

RESEARCH ARTICLE

War crimes allegations and the UK: towards a fairer investigative process

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Abstract

War crimes allegations have dogged the UK military for decades. Yet there is no settled process to deal with them. Different legal responses deployed have all suffered from complaints of unfairness. This paper proposes foundations for a more satisfactory approach based on an existing three-part consensus. First, that norms governing individual and systemic conduct in military conflict are relatively undisputed; secondly, that the state has a non-negotiable investigatory duty should a suspected breach occur; and thirdly, that any investigation should take into account the context within which it is conducted. The paper then advances three propositions: (1) first order principles of practicability, expertise, and investigator independence should provide the non-negotiable foundations of any response; (2) second order or subsidiary principles including promptness, adequacy, reasonable transparency, and respect for basic standards of natural justice should apply when practicable; and (3) a standing institution designed to comply with the first and second order principles would provide a fairer process for all participants (accused, victim and the wider national and international communities) whilst also fulfilling coherence and legal certainty requirements. The paper concludes that current structures cannot fulfil these demands and it explores the basis for a better alternative.

Keywords: public law; war crimes; accountability; investigations; fairness

Introduction

Allegations of war crimes have dogged the UK armed forces over the past decade or more. Multiple claims regarding unlawful killing and ill-treatment of detainees in Iraq, Afghanistan, Northern Ireland, the Falklands, Cyprus and other past military engagements, continue to provoke national and international concern.¹ Many have become acute political issues prompting considerable tension as to how they might be resolved. Yet there has been and remains no settled process to deal with their investigation. Instead, the UK has deployed a broad range of differing, often ad hoc, legal or governmental responses. Public inquiries, inquests, parliamentary committee scrutiny, internal Ministry of Defence review, civil and judicial review litigation, and coronial-type examinations have supplemented established military criminal justice processes for both investigation and resolution of allegations of wrongdoing. All have suffered from accusations of unfairness of one form or another for those affected (accused, victims and their families, military institutions and the public at large). Although different

[†]I am grateful to Victor Tadros, Owen Thomas and Victoria Basham and the anonymous reviewers for their comments on earlier drafts of this paper and suggestions for improvement.

¹I have outlined elsewhere failures of public law vis-à-vis the rule of law and human rights specifically in relation to the Iraq allegations. See A Williams 'The Iraq abuse allegations and the limits of UK law' (2018) Public Law 461. See also C Ferstman et al 'The UK military in Iraq: efforts and prospect for accountability for international crimes allegations?' 1 October 2018 available at https://www1.essex.ac.uk/hrc/documents/THE_UK_MILITARY_IN_IRAQ_1Oct2018.pdf.

actors perceive different kinds of unfairness, the legal incoherence of the UK's response has aggravated these perceptions. Uncertainty as to the applicable process acts to the detriment of all concerned. It also diminishes law's value as a means of attaining accountability for alleged individual and systemic wrongdoing committed by state agents in the war context.² Even if individual processes may appear fair to some parties for some of the time, the confusion and uncertainty perpetuates critiques of unfairness.

The recent political proposal to protect armed forces personnel and 'veterans' by introducing a statute of limitations to restrict investigations into historic crimes of war is unlikely to resolve this condition.³ It may even exacerbate it. Consequently, in this paper, I argue for a different solution: one that seeks to address the enduring uncertainty accompanying the investigatory issue. I attempt to lay the foundations for fulfilling the state's obligations to investigate fairly (whether or not as a precursor to prosecution) on the initial plausible assumptions that: (a) war crimes are of a different order from ordinary crimes of violence and deserve special and specific attention;⁴ (b) whatever the disputes about the broader aims of accountability processes, there is a moral duty to investigate serious wrongdoing committed in war accurately and fairly, and to hold wrongdoers publicly to account for their wrongdoing;⁵ and (c) such investigations should adhere to a reasonable, but context-specific, set of fairness standards for the benefit of those constituencies or individuals affected. My aim, then, is to encourage a move towards a more credible, certain and fairer investigatory scheme when war crimes are alleged.⁶

To this end, in section 1, I demonstrate that even though current UK practices might suggest otherwise, there already exists consensus on three relevant issues. First, on the applicable norms and substantive obligations related to individual and systemic conduct in military conflict; secondly, that the state has a non-negotiable investigatory duty should a suspected breach of those obligations occur; and thirdly, that any standards of investigation fulfilling the investigatory duty should take into account the context within which such investigations are to be conducted.

Informed and underpinned by this three-part consensus, I then advance, in section 2, a series of three propositions that I contend should direct the state's response to any war crimes allegedly committed by its forces. First, rather than assume that all standards (often but misleadingly subsumed

²I use the term 'war context' throughout to encompass internal and international armed conflicts as defined by international humanitarian law, and sustained military deployment that results in deliberate killing and ill-treatment. Although highly contentious, I accept for the sake of argument (and given the ongoing investigations into legacy crimes committed by both paramilitary and UK armed forces personnel) that the Northern Ireland 'Troubles' should fall within this definition. The character of that conflict as a sustained deployment of military forces plausibly falls within the 'war context' as I have described it.

³In 2018, the House of Commons Defence Committee launched an inquiry into how investigations against service personnel could be subject to a statute of limitations. Analysis of a public consultation by the Northern Ireland Office into this proposal was published in July 2019 (see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814805/Addressing_the_Legacy_of_the_Past_-_Analysis_of_the_consultation_responses.pdf). The original proposal follows a long tradition of political opposition to war crimes investigations. See for instance concern regarding police enquiries into allegations of unlawful killing in the Falklands War and the delay in resolving them: 'Falklands War Crimes Investigation' *Hansard* HL Deb, vol 554, cols 1006–1009, 3 May 1994.

⁴The term 'war crimes' reflects the condemnation not of killing per se, even of civilians, but of killing that transgresses the limits placed on the conduct of war. In this, they are not simply domestic crimes redefined for a different context. The war crimes norm also reflects its potential systemic quality in each and every alleged violation. All war crimes provoke collective responsibility if patterns of repetition show acquiescence or command in their committal or in the failure to prevent or punish.

⁵The purpose of the criminal justice system and punishment remains the subject of much debate at both national and international level. This does not affect the need to establish the truth of any allegations. It would be relatively uncontroversial to claim that there is a moral duty to investigate serious wrongdoing accurately and fairly and hold those responsible to account across models.

⁶Although my focus is on the UK experience, I acknowledge that other states face similar issues. For instance, New Zealand has questioned the appropriateness of its accountability processes in the light of allegations concerning specific operations in Afghanistan. The Inquiry into Operation Burnham (which resulted in the deaths of several Afghan civilians) was launched in 2018: see <https://operationburnham.inquiry.govt.nz/>.

within ‘fair trial rights’) associated with contemporary notions of fair criminal investigations automatically apply, first order principles of practicability, expertise, and investigator independence should provide the non-negotiable foundations of a state’s response. Secondly, subsidiary principles recognised as necessary for a fair investigative process to be compliant with international human rights law (IHRL) (including promptness, adequacy, public notification of outcomes, reasonable transparency of process, and respect for basic standards of natural justice) should apply to the fullest extent possible *as and when practicable* and generally subject to first order principles. Thirdly, that to ensure compliance with the first order and subsidiary principles, whilst also fulfilling legal coherence and legal certainty requirements, a dedicated independent and standing institution tailored for the war context would be the most plausible solution.

I conclude the paper by arguing that current structures and legal frameworks (whether in the military or civil criminal justice systems) cannot fulfil these demands as currently constituted. Nor do the recent and specific proposals for multiple institutions to deal with ‘legacy crimes’ in Northern Ireland address the whole set of outstanding and possible future war crimes allegations against the UK.⁷ I therefore explore some possibilities for the construction of a better alternative that accords with the established consensus and my three propositions.

1. War crimes investigations: the existing consensus

If it is accepted that the current war crimes investigatory and accountability structures operating in the UK are incoherent and perceived as unfair, how can a more effective system be established? My starting point is to identify those areas of consensus that can provide the foundations of a more suitable scheme. Three areas present themselves: first, the norms that govern the conduct of military forces in armed conflict; secondly, the investigatory duty that accords to a state once any suspected breach of those norms by its forces comes to light; and thirdly, the impact of the war context on what is deemed practicable in fulfilling the investigatory duty. I deal with these in turn below.

