduct an effective investigation into alleged violations of Articles 2 and 3 ECHR. As the *Al-Skeini* case has established, the difficulties in conducting forensic examination during armed conflict are acknowledged by IHRL, but they leave the investigatory obligation intact.²⁰⁹ Subsequently, *Hanan v Germany* emphasized that investigatory obligations persist during armed conflict, subject to what is reasonable in the circumstances (although no violation was found on the facts).²¹⁰ There is flexibility in the case law, and the Art. 2 ECHR investigatory obligation applies a ‘means not results’ test. Yet the UK’s emphasis on criminal investigations, and its very few prosecutions for crimes under international law, coupled with the rapid closure of groups of cases by IHAT and the SPLI in particular, suggest an institutional resistance to criminal accountability.

As a priority, the Defence Serious Crime Unit might task itself with re-examining potential crimes involving violations of Articles 2 and 3 ECHR. The then Secretary of State acknowledged that future historical allegations of unlawful conduct might be referred to the Defence Serious Crime Unit, but it would benefit the UK’s state practice to re-examine those cases which might have been closed in error. The MOD could usefully re-examine its reliance on the first instance judgment of Leggatt J in *Al-Saadoon*, which imposed an excessively high threshold for the quality of evidence, and criteria of cost-effectiveness and proportionality on which Operation Northmoor, IHAT and the SPLI subsequently relied in their closure of investigations into conduct which may have breached international law. The current government should consider repealing or amending the Overseas Operations Act: especially in respect of the presumption against prosecution for crimes allegedly committed over five years ago where these relate to investigations closed by IHAT and SPLI on questionable grounds, such as the assertion that the ill-treatment alleged was at a ‘lower’ or ‘medium’ level of severity. The OOA’s ‘long stop’ on civil litigation after six years is *prima facie* incompatible with these IHRL obligations and should be amended.

When the IIA and the IFI issue their further reports, the MOD must implement urgently any recommendations on investigations and command responsibility for future incidents, recognizing the UK’s obligations under IHL, IHRL and ICL. Previous IFI reports also need to be fully implemented.

Implementing in full the recommendations of the Henriques Report on a duty to disobey unlawful orders (Recommendation 24), and on a new non-criminal service offence of failure to report offences under the ICC Act 2001 (Recommendation 27) will be particularly helpful to improve the MOD’s investigatory record in general. The Henriques

209 *Al-Skeini & Others v the United Kingdom* [2011] ECtHR (Grand Chamber) Application no. 55721/07, [2011] ECHR 1093.

210 *Hanan v Germany* [2021] ECtHR (Grand Chamber) Application no. 4871/16, paras 223–229; C Simmons, *Military Investigations in Armed Conflict: Independence and Impartiality under International Law* (London: Routledge, 2024), pp. 57–59.

Report's recommendations of mandatory helmet cameras (Recommendation 29), surveillance cameras in detention facilities (Recommendation 30), improved record-keeping (Recommendations 30, 32, 34), custody records, and photographs and video interviews of detainees prior to release (Recommendations 32–33) might also begin to reduce the risk of torture and inhuman or degrading treatment, while also helping facilitate investigations into alleged violations of Article 3 ECHR.²¹¹

211 R Henriques, *Review Report on Strengthening the Service Justice System* (MOD, 2021).

5

Conclusion and recommendations

IHL's civilian protection obligations have been reinterpreted and undermined in multiple conflicts globally, with insufficient attention to the cumulative and reverberating effects of armed conflict. The investigatory obligations required for full IHL compliance have been neglected, and in the UK there has been misinformation that these obligations are a creature of IHRL alone.

This report has argued that operational investigations are integral to civilian protection in armed conflict, and to states' full compliance with IHL, IHRL and ICL. The UK's investigations have been unsuccessful in respecting and ensuring respect for IHL 'in all circumstances'; and conducting the effective investigations required by IHRL into alleged unlawful killings, torture, and other ill-treatment. Forensic records have been poor with initial investigations having to be repeated. Repeated investigations have been costly, but politicians have criticized them. The establishment of the Defence Serious Crime Unit in 2022 should help improve criminal investigations into serious crimes in domestic and international law; and the full implementation of the Henriques Report would benefit the independence and professionalism of investigations from their earliest forensic stage. This report identifies four main flaws in the UK's investigations into civilian harm to date, and ends with recommendations addressed to the UK government and MOD.

