

# WRONGHEADED TERMINOLOGY AND PROCEDURAL FAILURE: THE UK'S CLOSURE OF INVESTIGATIONS INTO ALLEGED TORTURE AND INHUMAN TREATMENT IN IRAQ

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**Abstract:** The UK Ministry of Defence (MOD) has closed hundreds of investigations into alleged ill-treatment of detainees by British troops in Iraq. This Article probes one reason given for the closure of these investigations: the assertion (without further evidence) that the allegations were 'less serious', 'lower-level' or in the 'middle' range of severity. These terms usually appear without reference to international law, and are once defined with reference to the English criminal law of assault, so that investigations were closed if the alleged treatment resulted in less than grievous bodily harm. The MOD's terminology is wrongheaded and conceptually underinclusive: it fails to grasp the threshold of inhuman or degrading treatment in international human rights law (IHRL), and largely neglects the investigatory obligations in IHRL, international humanitarian law (IHL) and international criminal law (ICL).

**Keywords:** Article 3 ECHR, inhuman or degrading treatment, torture, cruel treatment, investigatory obligations, international human rights law, international humanitarian law, international criminal law

## I. INTRODUCTION

In 2017-2018, the UK's Service Police discontinued most of the then-pending or 'legacy' investigations into alleged ill-treatment in British military custody in Iraq. These investigations (an indeterminate number) were closed because of an apparent lack of evidence (e.g. if there were no signed witness statements), because of inferences perhaps illogically drawn from the judgment of the Solicitors Disciplinary Tribunal against Phil Shiner, who represented many Iraqi claimants, or:

because the Service Police assessed them in terms of severity as falling at the lower end (ranging from very minor ill-treatment to assaults occasioning actual bodily harm) or middle (ill-treatment of medium severity and/or assault not reaching the threshold of grievous bodily harm) of the spectrum, and determined that a full investigation would be disproportionate.<sup>1</sup>

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<sup>1</sup> Systemic Issues Working Group, 'Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: August 2018' (Ministry of Defence August 2018) n 3

Similar language appears in the table of work completed by the now-defunct Iraq Historic Allegations Team (IHAT), whose residual case-load has been transferred to the Service Police Legacy Investigations (SPLI). In September and October 2016, the Deputy Head of IHAT discontinued ‘any further investigative work on [68 and then a further] 489 lower-level allegations of ill-treatment as it was not proportionate to continue to do so.’<sup>2</sup> On 12 June 2018, the Ministry of Defence (MOD) decided not to hold ‘inquisitorial inquir[ies]’ into these cases (identified by the same IHAT case numbers) where claimants had alleged violations of Article 3 of the European Convention of Human Rights (ECHR). One of the reasons given is that these cases did not reflect ‘issues of such seriousness...’ that lessons might be learned from further inquiry.<sup>3</sup> References to ‘less serious allegations of ill-treatment’ appear elsewhere in MOD investigatory practice, with a ‘very large number of cases’ so closed by IHAT, its successor the SPLI, and Operation Northmoor (an investigation into similar allegations in Afghanistan) since 2016.<sup>4</sup> The Systemic Issues Working Group (SIWG) notes that this ‘has caused the MOD to implement an appropriately modified approach for cases involving less serious allegations of ill-treatment.’<sup>5</sup> This suggests a systemic, MOD-wide approach. Outside the MOD’s own institutional structure, the Chair of the Al-Sweady Public Inquiry made findings of ‘actual or possible ill-treatment’, some of which he termed ‘trivial’, or paradoxically ‘unintentional’, based on ‘firm, robust handling’. He was not empowered to make findings as to Article 3 ECHR, but still expressed doubt that this ‘ill-treatment’ (which included the infliction of a broken nose, and a soldier having hit a detainee’s head against the wall) would violate Article 3 ECHR.<sup>6</sup>

The MOD has closed many hundreds of investigations into allegations of ill-treatment perceived as less than serious, but that perception is not open to independent analysis as to the facts or applicable law. The extract above suggests that ill-treatment is understood in terms of the English criminal law of assault, rather than international law; and hints at a novel proportionality requirement before allegations of ill-treatment in British military custody might be investigated. MOD investigatory bodies do not openly invoke the minimum threshold of inhuman or degrading treatment in ECHR jurisprudence, nor the distinction between torture and cruel, inhuman or degrading treatment or punishment in the Convention against Torture (CAT), which does lead to differential obligations (torture must be criminalized, and is subject to a prosecute or extradite obligation, while cruel, inhuman or degrading treatment must be prevented and investigated, but not necessarily prosecuted).<sup>7</sup> IHAT’s Pillar 1 procedure did differentiate between “‘serious” ill-treatment, e.g. rape, grievous bodily harm, ill-treatment which may amount to a “war crime” under the Rome Statute and other ill-treatment’, but this is an exceptional reference to international law in the MOD’s publicly-available investigatory output.<sup>8</sup> These materials do not generally refer to the grave breaches of torture or inhuman treatment;<sup>9</sup> nor the war crimes of inhuman treatment in international armed conflict, cruel

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<sup>2</sup> Ministry of Defence, ‘IHAT Table of Work Completed’ (October 2017)

<sup>3</sup> Ministry of Defence, ‘MOD Decisions on Article 3 Cases’ (August 2018)

<sup>4</sup> SIWG, above n 1, para 3.1

<sup>5</sup> *ibid.*

<sup>6</sup> Sir Thayne Forbes, ‘Report of the Al-Sweady Public Inquiry’ (2014) Vol I, Part I, para 1.28, cf. paras 1.29-1.30

<sup>7</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 10 December 1984 (entered into force 26 June 1987), 1465 UNTS 85 (CAT), Article 16

<sup>8</sup> David Calvert-Smith, ‘Review of Iraq Historic Allegations Team’ (Attorney-General’s Office and Ministry of Defence 2016) 11

<sup>9</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Article 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Article 51; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force

treatment in non-international armed conflict, or outrages upon personal dignity in both international and non-international armed conflict.<sup>10</sup> As to the decision that a ‘full investigation would be disproportionate’, there is no proportionality limitation in Article 3 of the ECHR,<sup>11</sup> and no suggestion in the case law of the European Court of Human Rights (ECtHR) that the investigatory obligation under Article 3 can be subject to a state’s discretionary judgements as to whether an investigation would be ‘disproportionate’. There are no proportionality prerequisites for prosecutions for grave breaches of IHL in international armed conflict, nor for war crimes in international or non-international armed conflict. In IHL and ICL, proportionality is a term of art in relation to the law of targeting only.

This Article seeks the roots of this practice in historical examples and domestic law (II), compares it with applicable IHRL, IHL and ICL conceptually (III) and procedurally (IV), before concluding (V).