(a) *Consensus on substantive norms*

Few claim seriously that the various established norms of international humanitarian law (IHL) should not apply to UK forces in war. Few argue that if UK personnel breach these norms, they should not be held to account for such violations. It seems uncontroversial, therefore, to argue that the standards applicable to the operations of the UK’s military are relatively certain. The obligations contained in the Geneva Conventions 1949, and those in the 1977 Additional Protocols I and II to the Geneva Conventions, in particular, as well as multiple other international instruments have been accepted without serious reservation by the UK and by most states.⁸

There is also reasonably significant international consensus over what and when breaches of these standards might constitute a war crime. Though there is ambiguity in the Geneva Conventions (equating ‘grave’ breaches of only some of its provisions with war crimes),⁹ Article 8 of the International Criminal Court Statute now provides a contemporary definition that has global support. Again, few would be surprised by or challenge the list in its entirety.¹⁰

⁷The Stormont House Agreement 2014 at para 30 provided for the creation of a Historical Investigations Unit, to be a ‘new independent body to take forward investigations into outstanding Troubles-related deaths’ compliant with Art 2 ECHR requirements. It also agreed that an Oral History Archive and an Independent Commission on Information Retrieval would be instituted to deal with the past.

⁸India, Turkey, Pakistan, the USA, Israel and Iran have not ratified Additional Protocol I.

⁹See Art 85 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 8 June 1977.

¹⁰Art 8 of the Rome Statute of the International Criminal Court 1998 (Rome Statute) includes specific reference to wilful killing, rape, torture, inhuman treatment, depriving protected persons of a fair trial and intentional acts targeting civilians amongst many other offences.

For the UK, there is less likelihood of dispute following the adoption of the International Criminal Court Act 2001. This incorporated war crimes (as well as genocide, and crimes against humanity), as defined by the ICC Statute, into UK law making them directly applicable to UK forces. The Armed Forces Act 2006 reinforced this by listing the ICC designated crimes as ‘serious offences’ that a unit commanding officer is obliged to report to the service police force as ‘soon as reasonably practicable’ after becoming aware of their occurrence.¹¹

Consensus is equally evident on the understanding of responsibility that may be associated with the commission of war related crimes. Since the Nuremberg Charter and the scheme of justice delivered in post-Second World War Europe, individuals have been identified as primarily accountable either as direct perpetrators or as commanders (political and military). In the latter case, command responsibility ensures that those who knowingly or negligently order, allow or encourage, tolerate their continued commission or fail to act when aware that war crimes are or have been taking place, are valid subjects of investigation.¹² Although this individual responsibility approach dominates thinking about war crimes investigation (as a prelude to individual prosecution), it is also recognised that ‘system criminality’ may require scrutiny.¹³ In other words, the role of a system or culture, plan or policy that enables or encourages war crimes to be committed (through perceived doctrine or training methods or other forms of encouragement) should be addressed through some legal process, though not necessarily criminal prosecution.¹⁴

In the UK, however, the Armed Forces Act 2006 places a barrier in the examination of systemic wrongdoing. Where there is evidence of multiple offences or offenders, the service police are required to regard each ‘person’s conduct in relation to each incident’ as ‘giving rise to a separate case’.¹⁵ As I have discussed elsewhere, this is indicative of the legal and institutional preference for the investigation of individual perpetrators over potential systemic issues, at least as regards criminal sanction.¹⁶ Only if some institution (through Parliament or politically appointed inquiry) is tasked specifically with examining the patterns, policies and institutional cultures that provoke abusive behaviour, will systemic issues be formally uncovered and assessed. As things stand, any independent investigation into state, governmental or military accountability for systemic wrongs is therefore only likely to arise through political movement or perhaps provoked by occasional and protracted civil litigation (either judicial review proceedings or actions for civil damages).¹⁷

Institutional resistance to systemic scrutiny, in terms of the avoidance of independent and timely examination and attribution of responsibility, has been particularly evident in recent allegations relating to the Iraq and Afghanistan wars. Although the Ministry of Defence instituted the Systemic Issues Working Group in 2014, which reports annually, its terms of reference are limited to identifying, reviewing, and correcting ‘doctrine, policy and training’ deemed insufficient in IHL terms.¹⁸ It holds no remit to seek accountability for wrongdoing. The same is true for concerns over historic practices in the Northern Ireland conflict, where the alleged ‘shoot to kill’ policy, coordinated ill-treatment of detainees (amounting to torture), and collusion with paramilitaries have all presented as potential systemic wrongs that have avoided coordinated scrutiny, let alone individual or institutional accountability. Any investigation has been on an ad hoc basis, mostly through internal (and sometimes in

¹¹See the Armed Forces Act 2006, s 113(1).

¹²Command responsibility is reflected in the ICC Act 2001, s 65 in the UK.

¹³For a sustained review see A Nollkaemper and H van der Wilt (eds) *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009).

¹⁴Draft Articles on Responsibility of State for Internationally Wrongful Acts 2001.

¹⁵See the Armed Forces Act 2006, s 117.

¹⁶See Williams, above n 1.

¹⁷For instance, in relation to detention practices during the occupation of Iraq 2003–2009, the decision in *Ali Zaki Mousa (No 2)* reserved the scrutiny of credible systemic wrongdoing to Parliament; see *Ali Zaki Mousa & Others v Secretary of State for Defence (No 2)* [2013] EWHC 1412 (Admin) at [224].

¹⁸See SIWG reports available at <https://www.gov.uk/government/collections/review-of-systemic-issues-arising-from-military-operations-overseas-index>.

secret) Ministry of Defence or armed forces review, or very exceptional public or other police-type inquiry.¹⁹ Individual or state accountability for systemic war crimes has rarely materialised, though there have been exceptions with occasional government apology after acceptance of wrongdoing and state payment of compensation without acceptance of liability.²⁰

Whatever the UK record, there is clear consensus over both the standards generally applicable and the persons who might be examined as responsible when any allegation of individual *and* systemic wrongdoing in war is made. It follows that any declaration of ‘combat immunity’ for whatever level of command or operation could not be tolerated within any rule of law-respecting state as a solution to the investigatory problem. The House of Commons Defence Committee’s current inquiry into ‘how service personnel can be protected from the spectre of investigation and reinvestigation for events that happened many years, and often decades, earlier’ strays into that immunity territory.²¹ Seeking a statute of limitations for investigations into allegations of war crimes does not adhere to the substantive obligations outlined above. The generally accepted international legal commitment for ‘every State to exercise its criminal jurisdiction over those responsible for international crimes’ is not time bound.²² Similarly, the state has a duty to address relevant human rights norms that may have been breached even if committed in a war context, though I would contend that this only applies to specific rights the breach of which can be interpreted as war crimes.²³

(b) Consensus on the investigatory duty

It seems equally uncontentious that, where there is reasonable suspicion of war crimes having been committed, the state party responsible has the primary and inalienable duty to carry out an investigation. Rule 158 of the International Committee of the Red Cross’s (ICRC) rules of customary IHL provides:

States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.²⁴

This is explicit for the treatment of detainees. Article 131 Geneva Convention IV 1949 states that ‘[e]very death or serious injury... shall be immediately followed by an official enquiry by the Detainee Power’.

States, such as the UK, which have ratified the ICC Statute, are also affected by the rules governing complementarity. The ICC’s jurisdiction will not be triggered unless the responsible signatory state is unwilling or unable to investigate or prosecute the case concerned.²⁵ This has apparently incentivised

¹⁹The John Stalker examination (and that of his successor Colin Sampson) into the ‘shoot to kill’ policy allegedly operating in Northern Ireland by the security forces in the early 1980s has never been made public.

²⁰On damages paid for alleged abuses, see, for instance, claims relating to Cyprus at <https://www.theguardian.com/world/2019/jan/23/britain-to-pay-group-of-greek-cypriots-1m-after-claims-of-human-rights-abuse>.

²¹See Defence Committee: *Statute of Limitations – Veterans protection inquiry – Scope of the Inquiry* available at <https://www.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/inquiries/parliament-2017/inquiry13/>.

²²Rome Statute, Preamble, para 6, above n 10.

²³The International Court of Justice *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (8 July 1996) paras 24–25 held that international human rights do not ‘cease in time of war’. But it also accepted that ‘whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the [UN Covenant on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself’. There remains considerable dispute as to whether *all* human rights can plausibly or legally continue to apply in war. If not (on practical grounds), then that leaves open the question of which rights across the civil, political as well as economic, social and cultural spectrum, can or should be dispensed with.

²⁴The rule stems from provisions of various IHL instruments, including Art 121 Third and Art 131 Fourth Geneva Conventions 1949.

²⁵Rome Statute, Art 17(1)(a), above n 10.

the UK to investigate war crimes allegations arising from both the Iraq and Afghanistan conflicts.²⁶ Fears that the ICC might step in have appeared to drive some of the processes that have contributed to the chaos of accountability I mentioned at the beginning of this paper.

