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Front cover: *Pasquale Trento, with other masons, mounting a sculpture in Florence. Masons have a proud tradition of self-regulation and quality control in Florence. The guild of master stonemasons and wood-carvers* – Arte dei Maestri di Pietra e Legname – *was already listed in 1236 as one of the Intermediate Guilds. Ensuring rigorous quality control through strict supervision of the workshops, the guild not only existed for more than 500 years (until 1770, when several of its functions were assigned to the Florentine chamber of commerce), but it has contributed to the outstanding quality of contemporary masonry in Florence. Photograph: © CILRAP 2017.*

Back cover: *Section of the original lower-floor of the Basilica of Saints Cosmas and Damian in Rome which honours the memory of two brothers and physicians for the poor in Roman Syria. Its mosaics and other stonework influenced the Florentine guild of masons referred to in the frontpage caption, as its craftsmen and sponsors created a culture of excellence through competition and exacting quality control. Photograph: © CILRAP 2018.*

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The UK in Iraq and the ICC: Judicial Intervention, Positive Complementarity and the Politics of International Criminal Justice

Rachel Kerr*

The United Kingdom ('UK') Government has a strong track record of providing support to international criminal justice. However, in May 2014, it found itself the subject of a preliminary investigation by the ICC into alleged misconduct of UK forces following the March 2003 invasion of Iraq – an investigation that the UK could not publicly criticize, given that it was a strong supporter of the Court, but one that risked directly contradicting former Prime Minister Tony Blair's assurances when the UK signed up to the Rome Statute in 1998, that no UK citizen would find him or herself in the dock there. The same allegations have been the focus of a series of criminal proceedings, cases brought before the European Court of Human Rights ('ECtHR'), domestic commissions of inquiry, and the Iraq Historic Allegations Team ('IHAT'), which was still actively engaged in investigations 14 years since the events in question took place. The ICC's preliminary investigation sits in the middle of a mess of contradictory and competing concerns, highlighting the sometimes tricky relationship between international and domestic politics, pragmatics and principles. This chapter seeks to set the British response to these developments in the context of a contemporary history of the different ways in which the UK has tried to address the legacy of allegations of unlawful conduct in

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Iraq to date, against the background of a shifting domestic political landscape, and in light of wider UK policy on international justice.

14.1. Introduction

On 13 May 2014, the Prosecutor of the International Criminal Court ('ICC'), Fatou Bensouda, announced that she was re-opening the ICC's preliminary examination into allegations of war crimes committed by British forces operating in Iraq from 2003–08. The examination, previously closed in 2006,[1] was re-opened following submission of a dossier of information relating to alleged crimes by the European Center for Constitutional and Human Rights Law ('ECCHR') and the UK law firm Public Interest Lawyers ('PIL') on 10 January 2014. Four years later, the examination was still ongoing.[2]

Whatever the eventual outcome, this preliminary examination was highly significant in several aspects. First, the decision to re-open the examination and the way in which it was handled sheds light on the Prosecutor's interpretation of the ICC's mandate to be a site of 'positive complementarity' and her exercise of prosecutorial discretion in that regard. As we have seen in other cases, the point of preliminary examination was not always to be a precursor to an investigation, but rather to encourage activity at the national level.[3] Preliminary examinations might have greater potential to be used in this way, where pressure may be exerted at critical points, rather than a full-blown investigation which, once started, may be difficult to stop, as the Kenya and Uganda cases demonstrated.

Moreover, the opening of a preliminary examination into the conduct of one of the permanent five Security Council members and a vigorous supporter of the Court was a bold move and one that could potentially have caused more harm than good to the Court's reputation, if mishandled. It undermined the frequently touted argument that the Court focused un-

1 ICC-OTP, *OTP response to communications received concerning Iraq*, 9 February 2006 (http://www.legal-tools.org/doc/5b8996/).