## II. CONTEXT

Since the early 1970s, the UK has sought to invoke gradations of harm in its practice on torture and ill-treatment. The government-commissioned Compton Committee considered each of the ‘five techniques’ (hooding, solitary confinement, subjection to continuous noise, the deprivation of food and of sleep, and wall-standing – a stress position) separately, identifying them as physical ill-treatment but not brutality.<sup>12</sup> In negotiations for the UN Declaration against Torture in 1975, the UK unsuccessfully sought a prohibition on the intentional infliction of ‘extreme’ rather than ‘severe’ pain and suffering.<sup>13</sup> The UK was also opposed to a stated prohibition on the intentional infliction of severe ‘mental’ pain and suffering, arguing that it was too ambiguous for domestic courts to adjudicate, especially if the purpose for which such suffering was inflicted was discrimination.<sup>14</sup> The MOD’s more recent practice shows a reluctance to prohibit ‘certain verbal and non-physical techniques’,<sup>15</sup> when the Report of the Baha Mousa Public Inquiry recommended that ‘harsh’ interrogation practices be banned. The MOD gradually renamed and adapted this approach to ‘challenge direct’ and ‘challenge indirect’, which the Court of Appeal found to have adequate safeguards to be lawful under Article 3 ECHR.<sup>16</sup>

Does domestic law offer an explanation? The Armed Forces Act (AFA) 2006 distinguishes between crimes which might be heard summarily or dealt with by the chain of command (those listed in Schedule 1) and crimes which are subject to court-martial jurisdiction

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21 October 1950) (GC III), Article 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Article 147; 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 3 (entered into force 7 December 1978) (AP I), Articles 11, 85

<sup>10</sup> Rome Statute of the International Criminal Court (adopted 1998, entered in force 1 July 2002) UNTS 2187, Articles 8(2)(a)(ii), 8(2)(c)(i)-3, 8(2)(b)(xxi), 8(2)(c)(iii)

<sup>11</sup> Stephanie Palmer, ‘A Wrong Turning: Article 3 ECHR and Proportionality’ (2006) 65 *The Cambridge Law Journal* 438; Michael K. Addo and Nicholas Grief, ‘Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?’ (1998) 9 *European Journal of International Law* 510

<sup>12</sup> Michael O’Boyle, ‘Torture and Emergency Powers under the European Convention on Human Rights: *Ireland v the United Kingdom*’ (1977) 71 *American Journal of International Law* 674, 676

<sup>13</sup> Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press 2008) 37-38

<sup>14</sup> *ibid.*, 38, 40

<sup>15</sup> HC Deb 8 September 2011, col. 572

<sup>16</sup> *R (Haider Ali Hussein) v Secretary of State for Defence* [2014] EWCA Civ 1087

(Schedule 2).<sup>17</sup> This distinction could explain the Service Police's analogy between 'lower' or 'medium' level 'ill-treatment' and the domestic criminal law of assault. Schedule 1 paragraph 7 of the Armed Forces Act 2006, and the Manual of Service Law both provide for assault and battery to be heard summarily<sup>18</sup> while an assault occasioning actual bodily harm may be dealt with summarily only with permission.<sup>19</sup> Assault occasioning grievous bodily harm is subject to court-martial jurisdiction.<sup>20</sup>

However, this leaves a number of points unanswered, because the Service Police definition apparently ignores other crimes listed as subject to court-martial jurisdiction in Schedule 2. These include the crime of torture under section 134 of the Criminal Justice Act 1988, the war crimes of torture, inhuman treatment, cruel treatment and outrages upon personal dignity all incorporated into domestic law by the International Criminal Court Act 2001, and the grave breaches criminalized by the Geneva Conventions Act 1957 (as amended).<sup>21</sup> It is possible that the requirement of either the Attorney-General's or the Director of Public Prosecution's permission for prosecutions under these statutes exerts a chilling effect on MOD investigations,<sup>22</sup> but there is no publicly-available evidence to support or deny that hypothesis in relation to IHAT and SPLI investigations. So, a distinction between Schedule 1 and Schedule 2 offences is an insufficient explanation for the Service Police's conceptually underinclusive definition of 'ill-treatment'.

Nor does the distinction between Schedule 1 and 2 offences justify the Service Police's closure of investigations. The AFA does not provide for this: sections 113-116 require that investigations and appropriate referrals (from commanding officer to the Service Police, and from the Service Police to the Director of Service Prosecutions) take place where evidence suggests that a service offence (in Schedule 1 or 2) has been committed and there is sufficient evidence to charge a person in relation to that offence.

The recent case of *Alseran*, in which four detainees were found to have suffered assaults and/or inhuman or degrading treatment in British military custody, raises questions about the MOD's closure of hundreds of potentially similar allegations. Soldiers were found to have run across the lead claimant's back while he lay prone;<sup>23</sup> while another claimant (MRE) suffered a blow to his head, probably with a rifle butt, which led to ongoing impairments; and hooding with a sandbag, with an eye injury apparently caused by a sharp object in the hessian sack.<sup>24</sup> The claimant KSU (detained with MRE and others) also suffered hooding, and was made to kneel and shuffle on his knees before being shoved and kicked into the back of a Land Rover. He did not suffer injuries from assaults, but Leggatt J (as he then was) found that he had suffered inhuman and degrading treatment.<sup>25</sup> The final test claimant, Mr Al-Waheed, detained in Iraq in 2007, was beaten repeatedly on his upper back and arms, probably with rifle butts, punched in

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<sup>17</sup> At this writing, section 3 of the Armed Forces Act 2016 has not yet been brought into force by statutory instrument. If and when it is brought into force, there will be amendments to the language of sections 113 and 116 of the Armed Forces Act 2006.

<sup>18</sup> Armed Forces Act (AFA) 2006 c 52, Schedule 1, paragraph 7 (Criminal Justice Act 1988 section 39); Manual of Service Law, JSP 803, chapter 8

<sup>19</sup> AFA 2006, Schedule 1, Part 2, para 7 (section 47 of the Offences against the Person Act 1861 (c 100))

<sup>20</sup> AFA 2006, Schedule 2 para 12 (j) (section 20 of the Offences against the Person Act 1861 (c 100))

<sup>21</sup> AFA 2006, Schedule 2, paragraphs 12 (aq), 12 (t), 12 (ai)

<sup>22</sup> International Criminal Court Act 2001 section 53(3); War Crimes Act 1991 section 1(3); Criminal Justice Act 1988 section 135; Geneva Conventions Act 1957 section 1A(3)(a); Kate Grady, 'International Crimes in the Courts of England and Wales' (2014) 10 Criminal Law Review 693

<sup>23</sup> *Alseran, Al-Waheed and Others v Ministry of Defence* [2017] EWHC 3289 (QB), [2018] 3 WLR 95, paras 950-954

<sup>24</sup> *ibid.*, paras 960-967

<sup>25</sup> *ibid.*, para 971

the face and suffered an injured finger; he suffered ‘harsh’ interrogation, deprivation of sight (with blackened goggles) and hearing, and was initially deprived of sleep. He too was found to have suffered inhuman and degrading treatment.<sup>26</sup> Mr Alseran, MRE and Mr Al-Waheed suffered what would be considered ‘minor injuries’ by analogy to the Guidelines on the Assessment of General Damages in Personal Injury Cases (Judicial College Guidelines),<sup>27</sup> but nonetheless they were found to have experienced inhuman and degrading treatment. Leggatt J strongly criticized the MOD for suggesting that hooding might not be inhuman or degrading treatment, despite the case of *Al Bazzouni* on this point.<sup>28</sup> The Service Police’s definition would be too narrow to encompass hooding.