The UK's Ministry of Defence *Manual on the Laws of Armed Conflict* recognises the political value in investigating allegations of war crimes too, stating:

Complaints of unlawful acts and omissions alleged to have been committed by individuals or by commanders are an almost inevitable feature of warfare... Failure by belligerent governments to investigate and, where appropriate, punish the alleged unlawful acts of members of their armed forces can contribute to the loss of public and world support, leading to isolation for the state involved.²⁷

Whatever the motivation, there is little moral argument raised against the state's duty to investigate individual *and* systemic accountability issues. Of course, during international armed conflicts there may be significant political and military pressure to avoid investigation into war crimes allegedly committed by one's own troops, at least whilst military operations continue. Arguments of military necessity could justify avoiding public and/or internal scrutiny on the basis that it would undermine morale. At a time when victory is the main goal of military action, any investigation that might not contribute directly to the war effort, and might even adversely affect it by questioning the moral virtue of one's own forces, could be considered unwarranted. Such an argument only has force for so long as hostilities continue. The duty is only suspended rather than dismissed. Even then, some will argue alternatively that as military discipline is essential for the efficient prosecution of armed conflict and observance of the laws of war is enshrined in military law, then any failure to address suspected war crimes immediately will undermine the application of that law and jeopardise discipline to the detriment of fighting effectiveness. For individual crimes at least, a lack of immediate scrutiny, if not accountability, for wrongdoing can threaten public support for the armed forces, erode confidence and professional pride, and reduce effectiveness as a result. There are therefore strong moral and practical reasons for the investigatory duty to apply as soon as reasonably practicable. Military law reflects this appeal and IHRL reinforces the obligation.²⁸

Even if states may derogate from some human rights commitments during an internal or international armed conflict, this does not affect the specific national legal obligations regarding unlawful killing and the right not to be tortured, nor the application of the rules governing armed conflict to military operations within the state. That has become a settled principle within European Human Rights Convention law and accepted in UK law too.²⁹ The obligation to investigate war crimes remains an acknowledged aspect of the rule of law.³⁰

²⁶Former Attorney-General, Jeremy Wright QC, commented to the House of Commons Defence Committee 'we must be aware of the fact that if we are not demonstrating to the ICC that we are investigating these matters properly, the chances of the ICC deciding to do it for us are very much increased. It seems to me that that situation is best avoided': Q186 Oral Evidence 19 October 2016 available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/oral/41503.html>.

²⁷Ministry of Defence *Joint Service Manual on the Law of Armed Conflict 2004* para 16.1.2.

²⁸See *McCann and Others v United Kingdom*, ECtHR, App No 18984/91 at paras 149–150 (27 September 1995), where the ECtHR held that deprivations of life must be subject to 'the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination'.

²⁹Art 15(2) European Convention on Human Rights 1950 provides 'No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision'.

³⁰House of Commons Defence Committee, 'Who guards the guardians? MoD support for former and serving personnel', Sixth Report of Session 2016–17 (TSO, 2017) HC 109, which concluded (inter alia) 'As a nation we expect our servicemen and women to conduct themselves at the highest levels of professionalism on operations. Where the rule of law is broken, justice must be done in military as in civilian life'.

The position becomes slightly more complicated when systemic wrongdoing is alleged, but even here, the underlying duty to investigate remains. Though a systemic issue may require evidence of repeated behaviour or a revelation of plan or policy to commit war crimes, in order to prompt specific scrutiny, the need for investigation is still accepted.³¹ The duty may be triggered some time after the wrongdoing has been committed, but the requirement for proper investigation subsists until or if evidence of systemic crimes materialises.

(c) *Consensus on the war context*

Though the consensus on substantive norms and investigatory duty is strong, the standards, form and timing of any investigation (in short, what amounts to an objective 'fair' investigation) are contested. I return to this question in section 2, but for now it is at least uncontroversial that the precise context within which any alleged breach occurs will have an impact on how and on what terms an investigation is conducted. It might seem counter-intuitive to suppose any investigation into a crime could be both *unfair* and legitimate, but the circumstances of war, where the enemy is denied certain rights or respect as an inherent condition of conflict, may reduce the fairness obligation below what is generally accepted as apt in peacetime. Whatever ideal standards of fairness may be preferred, the war context renders contingent the exact requirements of fairness whilst conflict persists. Some compromise may be necessary (such as in relation to the preservation or access to crime scenes, the interviewing of witnesses, the collection of physical evidence) but not to the extent that accountability processes should be dispensed with altogether.

IHRL and IHL recognise both the duty and the constraints of the war context. In *Al Skeini* the European Court of Human Rights found that where an investigation is merited, 'obstacles may be placed in the way of investigators'.³² It drew on UN Special Rapporteur Philip Alston's finding that even though military operations might impede investigations they will 'never discharge the obligation to investigate – this would eviscerate the non-derogable character of the right to life – but they may affect the modalities or particulars of the investigation'.³³ The obligation (under Article 2 ECHR in this case) remains, so that 'even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted'.³⁴ It follows that this is particularly so if an investigation were potentially for the purposes of instigating (or discounting) the prosecution of an individual. Then, the demands of most accounts of criminal justice (international and domestic) would still require observance of certain standards during the investigatory stage of proceedings for the benefit of the accused (and in many accounts, the victims and their families) as essential components of a fair process. Failure to do so appropriately may weaken that process in terms of its public support, particularly if the interests of the state's nationals were prejudiced. The requirement applies equally to investigating individual and systemic wrongdoing.³⁵

If I am right in this, then matters of jurisdiction (IHL or IHRL), which have taxed the legal response to the Iraq allegations in particular, become otiose as far as the investigatory duty is concerned. Though there may be good reason to draw on the experience of human rights law and practice in fact-finding or other enquiry, which has developed at considerably greater pace than the laws of war

³¹See the Armed Forces Act 2006, s 113(1) and (2), which provide that any unit Commanding Officer must inform the service police of an allegation 'as soon as is reasonably practicable' if it would 'indicate to a reasonable person' that a serious offence has been committed (the list of offences includes war crimes in Schedule 2 to the Act).

³²See *Al-Skeini and Others v The United Kingdom* (Grand Chamber), ECtHR, App No 55721/07, para 164 (7 July 2011).

³³Report no E/CN.4/2006/53 on Extrajudicial, Summary or Arbitrary Executions (8 March 2006) at para 36.

³⁴See above n 33.

³⁵What is practicable for armed forces in fulfilling any duty has been a relevant consideration in many court analyses. For instance, in *Alseran and Others v Ministry of Defence* [2017] EWHC 3289 (QB) 14 at para 356 when assessing the UK's responsibilities regarding detention practices, Mr Justice Leggatt stated 'it is also necessary to recognise the practical exigencies of the situation which confronted HM Forces at the time, and to endeavour to apply the Convention in a manner which is feasible in the real world'.

since 1945, there is also good reason to acknowledge the differing circumstances and contexts of military conflict and operation in designing an apt response. This is not a reason to ignore human rights norms. Louise Doswald-Beck makes a case for human rights law standards to ‘supplement and interpret’ IHL.³⁶ Nonetheless, the war context (creating special moral questions) arguably requires a more sophisticated approach than either the application of domestically recognised substantive and procedural human rights *tout court* or their denial. Reliance on one body of law or another to govern how war crimes allegations should be addressed at the investigatory stage provides too binary an approach to solve what is a complex problem. The variety of scenarios where agreed standards may be breached (international or internal armed conflicts, full-blown invasion and occupation or brief skirmish or intervention) lend themselves to a tailored solution.

Systemic issues particularly warrant such consideration. For instance, any investigation into an alleged ‘shoot to kill policy’ may be *prima facie* preposterous if applied to belligerents in an international or internal armed conflict of sufficient intensity,³⁷ but *prima facie* essential and expected in another context (for instance, police or anti-terrorist operations in peacetime).³⁸ Recognising the war context is merely a restraint on the investigative duty only for so long, and in so far, as conflict might prevent the full application of the agreed standards. It would not determine that IHL (or international criminal law for that matter) held exclusive preserve over the standards of investigation expected. The practical application of the investigatory duty should not be fixed according to any one moment of assessment but flexible so that evidence collection in particular would reflect what was possible as circumstances changed.

So, although the context of war does not warrant avoiding proper standards of investigation and due process altogether, it does alter expectations with respect to the application of those standards in practice. This may lead to some temporary compromise on the fairness that might otherwise be expected from domestic criminal investigations.

2. Towards an alternative investigatory scheme: three propositions

Despite the plausible consensus on norms, investigatory duty and appreciation of the war context outlined above, there is no current agreement over *how* war crimes should be investigated at any particular time and *vis-à-vis* any particular allegation. It is relatively uncontroversial to say, however, that there should be a procedural commitment to conduct some kind of inquiry that is fair, if the three-part consensus I have sketched in the previous section is not to be subverted. But how might this be arranged? What standards of fairness can be expected?