2 In her November 2016 report, the Prosecutor announced that a decision on the Afghanistan examination was 'imminent' (although six months later, one might question her understanding of imminence!), whilst the examination of Iraq remained in the Phase 2 (subject-matter jurisdiction). ICC-OTP, *Report on Preliminary Examination Activities 2016*, 14 November 2016 (http://www.legal-tools.org/doc/f30a53/).

3 The conduct of the preliminary examination into Colombia is a good example of this. See, Fatou Bensouda, "Reflections From the International Criminal Court Prosecutor", in *Case Western Reserve Journal of International Law*, 2012, vol. 45, no. 1, pp. 505–511.

duly on Africa and that it was a neo-imperialist institution intent on meting out justice by the strong against the weak. The examination of Afghanistan, potentially involving US, Canadian, UK and Australian forces, also helped undercut this narrative.

But there was a flip-side to this, which was that if the Prosecutor once again decided to close the examination and not proceed to open an investigation into either Iraq (or Afghanistan), she might face criticism that she has succumbed to political pressure and it will only serve to reinforce the anti-ICC rhetoric. Whilst these political questions should not be part of the Prosecutor's calculations, and there is no evidence that they have been, she must nevertheless have been aware of the potential political repercussions of her decisions.

For the UK, it was significant because it constituted evidence of failure on a number of counts. First, it stood in direct contradiction to the assurances given by then Foreign Secretary Robin Cook to Parliament in 2001, when the International Criminal Court Act was passed, that there was absolutely no risk of seeing a British citizen brought before the Court: "British service personnel will never be prosecuted by the International Criminal Court".[4] Second, it highlighted the fact that UK investigations into alleged abuse, piecemeal and reactive as they have been, were at times seriously flawed and woefully inadequate. Third, it was motivated, at least in part, by a nebulous and as yet unfulfilled desire for 'justice' following the UK's ill-fated invasion of Iraq and its aftermath.

How concerned should the UK Government have been about all of this? The Attorney General, Dominic Grieve QC, and Director of Service Prosecutions, Andrew Cayley QC, both made it clear that they did not consider it at all likely that the examination would result in an investigation being opened at the ICC, and even more unlikely that any charges will be brought against UK citizens.[5] They were probably right to be so confident. Nevertheless, after 14 years, £150 million, two inquiries, four courts martial, one criminal trial, hundreds of civil claims for damages, six judicial reviews, four ECtHR judgments and two misconduct hearings,

4 Foreign Secretary Robin Cook, International Criminal Court Bill [Lords], United Kingdom House of Commons, 3 April 2001, HC Deb 03 April 2001 vol. 366, cc. 214-79 (available in the *Hansard*).

5 Ian Cobain, "ICC to examine claims that British troops carried out war crimes in Iraq", in *The Guardian*, 13 May 2014.

the ongoing preliminary examination ensured that the "tortuous process"[6] of UK-Iraq war crimes investigations continued, even as developments in the UK increased the pressure for them to be closed down.[7]

Meanwhile, the August 2016 collapse of PIL, the firm that lodged the dossier containing new allegations which prompted the opening of the preliminary examination, and the finding of professional misconduct against its head, Phil Shiner, cast considerable doubt over many of the allegations, and prompted the ICC to look again at the claims. And yet, the question that has not been adequately addressed, and which is left hanging over the military, is not whether any abuse took place – we know it did – but whether it was 'systematic' – in particular whether it was the direct result of the sanctioned use of the so-called 'five techniques' banned in 1972 (hooding, stress-positioning, noise bombardment, deprivation of food and water, and sleep deprivation), how long it went on, and how widespread it was. The Baha Mousa Inquiry, led by Sir William Gage, lambasted the Ministry of Defence's "corporate failure" with regard to the directive given to soldiers shortly after the invasion, that interrogators in the Joint Forces Interrogation Team should adopt a "holistic approach" to interrogation and "not to get wound up in prisoners' rights at the expense of [intelligence]".[8] Gage noted that there was "more than a hint" that the practice extended beyond the individual treatment of Baha Mousa. Meanwhile, others suggested that the events of summer 2003 were not an aberration but were in fact "very British".[9] Ian Cobain concludes his study of British interrogation practice with the sobering observation that, "far