The *Alseran* judgment notes that 331 similar cases had been settled by the MOD by the time of the hearings in that case, with four discontinued or struck out, leaving 632 then unresolved.<sup>29</sup> The facts of those cases subject to settlement are inaccessible to researchers. While we cannot know how many, if at all, of these cases subject to settlement were also closed by IHAT, the SPLI; and/or marked as ‘no inquiry’ by the MOD under Art 3 ECHR, the number of settlements suggests a pattern of conduct in relation to ill-treatment that would justify careful investigation of remaining cases, not their closure.

Domestic law offers only a trace of authority for closing investigations based on a novel proportionality standard. *Brecknell v United Kingdom* (on lapse of time and the investigation of historic allegations of unlawful killings) acknowledged that investigatory obligations ‘must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.’<sup>30</sup> That case was cited in a 2016 judgment in the *Al-Saadoon* litigation on IHAT’s delayed implementation of its Article 2 and 3 ECHR investigatory obligations. The Designated Judge considered that there could be a cost/benefit analysis in the decision-making by an investigatory body, in which:

i) the strength of the existing evidence; (ii) the gravity of the allegation; and (iii) the likely difficulty and cost of the possible investigative steps weighed against the likelihood that they will yield further significant evidence and the potential value of that evidence’<sup>31</sup>

might be weighed. Yet, Leggatt J applied this line of reasoning to an evidential sufficiency test, and not squarely to the question of the gravity of allegations. As written, the judgment is authority only for the judge’s interpretation of the AFA 2006 sections 113-116 that if there had been no ‘realistic prospect of obtaining sufficient evidence to charge an identifiable individual with a service offence’, then IHAT could lawfully stop an investigation.<sup>32</sup> The case might ground a lawful practice as to the first reason given by the Service Police/SPLI (as interpreted by the SIWG) for closing investigations: that of insufficient evidence; but it offers no support for the MOD’s practice of discontinuing investigations on the assertion that they involve less serious allegations of ill-treatment. The Review of IHAT includes a lengthy extract from paragraphs 289-291 of *Al-Saadoon*, strongly suggesting that those paragraphs’ emphasis on IHAT ‘set[ting] priorities and target[ing] its resources’ in order to ‘deal with the vast influx of

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<sup>26</sup> *ibid.*, paras 972-977

<sup>27</sup> *ibid.*, paras 501, 952, 973

<sup>28</sup> *Alseran and Others v MOD*, above n 23, para 495, citing *R (Al Bazzouni) v Prime Minister* [2011] EWHC 2401 (Admin), [2012] 1 WLR 1389

<sup>29</sup> *ibid.*, para 25

<sup>30</sup> *Brecknell v United Kingdom* (2008) 46 EHRR 42, para 70

<sup>31</sup> *R (Al-Saadoon) v Secretary of State for Defence (No 2)* [2016] 1 WLR 3625, para 198

<sup>32</sup> *ibid.*, paras 283, 291

allegations in a proportionate way' has influenced subsequent MOD practice,<sup>33</sup> and may be an explanation for the closure of investigations which were alleged to lack seriousness.

### III. HOW DO THE MOD'S CONCEPTS COMPARE TO SUBSTANTIVE PROHIBITIONS IN INTERNATIONAL LAW?

The IHRL prohibitions on torture and cruel, inhuman or degrading treatment or punishment include two distinct thresholds based on severity: i) the lower threshold of inhuman or degrading treatment or punishment in ECtHR case law; and ii) the distinction between torture and cruel, inhuman or degrading treatment or punishment in the CAT. IHL and ICL have their own thresholds; with IHL's developing initially with reference to bodily injury. The IHL and ICL thresholds are less specific than those developed in IHRL, and IHRL jurisprudence has arguably influenced their development, in an apparent convergence rather than fragmentation between these three branches of international law. This section considers how the MOD's various references to 'lower level... ill-treatment' might compare to each of these thresholds in IHRL, IHL and ICL.

#### *A. The Threshold for Inhuman or Degrading Treatment or Punishment*

ECtHR case law demonstrates an evolving threshold between inhuman or degrading treatment or punishment and conduct which might be held to violate another ECHR right, such as Article 8,<sup>34</sup> or to be a criminal offence or tort under domestic law. The ECtHR takes account of all the circumstances, whether the minimum threshold of 'actual bodily injury [or] intense physical or mental suffering'<sup>35</sup> is reached based on the duration and effects of the ill-treatment, and the individual's sex, age, and state of health.<sup>36</sup> This contextual threshold is victim-centred; not based on a state's interpretive choices as to the gravity of an allegation. While the ECtHR often finds a violation of Article 3 without distinguishing between inhuman or degrading treatment or punishment, Webster argues that degrading treatment is perceived to be less severe than inhuman treatment; located at the lower point of the threshold between Article 3 ECHR violations and conduct that does not violate Article 3.<sup>37</sup> Inhuman treatment is 'premeditated, applied for hours at a stretch and causes intense physical and mental suffering'.<sup>38</sup> The *Greek* case offers the composite account that all torture is necessarily inhuman and degrading and all inhuman treatment is degrading.<sup>39</sup> Degrading treatment, on the other hand, involves 'feelings of fear, anguish or inferiority, capable of humiliating or debasing a person, of breaking a person's physical or moral resistance, driving a person to act against will or conscience, or having an adverse effect on personality'.<sup>40</sup> This definition does not necessarily require 'actual bodily injury [or] intense physical ... suffering'.

There is a lasting tension in the jurisprudence between the need to interpret the ECHR as a 'living instrument which must be interpreted in the light of present-day conditions', so that

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<sup>33</sup> *ibid.*, para 289(iv), cited in D Calvert-Smith, above n 8, 11

<sup>34</sup> *Wainwright v United Kingdom* (2007) 44 EHRR 40

<sup>35</sup> *Ireland v UK* (1978) 2 EHRR 25, para 167

<sup>36</sup> *ibid.*, para 162

<sup>37</sup> Elaine Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights* (Routledge 2018)

<sup>38</sup> *Ireland v UK* (1978) 2 EHRR 25, para 167

<sup>39</sup> *The Greek case*, Commission Report, 5 November 1969, Yearbook of the European Convention on Human Rights XII (1969) 186, 195-196

<sup>40</sup> E Webster, above n 37, 6, synthesising *Ireland v UK* (1978) 2 EHRR 25, para 167 with subsequent case law

conduct which was previously classified as inhuman or degrading treatment or punishment would now be considered torture;<sup>41</sup> and a continued insistence on the threshold between inhuman or degrading treatment or punishment and conduct which is considered less severe than this.<sup>42</sup> In a case in which the Court found the threshold to have been reached, Judge Costa urged in general that ‘Article 3 should not be cheapened or trivialized through overuse’.<sup>43</sup> Particular restraint is expected by state actors responsible for detainees:

In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3.<sup>44</sup>

Thus, in *Yankov v Bulgaria*, punitive hair shaving and solitary confinement amounted to degrading treatment;<sup>45</sup> and in *Bouyid v Belgium*, a majority of the Grand Chamber controversially found that slapping of a juvenile in police custody was degrading treatment.<sup>46</sup> The Chamber had decided unanimously that there was no violation of Article 3. Before the Grand Chamber, the three dissenters, including the UK’s judge, sought to demarcate Article 3 violations from other infringements of human dignity which did not, in their view, reach the lower threshold of Article 3.<sup>47</sup> The findings of the majority, they argued, risked ‘trivialising’ Article 3, and would impose standards too stringent for law enforcement officials to follow.<sup>48</sup> In her nuanced critique, Mavronicola notes the three dissenting judges’ acknowledgement that police officers might ‘lose their temper’ by slapping a detainee.<sup>49</sup> Mavronicola argues that the dissenters fail to grasp the subtleties of the Article 3 prohibition, which is not merely of the infliction of physical pain and suffering, but of a range of ‘*wrongful*’ forms of pain and suffering.<sup>50</sup> IHAT and the SPLI’s practice of closing investigations suggests a similar conceptual failure.

Case law on inhuman or degrading treatment extends from assaults in custody to threats of torture, where these threats caused mental pain and suffering,<sup>51</sup> conditions of detention,<sup>52</sup> strip-searches,<sup>53</sup> and deportation where an individual would not receive requisite medical care in the destination country.<sup>54</sup> This range of wrongdoing expresses the qualitative breadth and depth of conduct prohibited by Article 3; concepts missing from the Service Police’s wrongheaded choice to continue investigations only where the ill-treatment alleged reached the threshold of grievous bodily harm.<sup>55</sup> The lower threshold for Article 3 ECHR might have been

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<sup>41</sup> *Selmouni v France* (1999) 29 EHRR 403

<sup>42</sup> *Ireland v UK*, (1978) 2 EHRR 25, Separate Opinion of Judge Fitzmaurice

<sup>43</sup> *McGlinchey v UK* (2003) 37 EHRR 41, Concurring Opinion of Judge Costa, para 2

<sup>44</sup> *Assenov v Bulgaria* (1998) 28 EHRR 652, para 69; *Tekin v Turkey* [1998] (2001) 31 EHRR 4, paras 52-53

<sup>45</sup> *Yankov v Bulgaria* (2003) 40 EHRR 36

<sup>46</sup> *Bouyid v Belgium* (2016) 62 EHRR 32, paras 87-88

<sup>47</sup> *ibid.*, Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney, para 5

<sup>48</sup> *ibid.*, para 7

<sup>49</sup> *ibid.*, cited in Natasa Mavronicola, ‘*Bouyid v Belgium*: The “Minimum Level of Severity” and Human Dignity’s Role in Article 3 ECHR’ (2016) *Cyprus Human Rights Law Review* 11

<sup>50</sup> N Mavronicola, 15 (emphasis in original)

<sup>51</sup> *Gäfgen v Germany* (2011) 52 EHRR 1

<sup>52</sup> *Peers v Greece* (2001) 33 EHRR 51; *Florea v Romania* (App No 37186/03) [2010] ECHR; *Ananyev v Russia* (2012) 55 EHRR 18

<sup>53</sup> *Frérot v France* (App no 70204/01) [2007] ECHR; cf. *Wainwright v United Kingdom* (2007) 44 EHRR 40

<sup>54</sup> *D v United Kingdom* (1997) 24 EHRR 423; cf. *N v United Kingdom* (2008) 47 EHRR 39; see also *Wellington v UK*

<sup>55</sup> SIWG, above n 1; see also Crown Prosecution Service, ‘Offences against the Person, Including Charging Standard’ (February 2018): grievous bodily harm is “‘really serious’ harm – *DPP V Smith* [1960] 3 WLR 546... psychological injury not amounting to recognizable psychiatric illness does not fall within the ambit of bodily harm... *R v D* [2006] EWCA Crim 1139’

misconstrued as a result of the emphasis in the original *Ireland v UK* case on ‘actual bodily injury [or] intense physical or mental suffering’<sup>56</sup> but there is no indication from these publicly available MOD documents that investigators had ECtHR jurisprudence in mind. Perhaps the Service Police might not be expected to have detailed knowledge of ECtHR case law, because ECHR violations are not criminalized under the AFA 2006. IHAT, however, had a dual role of investigating criminal offences under the AFA 2006, and satisfying the investigatory obligations under Articles 2 and 3 ECHR;<sup>57</sup> and more implicitly, to show the International Criminal Court (ICC) that UK authorities were conducting a ‘genuine investigation’ of possible war crimes.<sup>58</sup>

MOD approaches are inconsistent with the lower threshold of inhuman or degrading treatment as developed by the ECtHR. The Service Police/SPLI, IHAT and wider MOD terms are underinclusive in the following respects: First, they fail to acknowledge the prohibitions on ‘degrading treatment’, and on the subjective and intersubjective aspects of mental pain and suffering to which this gives rise. Second, there are silences around sexually degrading treatment. Only the review of IHAT mentions rape alongside ‘grievous bodily harm and ill-treatment which may amount to a “war crime” as a form of ‘serious’ ill-treatment that requires investigation. This omits a line of ECtHR case law finding inhuman or degrading treatment in some but not all cases where the applicant complained of a strip-search.<sup>59</sup> Third, in emphasising physical injury, such as assault, actual bodily harm and grievous bodily harm, the MOD’s definitions implicitly privilege cases where there is forensic evidence of injury. This ignores forms of torture, inhuman or degrading treatment which might cause physiological or psychiatric distress, but not bodily injury.

#### *B. The Distinction between Torture and Cruel, Inhuman or Degrading Treatment or Punishment*

Section 134 of the Criminal Justice Act 1988 provides for the prosecution of the crime of torture, and Schedule 2 of the AFA 2006 places this crime within court-martial jurisdiction. This is the UK’s implementation of the obligation in the CAT to criminalize torture.<sup>60</sup> CAT also imposes an obligation on states parties to prosecute the crime of torture,<sup>61</sup> and UK state practice on this is limited to three cases to date, one of them in progress,<sup>62</sup> in civilian courts. CAT does not impose an obligation to criminalize, investigate or prosecute cruel, inhuman or degrading treatment or punishment. In their analysis of the CAT’s drafting history, Nowak and McArthur argue that it is this procedural distinction that grounds the substantive distinction between torture and other ill-treatment in the CAT,<sup>63</sup> while Nowak as Special Rapporteur suggested that the distinction lay in the four disjunctive prohibited purposes which form part of the definition of torture in Article 1 of CAT.<sup>64</sup>