Given the impact of the war context on the investigatory duty, it seems implausible to adopt a list of ideal and detailed standards (fashioned to examine abuses of individual rights to life, integrity and dignity *as well as* an accused’s domestic right to fair trial) that will necessarily and frequently be breached in practice. Equally, reliance upon those principles of investigation currently applied in European Convention rights terms, rather than some investigatory standard, may not solve the conundrum. These principles have been affirmed in a long line of case law. *Isayeva, Yusupova and Bazayeva v Russia* expressed them succinctly as: (a) state ‘authorities must act on their own motion once the matter has come to their attention’; (b) investigations must be ‘independent from those implicated’ in order to be ‘effective’; (c) they must be prompt and reasonably expeditious to maintain ‘public

³⁶L. Doswald-Beck ‘The right to life in armed conflict: does international humanitarian law provide all the answers?’ (2006) 88(864) *International Review of the Red Cross* 881. Mark Osiel, for one, disagrees. See his *The End of Reciprocity: Terror, Torture, and the Law of War* (Cambridge: Cambridge University Press, 2009) p 127 ff.

³⁷*Prosecutor v Duško Tadić* (Jurisdiction of the Tribunal) ICTY Case No IT-94-1-AR72 (2 October 1995) decided that an internal armed conflict would be called such where it satisfied requirements of sufficient duration, intensity and degree of organisation of the non-state actors engaged.

³⁸Though this may be generally true, there would still be scope to assess any killing as unlawful if it breached the principle of inflicting unnecessary suffering or other rules preventing a policy of ‘no quarter’ or the killing of combatants *hors de combat*. See, in particular, Arts 35(2), 40 and 41 Additional Protocol I, above n 9.

confidence' in 'adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts' on the part of the state's authorities; and (d) 'there must be sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory', the degree of which will vary, though the 'next-of-kin must be involved in the procedure' to safeguard their interests.³⁹

In broader international human rights reviews, similar principles have been identified as necessary for investigations into war crimes. Independence, effectiveness, promptness and impartiality appear as 'universal' requirements.⁴⁰ Transparency has also been mooted as essential.⁴¹ Despite various attempts to fix the identification of such principles (the Minnesota Protocol on the Investigation of Potentially Unlawful Deaths is a recent expression), the war context is presented not as a vital conditioning factor but as an exception to the general standards expected.⁴² The Protocol suggests only that '[c]ertain situations, such as armed conflict, may pose practical challenges for the application of some aspects of the Protocol's guidance'.⁴³ Otherwise there is little regard for both the nature of war crimes as a whole beyond certain forms of unlawful killing and perhaps ill-treatment or torture.⁴⁴ The principles are in any event left sufficiently vague in relation to the war context that different actors have licence to interpret them in different ways. The absence of a uniform definition of these principles and any single authoritative international body capable of reviewing state practice and assessing conformity with them, means that any investigation can only be judged on an ad hoc basis. Any demand for legal certainty and consistency of process in advance of any investigation is thus likely to fail.

Seeking some clarity on the approaches in practice, Michael Schmitt examined the record of four states regarding alleged war crimes over recent years.⁴⁵ From that study, he cautioned against applying some unattainable ideal list of standards applicable in peacetime. Though there is no significant dispute about how a 'good investigation' should be conducted, he concluded simply that investigations 'are required only if there is reasonable suspicion or a credible allegation of a war crime having been committed' and that 'IHL does not require an investigation that exhausts all possible investigatory options'.⁴⁶ The four 'universal principles' need to be met, but these are open to considerable interpretation. In particular, he suggested independence does not have to mean that investigators should be non-military personnel. Equally, he argued that '[h]uman rights-specific procedures such as victim involvement or the performance of autopsies have no normative relevance to investigations of IHL violations'.⁴⁷ 'As a matter of law,' he stated, 'practices that may be legally mandated during a human rights investigation occurring in peacetime are supplanted by IHL standards during armed conflict'.⁴⁸

The consequence of Schmitt's approach is to accept that individual states can approach war crimes allegations in multiple ways. Though regard must be paid to some basic principles, the war context fixes the legal standards according to the moment of violation rather than to those agreed standards that would otherwise apply. This in effect does no more than reflect the current practice of the UK and other states' authorities. Even though universal principles for investigation are recognised, there is no

³⁹ *Isayeva, Yusupova and Bazayeva v Russia*, Judgment of 24 February 2005, at 209–213.

⁴⁰ These principles have been recognised more widely in the Inter-American Court of Human Rights and the UN Human Rights Committee. See discussion in *Report of the United Nations Fact-Finding Mission on the Gaza Conflict A/HRC/12/48* 25 September 2009 paras 1804–1810.

⁴¹ See for instance *Hugh Jordan v United Kingdom*, App No 24746/94 at para 109 (4 May 2001).

⁴² UN Human Rights Office of the High Commissioner *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016) (New York: UN, 2017).

⁴³ *Ibid*, para 20.

⁴⁴ The Minnesota Protocol refers to potentially conducting post-operation investigations into casualties resulting from an attack ('including the accuracy of the targeting') but does not consider other forms of killing or wrongdoing in war. See *Minnesota Protocol*, above n 42 at para 21.

⁴⁵ Canada, Australia, UK and USA were the four states examined.

⁴⁶ MN Schmitt 'Investigating violations of international law in armed conflict' (2011) 2 *Harvard National Security Journal* 31.

⁴⁷ *Ibid*, at 83.

⁴⁸ *Ibid*.

satisfactory means for interpreting how they interrelate. Nor is there clarity over the interaction between a proper investigation and those preferred rights associated with a domestic, peacetime ‘fair trial’ which protect the accused.⁴⁹ It may not be surprising, therefore, that the confused range of responses by the UK to multiple allegations of war crimes arising in different conflicts has resulted in accusations of unfairness of one form or another as different processes have applied to similar allegations. The problem has, at least, been appreciated officially regarding allegations attached to the Northern Ireland ‘Troubles’. The recent consultation by the Northern Ireland Office as to how ‘legacy crimes’ should be addressed concluded that ‘the current system needs to be reformed and we have an obligation to seek to address the legacy of the past in a way that builds for the future’.⁵⁰ But if reform is done without greater certainty over the governing principles and how they interrelate then it is likely the complaints of unfairness from one set of actors or another will continue.

How then might this problem be resolved? I advance three propositions that could underpin one possible solution.

(a) Proposition 1: identifying first order principles

If the current consensus on ‘universal principles’ and fair trial rights fails to provide sufficient certainty, it would be more plausible to adopt a set of first order principles to direct any process of investigation. These principles should apply to all war crimes investigations, be non-negotiable, and interpreted in association with each other and with regard to the multiple constituencies affected, including accused, victim, witness, national and international community.⁵¹ Three key principles satisfy this requirement, are essential in all circumstances and reflect the three-part consensus on substantive norms, investigatory duty and the effect of the war context: practicability, expertise and independence. Though claims may be made for others to obtain first order status, the three I outline are, I suggest, immutable. I consider them briefly in turn.

‘Practicability’ follows the need to appreciate the war context expressed in my identification of consensus in the previous section. Much of the argument against applying human rights investigative duties, as they have evolved since 1945, is based on the assumed unrealistic application of domestic police-type enquiry in times of conflict. The ‘fog of war’ is often argued as a good reason for failure to respond to allegations adequately or at all.⁵² That succeeds only if the decision as to practicability is made in good faith, and constantly and properly reassessed as conditions of conflict end or change. Although the exigencies of any situation should be taken into account, as I have maintained, they cannot provide a blanket, permanent excuse for avoiding the investigative duty altogether. Schmitt’s claim that IHL does not require the exhaustion of ‘all possible investigatory options’ may be correct. Many ideal standards that are relevant to the ‘victim’ or the ‘wider community’ would be largely unfeasible during hostilities. Equally, it should also be recognised that allegations of war crimes may arise some time after the event. Such factors will affect the assessment of what kind of investigation might be realistically achievable. But if the investigatory duty is not to be subverted, a practicability principle (what is practicable in any circumstances) should demand the adoption of ‘next best’ methods where any situation temporarily hinders recognised standards of evidence-gathering. It will not justify

⁴⁹The ECtHR has long held that the right to a fair hearing has application to pre-trial proceedings, which includes the conduct of investigations. Such rights protect those accused at the investigatory as well as the hearing stage of proceedings (see for instance *Salduz v Turkey*, (ECtHR GC) App No 36391/02, at paras 50–55). The Court must also ‘look at the proceedings as a whole, having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted and, where necessary, to the rights of witnesses’: see *Habran and Dalem v Belgium*, App Nos 43000/11 and 49380/11, para 96 (17 January 2017).

⁵⁰Northern Ireland Office *Addressing the Legacy of Northern Ireland’s Past: Analysis of the consultation responses* July 2019.

⁵¹See for instance *Prosecutor v Ademi and Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis, IT-04-78-PT, 14 September 2005 at para 53 which noted ‘a fair trial of the Accused is properly complemented by a concern for fairness towards other interested parties, such as victims and the international community’.

⁵²This has been associated with clarifying the principle of ‘combat immunity’. See for instance T Tugendhat and L Croft ‘The fog of law: an introduction to the legal erosion of British fighting power’ (Policy Exchange, 2013).

suspension, postponement or erasure of the investigative duty. It also requires regular review to respond to changing conditions.