6 United Kingdom, High Court of Justice, *R (Al-Saadoon and others) v. Secretary of State for Defence (No 2)*, Judgment, 17 March 2015, [2016] EWHC 773 (Admin), para. 1 ('Al-Saadoon (No. 2) Judgment') (http://www.legal-tools.org/doc/d82ad0/). In March 2015, the Daily Mail recounted the story of Kevin Williams, now 32, who was cleared by two army investigations and a collapsed criminal trial, then by IHAT and the Iraq Fatalities Inquiry, and now allegedly finds himself under the scrutiny of the ICC. Larisa Brown, "Betrayal of a Hero", in *Daily Mail*, 23 March 2013.

7 In February 2017, a House of Commons Defence Sub-Committee called for UK-based investigations conducted by the Iraq Historical Allegations Team to be closed down.

8 Mousa inquiry, cited in Ian Cobain, *Cruel Britannia: A Secret History of Torture*, Portobello, London, 2012, p. 285.

9 A.T. Williams, *A Very British Killing: The Death of Baha Mousa*, Jonathan Cape, London, 2012.

from being alien, torture can be seen to be as British as suet pudding and red pillar-boxes".[10]

But, if this was the problem, was the ICC the solution? Among the challenges of dealing with this issue was not only the volume of allegations – which were significant – and the time that has elapsed, but the multiple ways in which these allegations were made. The picture was complicated because it was so muddled. The question remains: whom, and what, was all of this for? Was the purpose of bringing the allegations to secure individual accountability in the form of prosecutions, or was it to force the UK to accept State responsibility? If the latter, what was the desired outcome – compensation or reform? If the former, it carried the risk that, whereas sufficient evidence suggests that such episodes of cruelty did occur, insufficient evidence existed to prove 'beyond reasonable doubt' an individual's culpability. Or was it all part of an ill-defined desire to seek 'justice' for the invasion of Iraq? Overshadowing all of this was that war's dubious legacy, the shifting political landscape in the UK and the tenor of public discourse, involving increasingly polarized attitudes toward two groups of professionals, human rights lawyers and the military. The ICC's preliminary investigation thus sat in the middle of a mess of contradictory and competing concerns, highlighting the delicate relationship between international and domestic politics, law, pragmatics and principles. This chapter seeks to disentangle the mess of litigation that has followed the UK's debacle in Iraq in order better to understand how and why we got here.

14.2. The Iraq War

In many respects, Tony Blair and the collapse of his 'ethical foreign policy' was at the centre of all of this. In the 'fury of judging' that followed the ill-fated decision in 2003 to invade Iraq, the need to hold Blair individually accountable was a recurring theme. That this remained almost impossible did not deter his opponents, including Labour Party leader Jeremy Corbyn, who expressed the view that Blair should be tried for war crimes.[11] In anti-war demonstrations, banners called for Tony Blair and US President George W. Bush to be indicted as war criminals, and inter-

[10] Cobain, 2012, p. 309, see *supra* note 8.

[11] Jon Stone, "Jeremy Corbyn 'still prepared to call for Tony Blair war crimes investigation'", in *The Independent*, 23 May 2016.

national lawyers warned the government not to embark on what would be an 'illegal war' in letters to the newspapers.

Upon the release of the Report of the Iraq Inquiry in July 2016 (commissioned by Prime Minister Gordon Brown in 2009), the ICC Prosecutor felt compelled to correct a story in *The Telegraph* that not only suggested that Blair *could* be prosecuted for the crime of aggression, but condemned the ICC for having already ruled out.[12] The conflation of war crimes and aggression, the confusion over the jurisdictional parameters of the ICC and the 'spread of inaccurate information' to which Bensouda referred was not limited to this one article, but recurred time and again in public discourse on the Iraq War litigation. As did the sentiment, expressed most vociferously in the right-wing press, that "double standards" are being applied whereby British soldiers "who have gone out to do their best for us […] are being hounded, and yet the guy who took them there is not being looked at".[13]