Investigations are a tool to facilitate states' implementation of the international law applicable in armed conflict as well as an obligatory step where criminal conduct is suspected.

1

The breadth of investigatory duties in IHL

The UK's investigatory practice has not acknowledged the breadth of investigatory obligations in IHL, nor the benefits of ongoing civilian casualty tracking, nor the importance of state responsibility for any breach of IHL. MOD investigations have focused on alleged criminal acts on deployment. In the past two decades, there has been one successful conviction for the war crime of inhumane treatment,²¹² and another conviction for murder (reduced to manslaughter) in domestic law where the evidence suggested a war crime, where the perpetrator was filmed stating he had just breached the Geneva Conventions.²¹³

IHL requires parties to the conflict to enquire into the location of the dead and missing, and to investigate the deaths of detainees. Common Article 1's overarching duty to 'respect and ensure respect' for Geneva law 'in all circumstances' can be interpreted to suggest comprehensive and ongoing monitoring of the civilian harm caused by armed conflict. IHL requires not only the repression of grave breaches, and the prosecution or extradition of those suspected of being responsible; but also the suppression of all other breaches of IHL. Suppressing all breaches of IHL implies operational investigations, but these need

212 R v Payne [2007] (General Court Martial held at Military Court Centre Bulford, UK, H DEP 2007/411).

213 R v Blackman [2017] EWCA 190 (Court of Appeal (Criminal Division)).

not be criminal investigations. As section 2 has shown, violations of IHL and IHRL primarily engage state responsibility.

As sections 1 and 3 have argued, operational investigations serve IHL compliance and are integral to civilian protection. Civilian casualty tracking can reveal patterns of targeting practice that fall short of the obligation to take ‘constant care’ and ‘all feasible precautions’ to avoid and in any event to minimize civilian harm. Criminal investigations might follow if civilian casualty tracking reveals wilful killing or indiscriminate attacks. All breaches of IHL lead to state responsibility; only some of these involve individual criminal responsibility.²¹⁴

A holistic and comprehensive approach to investigations can inform future state practice on the principles of distinction, proportionality, and precautions; and to ensure IHL obligations on the treatment of civilian detainees and those *hors de combat*.

in the UK there has been misinformation that investigatory obligations are a creation of human rights law alone

2

IHRL investigations closed on questionable grounds

The UK has failed to conduct effective investigations into alleged violations of Articles 2 and 3 ECHR. Since the first instance judgment of *Al-Saadoon*, criteria of cost-effectiveness, reasonableness and ‘proportionality’ have been employed to close investigations with insufficient public scrutiny. Previous research suggests that several hundred investigations into alleged torture or ill-treatment were closed by the MOD on the grounds that the ill-treatment alleged was at a ‘lower’ or ‘medium’ level, concepts unknown to IHRL. These decisions have implications for victims’ right to a remedy and reparation for violations of serious violations of IHL and IHRL; and for the legitimacy of MOD investigatory practice. A lack of transparency in the decisions to close investigations suggests flawed processes which are poorly suited to preventing civilian harm in future deployments.

The Overseas Operations (Service Personnel and Veterans) Act 2021’s ‘long stop’ limits civil claims (including those under the ECHR and HRA) so that civilians will not be able to sue the MOD for violations of IHL or IHRL after six years.²¹⁵ This risks past shortcomings in IHRL effective investigations becoming final, with no further recourse for claimants.

3

A narrow focus on criminal investigations

The UK’s investigatory practice has been too narrow, focusing first on potential criminal investigations (with IHAT, SPLI, and Operation Northmoor), followed later by inquiries into systemic issues, inquisitorial or coronial investigations (SIWG, Baha Mousa Public Inquiry, Al-Sweady Public Inquiry, IFI, IIA). The UK’s investigatory practice is more reactive than holistic, focused on retrospective criminal investigations usually when civil litigation has forced the MOD to investigate.

214 While violations of the principle of precautions are not listed as a grave breach in the GC or AP I (see e.g. AP I Art. 85(3)(a)–(b)), violating the principle of precautions leads to state responsibility (AP I Art. 91).