Both alleged individual and systemic wrongdoing would be captured by this requirement. Indeed, the revelation of patterns of abuse after the cessation of conflict could make practicable the investigation or re-investigation of individual IHL breaches.⁵³ So, for instance, the later discovery of sanctioned training for abusive interrogation practices may require the examination and possible prosecution of individual examples of wrongdoing where that training was applied. Though there would still be reason to 'learn lessons' and change practices for the future (as has been the focus for public inquiries and the Systemic Issues Working Group in relation to Iraq and Afghanistan), this should not preclude accountability for those responsible for abusive practices (as architects, perpetrators or those who fail to prevent wrongdoing), not if the goal of ending impunity is to be properly respected.⁵⁴

The second primary principle is appropriate expertise. It requires that those tasked with fulfilling the investigative duty should be capable of undertaking the examination of any allegation using methods appropriate for the claim made. Even for the war context, this should not be confused with *experience* of military service any more than police-type enquiries necessitate experience in any professional field where wrongdoing is alleged. Though some (like Schmitt) argue that the military are best-placed to appreciate the circumstances pertaining to aspects of armed conflict, this seems false in the round. Only a diverse investigatory team will be capable of both assessing the broad range of possible war crimes and ensuring that the process is fair not only to the accused, but also to victims, survivors, their families, witnesses, and the wider national and international community where practicable. Only a diverse team will foster public confidence in the fairness of the process and ensure compliance with both first order and subsidiary principles.⁵⁵ That team does, however, require access to expert knowledge of the context and means of military operation as well as obvious understanding of agreed IHL standards and how they might be applied.⁵⁶ Schmitt may be correct in arguing that:

[any] investigator who does not understand, for example, weapons options, fuzing, guidance systems, angle of attack, optimal release altitudes, command and control relationships, communications capabilities, tactical options, available intelligence options, enemy practices, pattern of life analysis, collateral damage estimate methodology, human factors in a combat environment, and so forth, will struggle to effectively scrutinize an air strike.⁵⁷

But to suggest that 'operational personnel' alone possess this knowledge is absurd. Assigning exclusive investigative responsibility to either serving or ex-military personnel is unnecessary and most likely undesirable and contrary to notions of fairness when considered with the other primary principles. Equally, the range of expertise required should encompass predictable need beyond evidential investigation relating to military operations. The UN's guidance regarding the examination of torture allegations (the Istanbul Protocol), for instance, sets out competencies (in particular, medical,

⁵³This would accord with the demand in *McCann* that 'all the surrounding circumstances including such matters as the planning and control of the actions under examination' must be considered in any proper investigation. See above n 28.

⁵⁴Failure to pursue direct perpetrators (as suggested by some political figures for historic alleged war crimes on the basis that they were following established protocol or training) would contravene Principle IV laid down at Nuremberg that superior orders could not relieve responsibility provided the perpetrator had a moral choice to disobey. See Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal 1950.

⁵⁵Indirectly involved constituencies (national and international communities) may be treated fairly through the public dissemination of information found and the retention of accessible archives. See UNOHCHR *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidelines and Practice 2015* available at https://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf.

⁵⁶A distinction should be drawn here between issues of evidence and those of judgement. So, for instance, to kill a disproportionate number of civilians in any legitimate attack is a war crime, but it need not be for the investigator to judge what is or is not disproportionate. The accumulation of evidence is the investigative task, although the investigating body must be alive to the applicable IHL principles.

⁵⁷Schmitt, above n 46, at 84.

psychiatric and psychological expertise) deemed necessary in any enquiry to protect victims and their families.⁵⁸ It would be appropriate for this expertise to be a standing component of any institution assigned the investigatory duty. It would also apply for the benefit of service personnel witnesses, and accused too, given the known impact of post-traumatic stress disorder and its relevance to the war context and the commission of war crimes.⁵⁹ Such competencies are clearly not exclusive to the military.

Both of the foregoing first order principles must be read in conjunction with the third: investigatory independence. Close association with alleged victim or accused (which would include state agents and institutions where systemic issues may be the concern) inevitably undermines any sense of trust in an investigative process. This applies to individual wrongdoing but has greater force in relation to systemic matters, where responsibility may flow up from individual criminal acts through the chain of command to those involved in the military and political establishments. Some connection is inevitable given that states are obliged to investigate their own agents. Complete independence would, therefore, only be achieved if international agencies were engaged. Although that might be fulfilled through an institution such as the International Criminal Court (or similar appointed international body)⁶⁰ the practicability principle militates against such an ideal move. The Office of the Prosecutor of the ICC simply does not have the resources at present to undertake multiple investigations. Even if it did, the principle of complementarity establishes investigative responsibility as lying primarily with the state, both as a means of preserving national sovereignty and in the interests of efficiency. This does not preclude oversight by international human rights and IHL bodies (that would be a sensible check and means of learning across jurisdictions) but none of these are equipped to fulfil the expertise principle uniformly.

For the UK, the absence of an existing sufficiently resourced external agent may mean that the next best solution to fulfil the independence principle would be a national body that lies outside the state's military or political command structure. If this is accepted, then those past reviews conducted by the British Army vis-à-vis Afghanistan (Operation Telemeter) and Iraq (the Aitken Review) and Ministry of Defence-led examinations such as the Systemic Issues Working Group (which has reviewed matters relating to military protocols and procedures in Iraq) contravene the independence principle.⁶¹ A Services Prosecution Authority (mirrored by many Judge Advocate departments in other jurisdictions) so closely rooted in the military establishment (its offices are located in the Air Force base at Northolt) similarly presents a dependent character regardless of individual professional integrity or assertions of independence.⁶² An institution established outside the military establishment would be a *sine qua non* to fulfil this first order principle, particularly when addressing suspected systemic crimes. The practicability principle may allow for interim investigation by military personnel, but the independence principle requires objective scrutiny unattached to existing chains of command (both military and governmental).

None of these three first order principles are surprising. Universally applicable norms for national human rights institutions (NHRIs), for instance, similarly identify competence and independence as

⁵⁸UN High Commission for Human Rights 'Istanbul Protocol or Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2004).

⁵⁹See for instance BT Litz et al 'Moral injury and moral repair in war veterans: a preliminary model and intervention strategy' (2009) *Clinical Psychology Review* 695.

⁶⁰Examples of non-national investigators appointed to examine any allegations are common. But these are not standing institutions.

⁶¹See Operation Telemeter report into the Royal Marines' culture and ethos following the Alexander Blackman case available at <https://www.gov.uk/government/publications/operation-telemeter-internal-review>; 'The Aitken Report: An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004' Ministry of Defence, 25 January 2008; SIWG, above n 18.

⁶²The SPA's mission statement reflects the potential conflict, stating 'Whilst maintaining independence from the service chain of command, the Service Prosecuting Authority fulfils its functions in support of operational effectiveness of the Armed Forces throughout the world'. See <http://spa.independent.gov.uk/>.

essential attributes.⁶³ But little distinction is made for NHRIs between the conduct of investigations in peacetime and during war. Nor is there clarity on the scope or focus of their investigative duty. If criminal conduct is apparent, the assumption is that even if a matter comes to the attention of a human rights body, it will be passed to those military criminal justice authorities charged with enforcing military law. That approach does not accord with the plausible fulfilment of the consensus as to substantive and investigative duties vis-à-vis individual and systemic war crimes that I have outlined.

(b) Proposition 2: subsidiary principles

The first order principles above lay the foundations for fulfilling the investigative duty. Though necessary and non-negotiable, they are not sufficient. My second proposition is that adherence to a series of subsidiary principles is desirable in order both to ensure fair process in any particular context and to judge the adequacy of a particular examination. These, however, should be interpreted to accord with the first order principles. In particular, they are applicable as and when practicable.

There are numerous candidates developed to ensure accountability by state agents for serious human rights abuses and war crimes coupled with contemporary notions of a 'fair trial'. But if one does not presume prosecution is the sole goal of any investigation, it seems apt to tailor principles accordingly. Though these do not preclude prosecution, they would not necessarily suffice should prosecution appear warranted once investigations had commenced. Consequently, I propose that promptness and respect for basic standards of natural justice (which inevitably may contain a number of subsidiary standards) are salient for a modern liberal democracy such as the UK. There is also good reason to add public notification of outcomes (reasonable transparency), although this has less to do with the resolution of the investigative duty than observance of the additional need to maintain public confidence. I take this to be a necessary element of public accountability that would be defeated if investigations are unduly secretive and undertaken by agents of the state. As with the proposed first order principles, I defend these subsidiary ones briefly below.