On 19 March 2003, the UK joined the US in a "coalition of the willing", invaded Iraq and overthrew the government of Saddam Hussein. US President George W. Bush declared "Mission Accomplished" on 1 May 2003 and there followed a period of military occupation under the governance of the Coalition Provisional Authority ('CPA'), which formally took charge on 6 May 2003, until the new Iraqi Governing Council was formed on 28 June 2004. British troops remained in Iraq with a UN-mandate (originally under Resolution 1546, 8 June 2004) to assist with stabilization and reconstruction until 31 December 2008 (they began their formal withdrawal in 2009). They were mainly stationed in the southeast of the country with a base at Basra. The occupation was affirmed by Security Council Resolution 1483 on 22 May 2003, but the legality of the decision to invade, taken by the Prime Minister on 17 March 2003, in the absence of specific Security Council authorization, remained highly contentious. Not only was the stated justification subsequently proven to be false – Iraq's programmes for the development of chemical, biological and nuclear weapons had been dismantled – but the invasion and its aftermath led to dire consequences for the people of Iraq – conservative estimates are 150,000 Iraqi civilian deaths and over a million displaced –

[12] ICC-OTP, "Statement of the Prosecutor correcting assertions contained in article published by The Telegraph", 4 July 2016 (http://www.legal-tools.org/doc/74578d/).

[13] Robert Mendick, "Outrage as war crimes prosecutors say Tony Blair will note be investigated", in *The Telegraph*, 2 July 2016.

and for the region that are still being felt. The removal of Saddam Hussein unleashed sectarian violence that proved impossible to contain and scotched efforts to rebuild the country.

All of this is well known and rehashed elsewhere, including in the Chilcot Report. What concerns us here is not only the conflation of 'war crimes' and 'aggression' mentioned above, leading to calls for Blair to stand trial in "The Hague" (without much clarity as to which body in The Hague should try him) but the conflation of legality and legitimacy. Even setting aside arguments about strict legality, the aftermath of the invasion fuelled arguments that it was essentially illegitimate, and allegations of war crimes committed by UK forces both fed into that narrative, and were fed by it. The sense of injustice and the sense that there was a 'rotten smell' at the core of the operation had enormous impact both on the tenacity of those bringing the claims and on the ambivalence with which they were received and dealt with.

The Chilcot Inquiry sits in the midst of the Iraq War's legacy of litigation. Chilcot was focused on (a) whether it was right and necessary to invade Iraq in March 2003; and (b) whether the UK could – and should – have been better prepared for what followed.[14] As such, it involved consideration of political and legal questions. It did not give an opinion on whether or not the invasion was legal but its conclusions were damning nonetheless: that military action in this case "was not the last resort", judgments as to the severity of the threat posed by Saddam's alleged weapons of mass destruction were unjustified, planning and preparations for the post-invasion period were "wholly inadequate" and the Government failed to achieve its stated objectives.[15] Other inquiries addressed the failure of the intelligence community and the media's role in presenting the material (the Butler and Hutton Inquiries), and the UN's Oil for Food programme (the Volker and Cole Inquiries). A handful of cases were brought before the courts questioning the legality of the war, and seeking compensation for those injured and killed in its prosecution,[16] including a

[14] "Statement by Sir John Chilcot", 6 July 2016 (http://www.legal-tools.org/doc/db3836/).

[15] Cabinet Office and Iraq Inquiry, "Report of the Iraq Inquiry: Executive Summary", 6 July 2016 (http://www.legal-tools.org/doc/79425c/).