215 Overseas Operations (Service Personnel and Veterans) Act 2021, ss 8–10.

A narrow focus on criminal investigations is also doctrinally problematic: IHL and IHRL violations lead to state responsibility. ICL establishes individual criminal responsibility, while IHL requires prosecution or extradition for grave breaches and IHRL's investigatory obligations assume the possibility of criminal prosecution.

A narrow criminal focus has led to recurrent investigations, with evidence sought repeatedly, often decades after the event. These recurrent investigations are costly in terms of investigatory resources, soldiers' welfare, and the MOD's reputation. Effective and comprehensive investigations of civilian harm would be far better. Combining civilian casualty tracking, civilian casualty monitoring and battle damage assessments (BDA) and integrating the findings into civilian casualty mitigation will benefit the UK's practice. Holistic investigations of torture and other ill-treatment of detainees can prevent future unlawful conduct against civilians and other detainees, especially if the SIWG is re-established and empowered to report on these practices, with parliamentary and executive oversight.

4

Initial forensic failures and reluctant witnesses

Weaknesses in initial forensic investigations²¹⁶ and in record-keeping soon after an allegation of civilian harm have been supplemented by a closing of ranks, and an unwillingness by witnesses to give frank evidence. Examples of this trend can be found in the Camp Breadbasket and Baha Mousa cases, and most recently in the IIA until late July 2024, when former Veterans Minister Johnny Mercer declined for several months to reveal the name of one of his sources using the confidentiality mechanisms offered by the inquiry.²¹⁷ These are institutional obstacles to effective investigation into civilian harm. They are also problems of military culture, as Simmons identifies: 'loyalty, camaraderie, and the phenomenon of the "wall of silence"', which can lead to 'large-scale cover-ups of violations committed by military personnel'.²¹⁸ Silence and cover-up can lead to criminal investigations which terminate in conditions of uncertainty, and allegations which have to be re-examined, wasting resources, leaving service personnel for years under a cloud of suspicion, and reopening questions about command responsibility to prevent and suppress violations of IHL. There is a lack of transparency in the reasoning used by IHAT, the SPLI and others; and prior to the IIA, very little public information on Operations Northmoor and Castro. x

Improving the UK's approach to investigating civilian harm is broader than simply remedying these four flaws in recent MOD and governmental practice. The following recommendations to the UK government and MOD would enable ongoing monitoring of civilian harm (including cumulative and reverberating effects), and facilitate IHL, IHRL and ICL compliance. The recommendations below would enable the UK to lead the way on investigatory best practice, building on recent experience in the Netherlands, and partnering with the ICRC, scholars, and civil society.

216 ICC OTP (cited above n. 38).

217 C Haddon-Cave, 'Ruling on Application by Johnny Mercer' (Independent Inquiry relating to Afghanistan, 11 July 2024); IIA, Inquiry Statement, 25 July 2024.

218 Simmons (cited above n. 210), pp. 99–110.

Recommendations

To the UK government:

- Fund and support the MOD to move towards holistic, comprehensive investigations of civilian harm, including the cumulative and reverberating effects of operations.
- Engage with the ICRC, scholars, and civil society to improve investigatory practices where war crimes are suspected and where state practice might be insufficient to 'respect and ensure respect' for IHL 'in all circumstances'.
- Facilitate parliamentary oversight of investigations, by analogy to the Dutch Roadmap Process on Protection of Civilians and Civilian Harm Mitigation and Response 2024.
- With ministerial oversight, promote civilian casualty tracking and civilian casualty recording so the UK can lead best practices in civilian protection and report with transparency on civilian casualties from its own deployments.
- Enable Foreign, Commonwealth and Development Office (FCDO) and Ministry of Justice briefings on the treatment of civilian detainees in UK military custody, and on pending and historic investigations where IHL, IHRL or ICL violations are alleged, including those allegedly involving UK Special Forces.
- Repudiate the previous government's rhetorical suggestion that investigations are an unwelcome intrusion on the armed forces. Investigations are a necessary contribution to service discipline.
- Consider repealing the Overseas Operations (Service Personnel and Veterans) Act 2021 or alternatively, amend it to enable civil litigation or criminal prosecution of historic cases involving arguable violations of IHL, IHRL or ICL.
- With diplomatic partners and expert input, work towards a Declaration of Best Practices in Investigating Civilian Harms.