Promptness is easily defended. Failure to gather evidence of all kinds in close proximity to any event is a clear threat to the integrity of any investigation. It undermines the dependability of that evidence but also faith and trust in the state's willingness to resolve allegations. What is possible and practicable remains a significant factor to consider when assessing any examination. This is one area where the UK's legal responses to war crime type allegations have been palpably deficient. The delay in military investigation, public inquiry and police-led examination has seen several cases of established abuse (the Baha Mousa case perhaps being the most prominent) remain unresolved.⁶⁴ Promptness is still relevant to allegations that relate to older conflicts (such as Northern Ireland and Cyprus) once evidence comes to light that requires an investigation to be commenced or re-ignited.

The principle of resource adequacy is also applicable. Any investigation should be provided with sufficient funding and resources 'to ensure that its credibility is never in doubt' and it is capable of resolving the allegation.⁶⁵ Although the need to consider costs is understandable, it should not prejudice proper and timely investigation. It follows that any permanent institution charged with fulfilling the investigatory duty must be adequately resourced too.

Respect for norms of natural justice seems apt as an essential principle as well. Guarantees for those accused follow the nature of accusation given the significance attached to war crimes. Even if the aim

⁶³Principles relating to the Status of National Institutions (The Paris Principles), approved by the UN General Assembly (A/RES/48/134) 20 December 1993 identify essential characteristics for NHRIs: they focus specifically on competence, independence and plurality.

⁶⁴After identifying numerous individuals culpable in the death of Baha Mousa, investigations were re-opened by the Iraq Historic Allegations Team in 2013. No further prosecution has commenced.

⁶⁵Principle 11, UN Human Rights Commission 'Set of principles for the protection and promotion of human rights through action to combat impunity' updated in 2005 relate to crimes in war as much as human rights abuse. This is a product of the attempt to merge IHRL with IHL. The advocated principles should not be dismissed for this reason. The guidelines are designed to 'assist States in developing effective measures' to bring perpetrators to 'account – whether in criminal, civil, administrative or disciplinary proceedings'.

of the investigative process is not prosecution (there may be good reasons for looking to alternative means of resolution), maintaining anonymity, the right to representation and information regarding the progress of investigation are all plausible safeguards for any accused. None should be allowed to interfere with the timely functioning of investigations to the extent that their viability is threatened. Recognising the specific position of combatants here is a reasonable acknowledgement of the perceived act, the war context, and their potential continuing role as serving personnel.

Addressing the interests of victims and their families should also be a subsidiary principle to fulfil broad notions of fairness. That would accord with human rights expectations and some interpretations of criminal justice duties as well as accounts of the rule of law particularly in international discourse. '[S]ecuring justice and dignity for victims' is a legitimate process requirement in transitional justice.⁶⁶ But if I am right that context is vital, then an obligation to keep victims informed about the investigative progress might be dispensable temporarily as a matter of practicability. The better alternative would be to incorporate the victim's and their family's right to know (already recognised in IHL to a limited extent as well as in IHRL) as a specific element within a general duty of public disclosure and transparency.⁶⁷ This would reflect the need to observe impartiality in investigations, and to protect the interests of victims of war crimes to maintain public confidence in the investigative process. Though some may see transparency as impracticable and perhaps a threat to security in times of war, the release of information to ensure a reasonable degree of public knowledge and fulfil any putative 'right to know' by victims and public alike is a natural product of the application of the first order principles. A holistically fair process would be the more likely result.

Identifying these subsidiary principles (others might lay claim for inclusion) only takes us so far. My third proposition looks to the means by which such principles might best be applied.

(c) Proposition 3: a dedicated investigative institution

To reflect the specific consensus on standards and investigative duty and to comply with the first order and subsidiary principles I have advanced, requires, I suggest, the construction of a standing institution tailored for these purposes. No single institution in the UK currently has this role. Instead, there exists a disparate range of agencies and ad hoc processes that have collectively failed to fulfil the investigative duty in a coherent and generally fair manner. As a result, numerous bodies and processes have examined allegations amounting to war crimes without any coordinated approach. This is particularly fatal to fulfilling substantive and procedural duties with regard to systemic wrongdoing where the open collation of information on practices is vital.

So, although the Armed Forces Act 2006 attempted to regularise the investigative process, requiring serious crimes to be investigated, the military police have not proven capable of consistently responding to allegations. The Iraq situation has produced successive investigative failures as identified in various judicial review proceedings and recognised by UK courts and the European Court of Human Rights alike in relation to individual cases.⁶⁸ On systemic issues, even greater failure has been evident. No institution has succeeded in confronting matters that have indicated general systemic problems. As I have already mentioned and discussed elsewhere, internal military reviews have lacked independence.⁶⁹ Public inquiries have been too singular in their approach to consider potential widespread abuse. Government appointed bodies or examinations have also contravened first order and subsidiary principles through their close relationship with those state institutions who might be involved in enabling systemic concerns to continue or to flourish. The same applies to the conflict in Northern Ireland. The government may have launched a public consultation on how to address the legacy of the

⁶⁶Report of the UN Secretary General on 'The rule of law and transitional justice in conflict and post-conflict societies' (23/08/2004) para 38.

⁶⁷The Hillsborough Independent Panel, which reported in 2012 to general acclaim, provides an example of a process premised on inclusivity.

⁶⁸*Al-Skeini and Others v The United Kingdom*, above n 32, para 161 ff.

⁶⁹Williams, above n 1.

province's past, (which must: (a) meet the needs of victims and survivors; (b) promote reconciliation; (c) 'reflect broad political consensus and be balanced, fair, equitable, and crucially, proportionate'; and (d) 'be consistent with the rule of law')⁷⁰ but no accord as to how allegations of military conduct may be addressed had been reached. Those proposals contained in the Stormont House Agreement in 2014, including an independent Historical Investigations Unit to deal with 'Troubles-related deaths' would only apply to Northern Ireland and would not confront possible systemic issues related to ill-treatment, torture during detention or any other allegations that relate to the spread of possible war crimes.

Neither situation, and nor that of other past allegations, can be adequately resolved by resort to the courts through civil litigation. Compensation through a civil process is no substitute for the accountability requirements relating to punitive, reformatory or reconciliatory justice aims that are appropriate when serious wrongdoing is in issue, and that are legitimate demands of national and international communities. Nor would the prospects for revealing systemic issues be uniform.

How then could the institutional vacuum be rectified? As I have mentioned, although the operation of international bodies, tasked with either policing the investigative duty or fulfilling it in the absence of national action, would appear in theory to offer adherence to the first order principles of independence and expertise, in practice their remoteness militates against successful intervention. Difficulties of access to situations and national information (which will be restricted) together with limited resources invariably undermine effective engagement. Reluctance to challenge national sovereignty except in extreme circumstances is also a primary containment. In the context of a functioning liberal democracy, the assumption that the state will fulfil its duty ensures considerable latitude is given by these international bodies. The principle of complementarity expresses this legal approach.⁷¹ In the UK's case, it has allowed the confused and chaotic response to the Iraq allegations and those relating to Northern Ireland to develop largely without international interference. If intervention does eventually occur, it is unlikely to fulfil those subsidiary principles simply through the lapse of time.

If standing international bodies do not present as adequate, nor, I suggest, do ad hoc international or national commissions of inquiry. Though a favoured response to incidences of gross human rights abuse and serious violations of IHL, subsidiary principles are again threatened by the inevitable delay in any commission's appointment and conduct of its enquiries.⁷² Equally, any other national ad hoc response to allegations, evident in public inquiries or specially appointed investigative commissions, is likely to fail for the same reasons – particularly on systemic issues. That might be the 'next best' solution where a state has failed to observe its investigative duty in an isolated case, but it would not be the preferred choice for a functioning, liberal democracy with significant current and past, as well as probable future, military commitments.

More plausible for better satisfaction of first order and subsidiary principles would be a standing national institution designed to address war crimes type allegations in both international and internal armed conflicts or where the military is deployed. That would not preclude undertaking other duties, such as national human rights review, provided the principle of expertise were not prejudiced. Full appreciation of the military context and the substantive standards I outlined in section 1 would be necessary to ensure effectiveness. It is not obvious that familiarity with human rights or domestic criminal investigation would suffice. Indeed, it might hamper for lack of expertise in the war context. Neither would a military based institution fulfil the first order principle of independence when reviewing patterns of wrongdoing. By definition, close association through service or command would undermine confidence in this respect. This is not to say that individual military and other experience

⁷⁰Northern Ireland Office 'Addressing the Legacy of Northern Ireland's Past: Analysis of the consultation responses' July 2019 at 3.

⁷¹The Office of the Prosecutor of the ICC, though engaged in reviewing the UK's investigations into Iraq and Afghanistan allegations, remains watchful rather than interventionist. See Report on Preliminary Examination Activities 5 December 2018.

⁷²Fact-finding missions are part of the international human rights law landscape. See F D'Alessandra 'The accountability turn in third wave human rights fact-finding' (2017) 33(84) *Utrecht Journal of International and European Law* 59.

could not be called upon to help discharge the institutional function. That would be a matter of particular and constant evaluation, as would adherence to both sets of principles.