[16] United Kingdom, House of Lords, *R v. Jones and others v. Director of Public Prosecutions*, Appellate Committee, 29 March 2006, [2006] UKHL 16. The defendants were all protesters against the War against Iraq in 2003 and had taken part in direct action involving damaging, or attempting to damage, military vehicles and property. During their trial for

private prosecution seeking a criminal trial of Blair, Foreign Secretary Jack Straw and Attorney General Lord Goldsmith for launching an aggressive war.[17]

The other way in which the legitimacy of the war was challenged was focused on the conduct of the war itself and the conduct of UK forces in post-war occupation and stabilization operations. The Chilcot Report does not address this aspect, except in a passing reference to inadequate training and preparation for handling civilian detainees. Allegations of war crimes involving use of prohibited weapons, dubious targeting practice and unlawful killing in shooting incidents were overlaid with an ever-increasing pile of allegations of abuse and ill-treatment of Iraqi civilians detained by UK forces. It was these allegations that prompted two separate inquiries to be established – the Baha Mousa and Al-Sweady Inquiries (to be discussed below) – and which formed the bulk of the January 2014 dossier submitted to the ICC, prompting the Prosecutor to re-open the preliminary examination into the UK-Iraq situation.

14.3. War Crimes

The first allegations of misconduct were made by non-governmental organizations on the basis of their own investigations on the ground in Iraq into Iraqi civilian deaths. In December 2003, Human Rights Watch published a report, *Off Target*, which expressed "serious concerns" about some practices adopted by coalition forces, including the use of cluster munitions in residential neighbourhoods, "unsound" targeting methodology in attacks on Iraqi leadership targets, and attacks on dual-use targets such as power distribution facilities.[18] HRW did not allege that war crimes had been committed, since the determination of whether a crime had been committed would require a more careful balancing of military necessity

criminal damage and cognate offences, the accused sought to defend themselves on the basis that they were seeking to prevent international crimes, namely war crimes in Iraq, and the crime of aggression. See Antonio Cassese (ed.), *Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 1274.

17 A private prosecution was brought by Iraqi General Abdul-Wahid Shannan ar-Ribat seeking a trial of Tony Blair, Jack Straw (Foreign Secretary) and Lord Goldsmith (Attorney General) was dismissed in November 2016 on the grounds of immunity of state officials but the claimants are seeking to challenge this decision. Vikram Dodd, "UK attorney general in bid to block case against Tony Blair over Iraq war", in *The Guardian*, 16 April 2017.

18 Human Rights Watch, "Off Target: The Conduct of War and Civilian Casualties in Iraq", 11 December 2003 (http://www.legal-tools.org/doc/9c35c6/).

and proportionality. Moreover, cluster munitions, whilst widely condemned, were not explicitly unlawful. Rather, they sought to highlight "cause for concern".

A second set of allegations concerned incidents in which Iraqi civilians were killed by UK forces on patrol. In a May 2004 report, Amnesty International alleged that in several documented cases, "UK soldiers opened fire and killed Iraqi civilians in circumstances where there was apparently no threat of death or serious injury to themselves".[19] Amnesty presented nine cases of alleged unlawful killing, in which Iraqi civilians were killed at the scene or fatally injured and died later. Some of these were investigated at the time, others have been since, and still others appeared among civil claims for damages and/or judicial review. None of these situations is manifestly unlawful – a court would need to determine whether the soldiers were acting in line with their rules of engagement and whether they applied due care and attention, and this would need to be done with consideration of the context and immediate circumstances of the incident. All were reported as shooting incidents and a decision taken whether or not to investigate first by the Commanding Officer and then by the Royal Military Police. None of these incidents was investigated further at the time.

The third set of allegations focused squarely on the treatment of Iraqi civilians in British custody and on acts that, if proven, were manifestly unlawful, such as beating, sexual assault and other ill-treatment. In February 2004, the International Committee of the Red Cross expressed concern at "serious violations of international humanitarian law" being committed by the coalition forces, including: brutality against protected person upon capture and initial custody, sometimes causing death or serious injury; physical or psychological coercion during interrogation to secure information; prolonged solitary confinement in cells devoid of daylight; excessive or disproportionate use of force against persons deprived of their liberty resulting in death or injury during their period of internment; seizure and confiscation of private belongings.[20] The report

[19] Amnesty International, "Killings of Civilians in Basra and Al-Amara", 10 May 2004, Index number: MDE 14/007/2004 (http://www.legal-tools.org/doc/d76394/).