To the MOD:

- Recognize that IHL compliance necessitates ongoing self-monitoring of state practice. Investigations matter for state responsibility even if no crime is suspected.
- Employ comprehensive civilian casualty tracking throughout a deployment, considering the IHL principles of distinction, proportionality, and precautions, and acknowledging the cumulative and reverberating effects of armed conflict on civilians.
- Use civilian casualty tracking data to rectify, within the chain of command, any targeting practices which fail to respect IHL.
- Work with the ICRC and civil society on civilian casualty recording, identifying individual civilians and acknowledging how they have been killed or injured by armed conflict. Share these records with agencies locating the missing and the dead, and with the families of the deceased. Retain and disclose these records where appropriate for criminal investigations or civil litigation.
- Implement in full IHL's obligations to locate the dead and the missing, and to enquire into the deaths of detainees.
- Conduct prompt, independent, and impartial investigations of any alleged torture or ill-treatment of civilians and those *hors de combat*.

- Improve forensic investigations on deployment, training commanding officers to document investigatory steps taken (and not taken) when battlefield conditions make usual investigatory practices too difficult. The reasoning for these decisions should also be recorded.²¹⁹
- Implement in full the recommendations of the Henriques Report including improving record-keeping in all initial investigations; imposing on service personnel an obligation to refuse an unlawful order; and promulgating a non-criminal service offence of failure to report crimes under the ICC Act 2001.
- Report (within the chain of command and to the Defence Select Committee) any closing of ranks and attempts to obstruct (criminal, civil or public inquiry) investigatory procedures.
- Train service personnel in the importance of investigations and sanction any personnel who obstruct an investigation. Consider making obstruction of investigations a non-criminal service offence, similar to the Henriques Report's proposed offence of failure to report crimes under the ICC Act 2021.
- Retain all investigatory data and share these with personnel from the Defence Serious Crime Unit whenever violations of international or domestic law are suspected.
- Recruit personnel with IHL, IHRL and ICL expertise to the Defence Serious Crime Unit and disseminate this expertise within the unit.
- Re-establish the Systemic Issues Working Group as a standing body, led by experts in IHL, IHRL and ICL, with authority to examine civilian casualty tracking data from battle damage assessments, and to conduct holistic reviews into the treatment of detainees in British military custody. Share SIWG reports with the Defence Select Committee and allow the committee's members to question members of the SIWG.
- Reconsider past investigations' reliance on the Al-Saadoon criteria of reasonableness, cost-effectiveness and 'proportionality' in closing many hundreds of investigations into alleged breaches of Articles 2 and 3 ECHR. In recognition of these criteria's incompatibility with Articles 2 and 3 ECHR's investigatory obligations, consider reopening these investigations and providing victims with a remedy and reparation.
- Establish clear and transparent criteria for assessing the credibility of alleged violations of international law, enabling investigation and rendering recurrent litigation unnecessary.

219 Simmons, p. 126.

Strengthening UK military investigations into civilian harm: Towards compliance, mitigation and accountability

In brief

Globally, the protection of civilians is in crisis. Comprehensive operational investigations can contribute to civilian protection in armed conflict, to accountability for violations, and to states' full compliance with international humanitarian law, international human rights law, and international criminal law.

This report outlines the applicable legal framework and critically examines the UK's investigatory mechanisms on civilian harm. It finds four shortcomings: a failure to acknowledge the breadth of international humanitarian law's investigatory obligations; investigations closed on questionable grounds in terms of human rights law; a narrow focus on criminal investigations; initial forensic

failures and reluctant witnesses, leading to repeated, costly reinvestigation.

Investigations are a tool to facilitate states' implementation of the international law applicable in armed conflict as well as an obligatory step where criminal conduct is suspected. Improving the UK's approach to investigating civilian harm extends beyond merely addressing specific shortcomings in the practices of the government and Ministry of Defence. This report proposes new approaches to fact-finding and investigation of civilian harm, drawing on practices from other states. Its recommendations will facilitate compliance with international investigatory obligations and contribute to civilian protection.

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