Finally, as I have argued, the priority attached to investigation as a prelude to individual criminal prosecution can be a hindrance to balancing fairness in the operation of any institution fulfilling the investigatory duty. Even accepting that punishment for war crimes is a moral necessity, it is not the only desirable outcome of investigation. Both IHRL and IHL recognise the importance of other goals, notably to provide victims or their dependents with effective remedies, to ensure the public's right to know what has been done in its name, to preserve memory of war crimes as a necessary component of deterrence and potential 'public catharsis', and to learn lessons so as to help prevent recurrence of systemic and individual violations. None of these aims is unfamiliar to legal structures designed to address wrongdoing. They are inherent in administrative law principles and public inquiries and therefore applicable. Preparation for prosecution should not, therefore, be the exclusive aim for any standing institution. There is good reason to suppose that many breaches of IHL standards *beyond* wilful infliction of suffering (including killing) will not necessitate an investigation as prelude to a criminal process. The camp conditions in Iraq criticised by the court as below acceptable IHL standards in *Alseran and Others v MoD* demand systemic scrutiny but are unlikely to provoke individual criminal prosecution.⁷³ The same might apply for the lack of military and political preparedness for UK troops going to war adequately protected against predictable dangers.⁷⁴ Nonetheless, a criminal justice response should not be precluded; it would depend on what was found through a systemic review.

Having a criminal justice possibility in mind still necessitates paying due attention to the quality of evidence gathering and its preservation, although that would not be the sole premise of evidential accumulation.⁷⁵ Nor would it mean that the standards of evidence applicable in domestic criminal prosecution had to be applied in all circumstances. It may be prudent for this to be the default position, if only to ensure the prospects of appropriate criminal prosecutions were not endangered, but circumstances might dictate a variation of this approach. Again, this is not a strange assumption in the conduct of plausible public inquiries or commissions. There have been solid precedents in the UK and other jurisdictions (where transitional justice and international criminal standards have been developed). One example, the 1993 UN-appointed truth commission of El Salvador, which examined the circumstances of the country's civil war during the 1980s, offers some inspiration. It chose to investigate cases by weighing 'the representative nature of the case, the availability of sufficient evidence, the investigatory resources available to the Commission, the time needed to conduct an exhaustive investigation and the issue of impunity'.⁷⁶ It was specifically mandated to adopt a procedure which was 'reliable and expeditious and may yield results in the short term, without prejudice to the obligations incumbent on the Salvadorian courts to solve such cases and impose the appropriate penalties on the culprits'. The Commission interpreted its mandate to examine

- (a) Individual cases or acts which, by their nature, outraged Salvadorian society and/or international opinion; and
- (b) A series of individual cases with similar characteristics revealing a systematic pattern of violence or ill-treatment which, taken together, equally outraged Salvadorian society, especially since their aim was to intimidate certain sectors of that society.

The two types were not treated as mutually exclusive, on the basis that 'many of the so called individual acts of violence which had the greatest impact on public opinion also had characteristics

⁷³*Alseran and Others v Ministry of Defence* [2017] EWHC 3289 (QB) 14.

⁷⁴*Smith and Others v Ministry of Defence* [2013] UKSC 41 established UK jurisdiction for Art 2 ECHR breaches relating to troops serving abroad.

⁷⁵Retaining information generally (including that which would not satisfy as evidence in a criminal prosecution) would still be required for assessing state responsibility questions and providing a record for public purposes. The archival function would be vital to fulfil the inter-generational fairness issues of the right to know.

⁷⁶The Commission on the Truth for El Salvador *From Madness to Hope: the 12 year war in El Salvador report* available at <https://www.usip.org/sites/default/files/file/ElSalvador-Report.pdf>.

revealing systematic patterns of violence'. However, to achieve its aims in the time allotted, the Commission adopted a confidential procedure for the hearing of evidence. No case was reported unless accompanied by a description of the 'degree of certainty' regarding its truth. One of three standards had to be attained: 'Overwhelming evidence – conclusive or highly convincing evidence to support the Commission's finding'; 'Substantial evidence – very solid evidence to support the Commission's finding'; or 'Sufficient evidence – more evidence to support the Commission's finding than to contradict it'. It did not adopt a 'due process' model, nor did it determine the 'rights or obligations of certain individuals under the law'. This was necessary in the circumstances faced, where finding the 'truth' was deemed essential for national peace initiatives and there were still fears of reprisals against witnesses.

Even if the El Salvador commission approach is not pertinent to the UK or desirable (if only because of the ad hoc nature of its mandate), there are still lessons here concerning the representative focus of the Commission, the denotation of evidence and the value of publicly presenting the 'truth' (recognised explicitly as variable) surrounding abuses within a conflict. Similarly, the standards of proof considered as appropriate in international human rights investigations, which are also variable as precursors to further enquiry or prosecution, provide useful precedents.⁷⁷ But evidently my scheme requires a national institution that is capable of fulfilling the first order and subsidiary principles specifically in relation to the implementation of IHL norms in an integrated way.

This would not be satisfied by recourse to those standing national institutions with an IHL mandate recommended by the ICRC since 1995.⁷⁸ Such bodies only hold an advisory or coordination function *within* the executive, not independent of it. Promoting and developing IHL norms has been preferred to fulfilling the investigatory duty. Indeed, in relation to monitoring and evaluating specific IHL breaches, the ICRC emphasises:

this is not a typical role of such committees, whose purpose is to act not as a judicial body but as an advisory body. Ideally, a separate body would be responsible for monitoring and reporting on IHL violations as, if this were to be done by the national IHL committee, it might affect its relationship with other bodies with mandates in this area – for example, commissions supporting the collection of evidence for war-crime prosecutions or the judiciary – and might be perceived as conflicting with the national IHL committee's primary function.⁷⁹

The UK has followed this advice, establishing an IHL committee in 1999 but without creating a standing body to monitor and evaluate IHL breaches. The committee only consists of representatives from government departments and the British Red Cross, with a mandate to consider implementing legislation and dissemination. Apart from anodyne reports on IHL norms and the UK context, nothing has been mentioned publicly on the multiple allegations from recent and more dated conflicts.⁸⁰

The general failure to create a single body to investigate allegations has not been remedied by other processes. Individual public inquiries (Baha Mousa, Al Sweady and now the coronial process of the Iraq Fatalities Investigations) may have fulfilled a limited didactic function but they have not acted as appropriate preparatory mechanisms for prosecution, where potentially applicable, or some other resolution. Nor have they been able to examine systemic issues unhindered. Indeed, the proceedings have been premised on protecting participants from criminal sanction in the interests of reaching the

⁷⁷See S Wilkinson 'Standards of proof in international humanitarian and human rights fact-finding and inquiry missions' Geneva Academy of International Humanitarian Law and Human Rights 2012.

⁷⁸26th International Conference of the Red Cross and Red Crescent: Resolution 1, Annex II: Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23–27 January 1995: Recommendations: <https://www.icrc.org/en/doc/resources/documents/resolution/26-international-conference-resolution-1-1995.htm>.

⁷⁹ICRC National Committees and Similar Entities on International Humanitarian Law *Guidelines for Success* December 2018 available at <https://www.icrc.org/en/document/national-committees-and-similar-entities-international-humanitarian-law-guidelines-success>.

⁸⁰See for instance <https://www.gov.uk/government/publications/international-humanitarian-law-and-the-uk-government>.

truth of a matter. Even where evidence emerges of serious breaches of IHL, there has been little or no criminal justice process provoked. The Baha Mousa Inquiry prompted no further prosecutions despite the identification of systems and individuals responsible for IHL breaches. The Bloody Sunday, Loughinisland, Ballymurphy and Stalker/Sampson inquiries relating to Northern Ireland have operated over decades without criminal prosecution.⁸¹ The Iraq Fatalities Investigations coronial process appears equally impotent, though it may have been successful in finding facts related to some individual killings.⁸² This experience reflects the apparent unfairness redolent within the spectrum of responses the UK has adopted even if some reparatory justice has followed through government payment of compensation.⁸³

The special construction of a standing national institution (rather than ad hoc commission) to investigate war crimes to accord with the principles I have outlined would be a more plausible approach. It could work closely with international institutions such as the ICC to develop and share its expertise and experience. Many of the issues of unfairness to all concerned could then be addressed in a specific and tailored manner.⁸⁴

Conclusion

If the UK is to construct an appropriate institution to fulfil the investigatory duty fairly, its imagination should not be constrained by current structures. The Commanding Officer, Military Police and Ministry of Defence nexus, which defines responses to all military crimes, fails the first order and subsidiary principles I have identified. War crimes as special crimes require a different response from that applied to ordinary serious crimes committed by military personnel. Military police embedded in the armed forces or Ministry of Defence operated units cannot be expected to investigate command responsibility and systemic issues given their subordinate position amidst the institutions within which responsibility may lie. It is also questionable whether they could examine fairly war crimes that arise from battle operations, where issues of proportionality and necessity in attacks against civilians, for instance, are in play.