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<sup>56</sup> *Ireland v UK*, (1978) 2 EHRR 25, para 167 (emphasis added)

<sup>57</sup> D Calvert-Smith, above n 8

<sup>58</sup> ICC OTP, Report on Preliminary Examination Activities (2018), see IV below; Carla Ferstman, Thomas Obel Hansen and Noora Arajärvi, ‘The UK in Iraq: Efforts and Prospects for Accountability for International Crimes Allegations: A Discussion Paper’ (University of Essex Human Rights Centre; Ulster University Transitional Justice Initiative 2018) 8

<sup>59</sup> above n 53

<sup>60</sup> CAT, Article 4

<sup>61</sup> CAT, Article 8

<sup>62</sup> UK dialogue with the UN Committee against Torture, 66<sup>th</sup> session, 8 May 2019

<sup>63</sup> Cited in Jeremy Waldron, ‘The Coxford Lecture: Inhuman and Degrading Treatment: The Words Themselves’ (2010) 23 Canadian Journal of Law & Jurisprudence 269, 275

<sup>64</sup> Cited in ICRC, *Updated Commentary on the First Geneva Convention of 1949* (ICRC, Cambridge University Press, 2016), Common Article 3, para 630



However, Article 16 applies the investigatory duties in Articles 12-13 to cruel, inhuman or degrading treatment or punishment as well as torture, where ‘such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’<sup>65</sup> Therefore, the UK should have ‘ensure[d] that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe’ cruel, inhuman or degrading treatment or punishment had been committed;<sup>66</sup> and alleged victims should have had a ‘right to complain to, and to have his case promptly and impartially examined by, [the state’s] competent authorities’, with alleged victims and witnesses protected from intimidation.<sup>67</sup> IHAT was repeatedly criticized for its delay in investigating cases,<sup>68</sup> so the MOD has arguably failed to provide a ‘prompt’ investigation for both torture allegations and alleged cruel, inhuman or degrading treatment or punishment.

Publicly available documents offer no evidence that the MOD considered the investigatory obligations relating to cruel, inhuman or degrading treatment or punishment; but nor is there evidence that the IHAT or SPLI considered section 134 of the Criminal Justice Act. The bias towards bodily injury in the available definitions a lack of attention to the prohibited purposes in Article 1 CAT and its prohibition on the intentional infliction of severe mental pain and suffering.

### C. International Humanitarian Law

Might the MOD’s terminology hint at the threshold for a grave breach of torture or inhuman treatment in the IHL applicable to international armed conflicts? This seems plausible because of the reference to ‘ill-treatment which may amount to a “war crime”’ in the list of priority offences IHAT would sift in its first stage or Pillar 1.<sup>69</sup> Questions of threshold and relative severity were raised in the negotiating history for the grave breaches provisions in the Four Geneva Conventions 1949, with delegates reassured by the following assertion:

This category has been carefully defined, so as to avoid including acts which allow for various degrees of gravity and could not therefore be considered to be grave breaches if only committed in their less serious forms.<sup>70</sup>

There is both a high threshold and an emphasis on bodily integrity, not mental suffering, in the definitions of grave breaches in the Four Geneva Conventions 1949. Although the lists of grave breaches vary as between the four treaty texts, ‘torture or inhuman treatment, including biological experiments, wilfully causing *great suffering or serious injury* to body or health’ are included in all of them.<sup>71</sup> Additional Protocol I’s longer list of grave breaches does include in Article 11(4) an ostensible prohibition on ‘[a]ny wilful act or omission which seriously endangers the physical or *mental* health or integrity of any person’ held by another Party to the conflict, but this is to be read in relation to prohibitions in earlier subsections, on unjustified ‘physical mutilations; ... medical or scientific experiments... removal of tissue or organs for transplantation’.<sup>72</sup> At first sight, none of these selected grave breaches includes a slap or a threat.

<sup>65</sup> CAT, Article 16

<sup>66</sup> CAT, Article 12 (read together with Article 16)

<sup>67</sup> CAT, Article 13 (read together with Article 16)

<sup>68</sup> *Al-Saadoon v Secretary of State for Defence* [2016] EWHC 773 (Admin), paras 15, 24, 36-37, 30, 37

<sup>69</sup> D Calvert-Smith, above n 8, 11

<sup>70</sup> Report on Panel Sanctions to the Joint Committee, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, 115, cited in International Committee of the Red Cross (ICRC), *Updated Commentary on the First Geneva Convention of 1949* (ICRC, Cambridge University Press 2016), Article 50 GC I, para 2916

<sup>71</sup> GC I, Article 50; GC II, Article 51, GC III, Article 130, GC IV, Article 147 (emphasis added)

<sup>72</sup> AP I, Article 11(2)

Moreover, IHL treaties are not expressly interpreted as a ‘living instrument’, in contrast to the ECHR. States vary in their willingness to accept progressive interpretations of IHL treaties, and in the weight they accord to the historic and now-gradually updated ICRC Commentaries to the Four Geneva Conventions and their Additional Protocols.

These observations are persuasive, but an argument that IHL’s grave breach of inhuman treatment is radically different from the thresholds in IHRL works only if IHL’s grave breaches provisions are interpreted alone, as a solitary *lex specialis*, and without reference to the IHL of non-international armed conflict, IHRL or ICL. There are four counterarguments to this fragmented, hierarchical approach. First is the prohibition on ‘outrages upon personal dignity, in particular humiliating and degrading treatment’ in Common Article 3 to the Four Geneva Conventions.<sup>73</sup> Subjective, mental harms are therefore foreseen and prohibited in the IHL of non-international armed conflict, although in an important contrast between IHL and ICL on the one hand and IHRL on the other, the victim need not be aware of the humiliating or degrading treatment. Outrages upon personal dignity are equally prohibited against dead bodies.<sup>74</sup> Second is the convergence in ICL between ‘inhuman treatment’ in international armed conflict and ‘cruel treatment’, as prohibited in the IHL of non-international armed conflict. The ICRC Commentary to Common Article 3 notes that, in the absence of treaty definitions for each of these terms, the International Criminal Tribunal for the former Yugoslavia (ICTY) defined cruel treatment and inhuman treatment as equivalent to each other, and as requiring ‘physical or mental suffering of a serious nature’; no particular purpose is required.<sup>75</sup> ICTY jurisprudence has been strongly influenced by the contextual and partly subjective criteria applied by the ECtHR in assessing whether or not the war crime of cruel treatment in non-international armed conflict has taken place.<sup>76</sup> Third, the ICRC Updated Commentary openly refers to IHRL and ICL in its analysis of the grave breaches provisions in GC I and GC II.<sup>77</sup> It does so in part to conclude that the grave breach of torture does not require proof of a physical injury; torture in IHL can be proven with reference to mental suffering, and this has been recognized in ICL in relation to ‘being forced to watch severe mistreatment’ of a relative, ‘threats of death’ and obliging a victim to collect the remains of neighbours and friends.<sup>78</sup> This is far from the simple emphasis on bodily integrity, and a prohibition on mutilation and medical experimentation in the Four Geneva Conventions’ grave breaches provisions. Fourth, there is a compelling scholarly argument that IHRL is more specific than IHL on torture and inhuman/cruel treatment, so that IHRL, and not IHL, is the *lex specialis*, shaping the interpretation of IHL norms.<sup>79</sup> The MOD’s terminology is wrongheaded, failing to grasp IHL prohibitions and the precision offered by IHRL jurisprudence in the definition of grave breaches and war crimes.