[20] International Committee of the Red Cross, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and In-*

noted especially the use of hooding, beatings and humiliating and degrading treatment such as being forced to spend considerable amounts of time naked and in "stress positions". The allegations of mistreatment of detainees by UK forces were corroborated in a report published by the REDRESS Trust in October 2007, which highlighted concerns that during the period of occupation, British forces were using previously banned "techniques" of hooding, sleep-deprivation and stress-positioning.[21]

14.4. Trials and Tribulations

These allegations of serious mistreatment and of unlawful killing gave rise to three sets of legal consequences, which made up different parts of the jigsaw of domestic Iraq War litigation discussed below: (i) the responsibility of the State to investigate and prosecute alleged war crimes discharged through criminal and military courts (prosecutions); (ii) the duty of the State to investigate alleged violations of Articles 2 and 3 (and possibly 5) of the European Convention on Human Rights ('ECHR') as set out in the 1998 Human Rights Act (judicial reviews); and (iii) individual claims for damages brought by victims and their families (not discussed in detail in this chapter). It presented a complex picture, with overlapping chronologies in separate jurisdictions, but dealing with either very similar or identical cases in different fora. The IHAT, established in 2010, was seized with all three sets of overlapping claims although it was aimed at satisfying only the first two; the legal firm PIL was at the heart of the last two.

14.4.1. Prosecutions

As already stated, the killing of civilians, whilst clearly regrettable, does not always constitute a war crime. In Iraq, standard operating procedure was that where the death of a civilian occurred, a report was made to the Commanding Officer, who made a judgment as to whether or not the soldier involved acted with their rules of engagement. If they did, that was the end of the matter and no further action was taken. If there was any doubt, the situation was referred to the Special Investigations Branch ('SIB') of the Royal Military Police ('RMP') to investigate. Notably, in

terrogation, January 2004. Although the Report was confidential, significant extracts were published in the *Washington Post* in May 2004 (http://www.legal-tools.org/doc/e5324c/).

21 REDRESS, *UK Army in Iraq: Time to Come Clean on Civilian Torture*, London, October 2017.

April 2004, a decision was taken that all shooting incidents involving British forces were automatically to be referred to the SIB.

From the invasion of Iraq in March 2003 to January 2008, it was reported that 229 allegations of criminal activity were investigated by the RMP, including shooting incidents, traffic accidents, fraud and other crimes. Of these, 20 led to further consequences, either summarily dealt with in the chain of command or resulting in courts martial. One, unusually, resulted in a criminal trial.[22] Four resulted in courts martial.[23] All four cases related to incidents in South-East Iraq between May and September 2003 when the UK was an occupying power. In two other cases investigations were undertaken but no charge brought.[24] A handful of the proceedings related to conduct that could be considered outside the course of normal military operations and, according to Brigadier Jonathan Aitken in his 2008 report, "could not be mitigated by decisions made by British soldiers 'in the heat of the moment' or in the face of an immediate threat to their own safety, but rather which appeared to have been committed in a deliberate or callous manner".[25]

In the *Evans* case, charges were dropped and the military investigation heavily criticized by the Judge Advocate General Jeff Blackett. Blackett also accused some Iraqi witnesses of deliberately making false statements in hope of financial gain: "In their own admission these Iraqis saw an opportunity to seek financial advantage from the British Army.

22 Trooper Kevin Williams of the Royal Tank Regiment was charged with the murder of Iraqi civilian Hassan Said on 3 August 2003 in Ad Dayr. Said was killed in the course of a struggle in which Williams said he was trying to grab his colleague's gun. The initial determination of the CO was that Williams was acting within the RoE. However, the Army Prosecuting Officer passed the case to the Attorney General who referred it to the Crown Prosecution Service. A criminal trial began at the Old Bailey in September 2004 but was stopped in April 2005 after the CPS reviewed the case and determined there was no case to answer.