For some, no doubt, this observation reflects nothing more than current thinking on established process rights attached to the right to life and the right not to be tortured. The assumption that the military discipline regime should extend to war crimes as military criminal wrongs remains, nonetheless, a strong one despite failure to adhere to the first order principle of independence and to understand the special and complex nature of duties arising if war crimes are committed. Much like the introduction of the Independent Office for Police Conduct (IOPC) was to resolve public concerns over police behaviour, a body outside the military and government establishment would be a more plausible route to resolve fairness issues for all constituents in war crimes allegations. However, the IOPC is an apt model only so far as it is able to consider individual allegations. Systemic matters, in the guise of ‘super-complaints’ that relate to ‘a feature, or combination of features, of policing’ which ‘is, or appears to be, significantly harming the interests of the public’, have to be

⁸¹In 2019 ‘Soldier F’ was charged with murder in relation to Bloody Sunday: see <https://www.theguardian.com/uk-news/2019/mar/14/prosecutors-explain-bloody-sunday-charges-against-soldier-f>.

⁸²The sad death of Sir George Newman in June 2019 leaves the process uncertain, which highlights the precarious nature of these ad hoc judge-led processes.

⁸³Out of court settlements have seen compensation paid in multiple cases, most recently to Greek Cypriots who claimed war crimes had been committed by the UK prior to independence. See above n 20.

⁸⁴It would also comply with various international human rights commitments. See, for instance, the Istanbul Protocol (above n 58) Art 75, which provides that ‘Where investigative procedures are inadequate because of a lack of resources or expertise, the appearance of bias, the apparent existence of a pattern of abuse or other substantial reasons, States shall pursue investigations through an independent commission of inquiry or similar procedure. Members of that commission must be chosen for their recognized impartiality, competence and independence as individuals. In particular, they must be independent of any institution, agency or person that may be the subject of the inquiry’. Article 109 also stresses the need for any Commission to be impartial and ‘not closely associated with any individual, State entity, political party or other organization potentially implicated in the torture’.

made to Her Majesty's Chief Inspector of Constabulary.⁸⁵ Nonetheless, together the scrutiny of policing through these schemes provides a plausible template for achieving similar military accountability.

It might be tempting to identify the Equality and Human Rights Commission as a suitable candidate for these functions. This should not be discounted, as I have mentioned elsewhere, although its current framework and organisation – as well as its mandate – are not adequate.⁸⁶ Nonetheless, it has occasionally been interested in human rights questions applicable to the war context, intervening in cases regarding the extra-territorial application of the ECHR to UK troops serving overseas and raising concerns over detention practices.⁸⁷ But it has not assumed a systematic approach to military-related matters and does not yet fulfil the first order principles beyond independence. If Mark Osiel's general critique against human rights activists and lawyers (that they are loath to understand the war context) is accepted, then specific expertise has to be acquired in both the substantive obligations and the possible circumstances in which they apply.⁸⁸ It is not sufficient to assume that human rights experts are competent to comply with the multiple fairness issues at stake.

Equally, current international guidance on the operation both of national human rights institutions (of which the EHRC is one) and IHL commissions does not recommend coherent war crimes investigative processes as part of their remit. The UN's Paris Principles are premised on general promotion and review of international human rights treaties for the former, and the ICRC advises against interference in the criminal justice arena for the latter.⁸⁹ Neither countenance the specific circumstances pertaining in war that necessitate scrutiny of both individual and systemic wrongdoing as a matter of international criminal justice imperatives. Though lessons will be learned from human rights, on the one hand, and overarching review of IHL developments, on the other, neither institutional type (as currently conceived) will do.

Nor would it be satisfactory to perpetuate the principally military or governmental character of addressing systemic matters (as evident in the Iraq allegations and Northern Ireland in particular). Neither are capable of fulfilling the first order principles I have advocated and have contravened subsidiary principles in their operation too. The principle of independence alone would work against either the military or ministerial route. They are currently part of the problem, failing fairness standards for victims, service personnel accused, and the wider community's right to know. As it stands, this leaves them perpetually open to the kind of remedy-seeking human rights judicial review or civil litigation actions that have contributed to the incoherence of response to allegations. Parliamentary procedures are also incapable of fulfilling the investigatory duty, even if the courts may look to the political realm to assert control over systemic issues scrutiny.⁹⁰ Given the irregular and under-resourced capacity of parliamentary committees to conduct any inquiry that can both discover the truth of a concern as well as provoke criminal justice measures should they be warranted, they are ill-equipped to undertake this role. The ten-year examination of complicity in torture and extra-ordinary rendition by UK security services by the Intelligence and Security Committee points to prolonged delay in any scrutiny that by definition will breach the subsidiary principles as described above.⁹¹

⁸⁵Police Reform Act 2002, s 29A. Super-complaints can only be brought by designated bodies, which consist currently of a small number of NGOs including Liberty and Southall Black Sisters. For a full list see <https://www.gov.uk/government/publications/police-super-complaints-designated-bodies/designated-bodies>.

⁸⁶Williams, above n 1.

⁸⁷See Commission interventions on torture at <https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/convention-against-torture-and-other>.

⁸⁸Osiel, above n 36, pp 131–132.

⁸⁹The Paris Principles, above n 63.

⁹⁰In *R (Ali Zaki Mousa and Others) v SSD (No 2)* [2013] EWHC 1412 (Admin) at para 224 systemic issues were specifically left for parliamentary scrutiny.

⁹¹See Intelligence and Security Committee Report *Detainee Mistreatment and Rendition 2001–2010*, 28 June 2018, HC 1113.

If there is no candidate identifiable amidst existing UK organisations, would a separate standing war crimes investigation institution be a credible solution? There is little doubt that the UK has the resources to construct such an organisation. It could follow the form of dedicated war crimes units established in France, Germany and the Netherlands.⁹² Though these address universal jurisdiction cases (grave international crimes committed in third-party state conflicts), the principles underpinning their constitution are relevant. A similar mandated institution in the UK (internally and extra-territorially focused) could be cast to allow for both prompting criminal processes through the established system of criminal justice and, where appropriate, alternative ends compatible with the broader aims of international justice.⁹³ Its specialised nature would also enable expertise in the war context, the treatment of military personnel post conflict, and, where significant issues of social harm arise, to be central to the investigation of both individual and systemic wrongdoing. It might even be prudent to combine the role of the Military Ombudsman, where fair treatment within the armed forces would work in conjunction with the public commitment to uphold the laws of war as well as any covenant with the military. The two are not incompatible, given that the latter is likely to be dependent on compliance with the former at least to the extent that clear failure to adhere to and enforce the laws of war by the armed forces would breach any social commitment to treat military personnel with a respect deserved by their service. Equally, a standing institution would have the task of monitoring response to the conclusions arising from investigation. Public inquiries are often used to identify lessons to be learned but frequently fail to provide a mechanism for ensuring recommendations are applied.⁹⁴ The government holds that responsibility but fails in the independence principle when fulfilling it. An independent institution tasked with following up decisions with ongoing scrutiny would provide a more effective tool.

I recognise that the political mood for such a development is currently absent. That is partly the result of a failure of politics and law to engage with the known nature of military action and its consequences. Responses to date have approached such matters in a feigned state of surprise, at best, reacting to allegations rather than reasonably predicting their occurrence. As I have argued elsewhere, public law provides insufficient remedy for this political and governmental failure to adhere to values and principles that are purportedly central to domestic and international commitments.⁹⁵ Nor would the political proposal to introduce a statute of limitations for the investigation of service personnel and veterans be likely to solve those fairness issues that arise.⁹⁶ Given the political and legal failings, adopting a specific solution to the problem of due accountability through an institution designed as I have advocated would stand a better chance of developing a public ethos that is not plagued by unfairness.

⁹²For details see Human Rights Watch Report ‘The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands’ (2014) available at <https://www.hrw.org/news/2014/09/16/europe-national-courts-extend-reach-justice>.

⁹³A War Crimes Team exists in the Metropolitan Police as part of its Counter Terrorism Command but little information is public for good reasons of security. See <https://www.cps.gov.uk/publication/war-crimescrimes-against-humanity-guidance-making-application-dpp-consent-application>.

⁹⁴National Audit Office *Investigation into Government Funded Inquiries Report* (21 May 2018) concluded that ‘[t]here is no organisation across government or Parliament with responsibility for monitoring and tracking whether recommendations have been implemented and ensuring that inquiries have the intended impact’ paras 3.17 and 3.18.

⁹⁵Williams, above n 1.

⁹⁶In the context of Northern Ireland, it has been reported that the ‘clear majority of all respondents to the consultation argued that a Statute of Limitations or amnesty would not be appropriate for Troubles-related matters’: Northern Ireland Office *Legacy report*, above n 50, at p 21.