#### D. International Criminal Law

As to ICL taken alone, therefore, how does the MOD’s terminology on ill-treatment compare to the Elements of Crimes of the ICC? The Review of IHAT referred to a procedural distinction between “‘serious” ill-treatment, e.g. rape, grievous bodily harm, ill-treatment which

<sup>73</sup> GC I-GC IV, Common Article 3; ICRC, *Updated Commentary*, above n 64

<sup>74</sup> ICC Elements of Crimes, Art 8(2)(b)(xxi)

<sup>75</sup> ICRC, *Updated Commentary* 2016 (Common Article 3) para 616-618, citing CTY, *Delalić* Trial Judgment, 1998, para. 550-552

<sup>76</sup> *ibid.*, para 619

<sup>77</sup> ICRC, *Updated Commentary* 2016 (GC I), above n 64; ICRC, *Updated Commentary on the First Geneva Convention of 1949* (ICRC, Cambridge University Press 2017), Article 51 GC I

<sup>78</sup> ICRC, *Updated Commentary* 2016 (GC I), above n 64, Article 50, para 2967

<sup>79</sup> Manfred Nowak, ‘Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ in Andrew Clapham and Paola Gaeta (eds), *Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2013)

may amount to a “war crime” under the Rome Statute, and other ill-treatment’.<sup>80</sup> This is at least an attempt to invoke ICL, and to acknowledge that war crimes deserve investigation, while ‘rape, grievous bodily harm’ defines IHRL violations too narrowly, omitting the crime of torture, and failing to refer specifically to mental pain and suffering.

In Article 8(2)(a)(ii)-2 of the Elements of Crimes, the war crime of inhuman treatment in international armed conflicts, provides that: ‘The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.’ The convergence between ICL and IHRL is already evident, and the inclusion of ‘mental pain and suffering’ calls into question yet again the Service Police/SPLI’s apparent omission of this in its decisions to close investigations. The four prohibited purposes from Article 1 of the CAT are added to the conduct element of inhuman treatment to form a second required element for the war crime of torture in international armed conflicts, as specified in Article 8(2)(a)(ii)-1 of the Elements of Crimes. The publicly available documents on the MOD’s approach do not refer to these prohibited purposes. The war crimes of inhuman treatment and of wilfully causing great suffering in Art 8(2)(a)(iii) are barely distinguishable from each other in the Elements of Crimes, element 1 of which is: ‘The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.’ ‘[S]evere’ and ‘great’ implies a gradation of greater to lesser pain or suffering. There are no express references to the war crime of wilfully causing great suffering in the MOD’s publicly available documents on its Iraq investigations.

For the war crime of cruel treatment in non-international armed conflict as described in the Elements of Crimes, Article 8(2)(c)(i)-3, the prosecution must prove the same conduct element as for inhuman treatment, and the victim must have been *hors de combat* ... civilians, medical personnel, or religious personnel taking no active part in the hostilities.’ The defendant must have been aware of the victim’s protected status, the existence of an armed conflict, and the armed conflict must objectively have been a non-international armed conflict. We cannot tell from the publicly available documentation if IHAT or the SPLI made any attempt to investigate the war crime of cruel treatment in non-international armed conflict specifically. There is no mention in the final, October 2017 Work Completed table for IHAT, nor in the much less detailed output of the SPLI of war crimes under non-international armed conflict at all.

Finally, the two crimes of outrages upon personal dignity have the following common text for their first and second elements:

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons. 2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.<sup>81</sup>

There is a footnote to Art 8(2)(b)(xxi), applicable in international armed conflict only:

For this crime, “persons” can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.

This text demonstrates both the differences and the similarities between ICL and IHRL. IHRL’s threshold for inhuman or degrading treatment includes a contextual, victim-centred element, but not specifically one relating to the victim’s ‘cultural background’ as it relates to the treatment of human remains. The possibility that an outrage upon personal dignity could be perpetrated against a person’s remains is markedly different from the concept of degrading treatment in IHRL. In IHRL, the primary victim may be deceased by the time of litigation, with

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<sup>80</sup> D Calvert-Smith, above n 8

<sup>81</sup> ICC Elements of Crimes, Article 8(2)(b)(xxi), Article 8(2)(c)(iii)

his or her surviving relatives the applicants, but degrading treatment presupposes a victim who suffered the degrading treatment while he or she was still alive. These differences aside, public SPLI and IHAT references to ill-treatment do not acknowledge the war crimes of outrages upon personal dignity. The elements of humiliation, degradation and violation of dignity are absent from materials released on the MOD's investigatory output thus far. These are profound conceptual omissions, showing the investigatory bodies' lack of priority for these matters, and perhaps investigators' ignorance of or choice not to engage with this aspect of IHRL, IHL and ICL.

#### IV. DOES THIS APPROACH SATISFY INVESTIGATORY OBLIGATIONS IN IHRL, IHL AND ICL?

##### *A. International Human Rights Law*

There is a marked lack of transparency in IHAT, SPLI and MOD documentation on investigations into alleged violations of international law in Iraq, but there is no suggestion from the publicly available materials that these bodies considered the obligation to prosecute the crime of torture, nor the obligation 'promptly and impartially' to investigate cruel, inhuman or degrading treatment or punishment discussed in III.B above.<sup>82</sup> As a work completed table for the SPLI is still awaited at this writing, and SPLI investigation numbers now differ from IHAT investigation numbers, researchers cannot trace particular cases between the two investigatory bodies, and therefore evaluate whether any of the ill-treatment cases alleged might have amounted to torture under the CAT.

For both unlawful killings cases under Article 2 and torture or inhuman or degrading treatment cases under Article 3, states parties to the ECHR must conduct 'an effective official investigation... capable of leading to the identification and punishment of those responsible.'<sup>83</sup> The word 'punishment' suggests criminal investigation and where there is sufficient evidence against a particular defendant, prosecution. Unlike the CAT, ECtHR case law applies the obligation to conduct such an investigation to allegations of torture *and* inhuman or degrading treatment. This duty is grounded not in explicit treaty language, but in an interpretation of either Article 2 or Article 3 together with Article 1's obligation to 'secure to everyone within their jurisdiction the rights and freedoms' in the ECHR; and the need to avoid 'agents of the State ... abus[ing] the rights of those within their control to virtual impunity'.<sup>84</sup> Article 13 is also relevant: the obligation to provide 'an effective remedy [to victims of ECHR violations] before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.' It is now settled law that the ECHR applied extraterritorially in relation to British military detainees in Iraq,<sup>85</sup> in relation to its negative and positive obligations.

The shortcomings in the ECtHR jurisprudence, and a potential site of exploitation by states, come in the phrasing that triggers the Article 3 ECHR investigatory obligation. In *Assenov v Bulgaria*, the duty to investigate is triggered when an individual raises an 'arguable case of serious... ill-treatment' by the police or other agents of the State.<sup>86</sup> The term 'serious' is not defined. The strongest argument is that this refers both to torture and to inhuman or

<sup>82</sup> CAT, Articles 8, 12-13 (read together with Article 16)

<sup>83</sup> *McCann v United Kingdom* (1996) 21 EHRR 95, para 161; *Assenov v Bulgaria* (1999) 28 EHRR 652

<sup>84</sup> *Assenov v Bulgaria*, paras 101-102

<sup>85</sup> *Al-Skeini v United Kingdom* (2011) 53 EHRR 18; *R (on the application of Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153

<sup>86</sup> *Assenov v Bulgaria*, above n 83

degrading treatment or punishment, because other phrasing in the same paragraph of the judgment refers expressly to the need to ensure the effectiveness of the prohibition of torture and of inhuman or degrading treatment or punishment, through ‘effective official investigation[s]’. However, to a decision-maker who lacks detailed knowledge of the ECtHR case law, the word ‘serious’ carries its own connotations. This risks discretionary judgment as to whether to investigate cases which might amount to inhuman or degrading treatment or punishment, but which might not attain the decision-maker’s subjective sense of torture.

The Article 3 ECHR investigatory obligation leads to a reversed burden of proof. Usually, the applicant in a case involving ECHR rights must prove that a violation has occurred, but in Article 3 cases, where an individual has been in custody, it is for the state to provide evidence to ground any assertion that the ill-treatment did not occur, or that injuries had an alternative explanation.<sup>87</sup> Further and more broadly, Article 3 ECHR is an absolute right, which lacks the limitations permissible in Articles 8-11 ECHR. Arguments based on proportionality (invoked briefly by IHAT and the SPLI)<sup>88</sup> are therefore inapplicable to Article 3 ECHR investigations, and there is no authority in ECtHR case law to suggest that the investigatory obligation is subject to a margin of appreciation. The absolute nature of Article 3 is asserted to apply to its negative and positive obligations,<sup>89</sup> and equally to the prohibition of torture and that of inhuman or degrading treatment or punishment.<sup>90</sup> These arguments, and the finding in section III that the MOD has failed to acknowledge the qualitative breadth of harm in degrading treatment, strongly suggest that the UK has failed to implement its obligations under Article 3 ECHR.

Might the MOD’s closure of investigations suggest an ‘administrative practice’ ‘in violation of the Convention’?<sup>91</sup> This concept from early case law involves not merely the ‘high level’ authorisation of torture or ill-treatment,<sup>92</sup> but also ‘repetition of acts’ and ‘official tolerance’ of conduct that violates Article 3 ECHR. Drawing on the *Greek* case, Reidy defines ‘official tolerance’ as follows:

though acts are clearly illegal, they are tolerated in the sense that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition, or that a higher authority, in the face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity; or that in judicial proceedings a fair hearing of such complaints is denied.<sup>93</sup>

The second of these three disjunctive criteria might well be met in relation to the closure of many hundreds of investigations into alleged ill-treatment.

### *B. International Humanitarian Law*

Having ratified the Four Geneva Conventions and Additional Protocol I, the UK is obliged to criminalize all the grave breaches listed in these treaties, and to prosecute or extradite

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<sup>87</sup> *Ribitsch v Austria* (1996) 21 EHRR 573, para 104

<sup>88</sup> Above n 1, 2

<sup>89</sup> S Palmer, above n 11

<sup>90</sup> MK Addo and N Grief, above n 11, 512

<sup>91</sup> *The Greek case*, above n 39; *Donnelly and others v the United Kingdom*, 4 DR 4, cited in Aisling Reidy, ‘The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights’ (Council of Europe 2003) 45,47

<sup>92</sup> *Ireland v UK* (App No 5310/71) (Commission Decision) 25 January 1976

<sup>93</sup> A Reidy, above n 91, 45; *The Greek case*, above n 39, 195-196, *Donnelly v United Kingdom*, above n 91

those suspected of committing them.<sup>94</sup> Article 86 Additional Protocol I requires High Contracting Parties and other Parties to the conflict to ‘repress grave breaches, and take measures necessary to suppress all other breaches’ which would result if they were to fail to act.<sup>95</sup> It introduces command or superior responsibility for such failure to act.<sup>96</sup> This is a positive obligation on military commanders to ‘prevent and, where necessary, to suppress and report to competent authorities breaches [not limited to grave breaches]’ of the Geneva Conventions and Additional Protocol I.<sup>97</sup> Command responsibility extends beyond grave breaches, so other IHL violations should also be prevented, suppressed and reported to competent authorities.

Torture and inhuman treatment are both grave breaches. IHAT’s Pillar 1 procedure did attempt to prioritize ‘serious’ ill-treatment, albeit not defined with reference to command responsibility or grave breaches.<sup>98</sup> Yet the marked lack of transparency in IHAT’s dismissal of 68 and then 489 allegations of ‘lower-level... ill-treatment’ means we cannot assess how many of these, if at all, might have amounted to grave breaches that should have been fully investigated and prosecuted. A further reduction in transparency since the establishment of the SPLI means that we cannot evaluate how many of allegations were dismissed on this basis. We lack the evidence to take on trust that all of these allegations were less serious than the grave breaches of torture and inhuman treatment.

There is no hint in the publicly available information as to how many of the investigations involved allegations of ill-treatment committed in international as opposed to non-international armed conflict. The grave breaches provisions appear only in the IHL of international armed conflict, so we must look to the subsequent development of ICL for obligations to investigate torture, cruel treatment and outrages upon personal dignity in non-international armed conflict.

### *C. International Criminal Law*

Is the MOD fulfilling its investigatory responsibilities under ICL in relation to allegations that might amount to the war crimes of torture, inhuman treatment or outrages upon personal dignity in international armed conflict, or those of torture, cruel treatment or outrages upon personal dignity in non-international armed conflict? The situation of Iraq/UK is now in its third admissibility phase of a preliminary examination by the Office of the Prosecutor (OTP) of the ICC. The OTP made the following findings as to subject-matter jurisdiction:

195. The information available provides a reasonable basis to believe that in the period from 20 March 2003 through 28 July 2009 the UK servicemen committed the following war crimes against at least 61 victims in their custody in the context of armed conflicts in Iraq: wilful killing/murder (article 8(2)(a)(i)) or article 8(2)(c)(i)); torture and inhuman/cruel treatment (article 8(2)(a)(ii) or article 8(2)(c)(i)); outrages

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<sup>94</sup> 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

<sup>95</sup> AP I, art 86(1)

<sup>96</sup> AP I, art 86(2)

<sup>97</sup> AP I, art 87(1)

<sup>98</sup> D Calvert-Smith, above n 8

upon personal dignity (article 8(2)(b)(xxi) or article 8(2)(c)(ii)); rape and other forms of sexual violence (article 8(2)(b)(xxii) or article 8(2)(e)(vi)).

196. Specifically, the Office has documented at least seven deaths as a result of abuse in custody and 24 separate instances of detainees' mistreatment involving 54 victims in total. At this stage, these incidents should not be considered as either complete or exhaustive, but rather illustrative of the alleged criminal conduct.<sup>99</sup>

There were, in contrast, no reasonable grounds to believe that UK armed forces committed war crimes in the conduct of hostilities; the sole grounds were in relation to arrest and detention.<sup>100</sup> The analysis in this Article is timely, as the OTP has not yet publicly considered the conceptual gulf between MOD terminology on ill-treatment and crimes in the Rome Statute.

The OTP has been analysing the work of IHAT, the SPLI and the SIWG, and the courts-martial prosecutions for manslaughter, assault and inhuman treatment that have taken place to date.<sup>101</sup> Its 2018 Report notes the systems for the review of IHAT, the efforts to ensure IHAT's independence, and the 'significant financial and human resources' devoted to investigations;<sup>102</sup> but also the focus to date on 'low-level physical perpetrators and mid-level superiors.'<sup>103</sup> Command and superior responsibility might be a deficit in the investigations to date. As part of the admissibility phase, the OTP is still examining whether any single or combined factor relating to IHAT and other procedures might 'vitate [the] genuineness' of the UK's investigation. This is important because the ICC might have jurisdiction for a full investigation of war crimes allegedly committed by the UK in Iraq if under Article 17(1)(a) and (b) of the Rome Statute the UK is found 'unwilling ...genuinely to carry out the investigation or prosecution'. Unwillingness is determined by the disjunctive criteria in Article 17(2):

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

While delay through repetition of procedures, IHAT's lack of convictions, and the UK authorities efforts to ensure IHAT's independence and impartiality are both mentioned in the 2018 Report,<sup>104</sup> there is no explicit mention of whether the UK's investigations had the 'purpose of shielding the person concerned from criminal responsibility', on delay 'which in the circumstances is inconsistent with an intent to bring the person concerned to justice' or on whether the manner of the investigations were 'in the circumstances, ... inconsistent with an intent to bring the person concerned to justice.' These matters of state purpose or intent are still to be addressed.

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<sup>99</sup> ICC OTP, Report on Preliminary Examination Activities (2018) paras 195-196

<sup>100</sup> *ibid.*, para 198

<sup>101</sup> *ibid.*, paras 200-204

<sup>102</sup> *ibid.*, para 204

<sup>103</sup> *ibid.*, para 202

<sup>104</sup> *ibid.*, 205, 204

A case will fail the admissibility hurdle if it is ‘not of sufficient gravity to justify further action by the Court’.<sup>105</sup> The OTP is analysing whether the war crimes alleged were ‘committed on a large scale or pursuant to a policy’, and the text on this in the 2018 Report suggests some contextual doubt on this point; but an ongoing question as to command and superior responsibility.<sup>106</sup>

This Article might be one source of information on the UK’s willingness or otherwise to conduct a genuine investigation or prosecution into cases of torture, inhuman treatment, cruel treatment or outrages upon personal dignity. Because of the lack of transparency in MOD investigations, the analysis in this Article offers less in relation to gravity. Only if the facts of each allegation are made available to the OTP can there be an authoritative determination of whether war crimes were ‘committed on a large scale’; and only if separate information on policy is released can there be a finding that such war crimes were committed ‘pursuant to a policy’. MOD investigations need to be examined in a broader political and institutional context, including the closure of IHAT in 2017, the target-driven approach for IHAT and SPLI,<sup>107</sup> and the lack of transparency throughout.

## V. CONCLUSION

MOD investigatory bodies have closed many hundreds of investigations into alleged ill-treatment of detainees in Iraq, based on an arbitrary and conceptually underinclusive ranking of their severity. These decisions use wrongheaded terminology, deracinated from applicable IHRL, IHL and ICL. Once these terms are defined with reference to the domestic criminal law of assault and actual bodily harm, so that investigations were closed when less than grievous bodily harm was alleged. Imposing domestic law terminology narrows the criteria for severity, and leads to a conceptually underinclusive approach. Doctrinally, this approach ignores both the distinctive aspects of conduct proscribed in IHRL, IHL and ICL, and the mutual conceptual influence between IHRL, IHL and ICL. There is no evidence that the MOD considered the threshold of inhuman or degrading treatment or punishment in ECtHR case law, the distinction between torture and cruel, inhuman or degrading treatment or punishment, nor grave breaches in the IHL applicable to IAC when deciding if these investigations should be closed. The words ‘cruel/inhuman/degrading treatment’, ‘severe mental pain and suffering’, and ‘outrages upon human dignity’ are absent. There is some evidence that cases of ‘serious’ ill-treatment that might have amounted to a war crime under ICL were sifted in IHAT’s decision-making procedure, but there is no information on which war crimes IHAT considered, how many cases were deemed to reach this threshold, nor the result for each of these investigations. IHAT refers to alleged rape as one subset of cases categorized for investigation under Pillar 1, but none of the investigatory materials refer to cases of degrading treatment through sexual humiliation.

Procedurally, the closure of these investigations suggests a general neglect of the investigatory obligations in IHRL, IHL and ICL. Publicly available documents rarely invoke the investigatory obligations in Article 3 ECHR (applicable in relation to torture and inhuman or degrading treatment or punishment), and there is no reference to the obligation to prosecute torture and the different investigatory obligations for cruel, inhuman or degrading treatment or punishment in the CAT. The MOD’s practice suggests the need to renew scholarly and judicial attention to the ECtHR concept of an ‘administrative practice in violation of’ the ECHR; particularly in relation to the ‘official tolerance’ of repeated acts that might violate Article 3.

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<sup>105</sup> Rome Statute, above n 10, Article 17(1)(d)

<sup>106</sup> ICC OTP, Report on Preliminary Examination Activities (2018) para 208

<sup>107</sup> Ministry of Defence News, ‘IHAT to Close at the end of June’, 10 February 2017; Peter Walker, ‘Iraq War Claims Unit to Be Shut down, Says UK Defence Secretary’ *The Guardian* (10 February 2017)



Setting a threshold of grievous bodily harm as the minimum injury that might warrant an investigation risks a failure to investigate an indeterminate number of torture cases; of grave breaches of the Four Geneva Conventions and Additional Protocol I, and could have the effect (but not yet the proven purpose) of shielding those responsible from prosecution for war crimes. Discretionary value judgements (e.g. 'less serious', 'lower-level allegations') also serve a rhetorical role, implying that it is the allegations (and not the conduct alleged) that are problematic, barely worth the use of investigatory resources. These terms are rhetorically consistent with other political assertions, that alleged victims, witnesses and their representatives troubled the MOD with many hundreds of unimportant allegations.