23 I have discussed these cases in detail elsewhere in Rachel Kerr, *The Military on Trial: The British Army in Iraq*, Wolf Legal Publishers, Nijmegen, 2009. See also, Christine Byron, "British Prosecutions Arising Out of the War in Iraq", in Antonio Cassese (ed.), *Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, pp. 602–4.

24 These related to the death by drowning of Saheed Shabram on 24 May 2003 and alleged beatings of Iraqi youths by British soldiers in Al Amarah in April 2004, captured in video footage.

25 "The Aitken Report: An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004", 25 January 2008, p. 2 (http://www.legal-tools.org/doc/9c175a/).

They frequently spoke of *fasil*, or blood money, and compensation in relation to what were patently exaggerated claims."[26] In July 2005, following the collapse of the *Williams* case, former Chief of the General Staff Lord Guthrie accused solicitors of "touting for business on the streets of Iraq".[27]

Most controversial was the case concerning Baha Mousa. On 15 September 2003, Baha Da'oud Salim Mousa, an Iraqi civilian, died whilst in British custody at a military base in Southern Iraq. In the days and hours leading up to his death, Mousa was subjected to numerous assaults, resulting in 93 separate injuries. The post mortem reported that the precise cause of death was unknown but was either the net result of those injuries or postural asphyxia.[28] Seven soldiers were charged with manslaughter and inhuman treatment, including the commanding officer, Colonel Jorge Mendonca. Of these, only one was convicted – Corporal Donald Payne, who pleaded guilty to inhumane treatment. No one was held individually criminally responsible for Mousa's death.[29] The Judge Advocate attributed this to a "more or less closing of ranks".[30]

Whilst for some these cases indicated serious failings in the military justice system, for others they represented show-trials – an attempt to find scapegoats for the Government's disastrous war and an effort to shield those at higher levels. Meanwhile, sections of the right-wing press were apoplectic about the decision to charge Colonel Mendonca, a decorated "war hero". However, perhaps the most serious implication was that the case lifted the lid on what many saw as a systematic pattern of abuse and a climate of impunity. During the trial, the situation in the detention unit where Mousa and others were held was described by the prosecution as "an apparent free for all with soldiers acting in the belief of total impunity".[31] The court heard how the detainees were referred to as "the choir" as

[26] Owen Bowcott and Richard Norton-Taylor, "Paratroopers cleared of murdering Iraqi after judge says there is no case to answer", in *The Guardian*, 4 November 2005.

[27] "Retired top brass claim Forces are under siege", in *The Times*, 15 July 2005.

[28] Rachel Kerr, "The UK in Basra and the Death of Baha Mousa", in David Lovell (ed.), *Investigating Operational Incidents in a Military Context: Law, Justice, Politics*, Brill, Leiden, 2015, pp. 71–85.

[29] Mousa's family were offered £2.83 million in compensation by the British Government in 2008.

[30] *R v. Payne*, Transcript, 13 February 2007.

[31] *R v. Payne*, Transcript, 2 February 2007.

each was struck in turn and called out in pain. They were also subjected to inhumane and degrading treatment including being forced to drink a soldier's urine and being kept in the toilet area for three hours. In his opening statement, the prosecuting barrister made clear the open and systematic nature of the abuse: "We are not dealing in this case with an isolated incident of ill-treatment carried out behind closed doors. We are dealing […] with the systematic ill-treatment […] over a period of at least 36 hours done quite openly".[32] Most damningly, evidence brought forward in the trial pointed to the sanctioned use of techniques such as stress positions, hooding, sleep and food deprivation, four of the "five techniques" banned in 1972 following revelations of their use in Northern Ireland.[33] These were used to maintain the "shock of capture" and apparently cleared at Brigade level and discussed with Mendonca, according to the testimony of Major Royce, who served as Battle Group Internment Review Officer in July–August 2003.[34] Apparently, specific direction not to use the 'five techniques', given in 1972 by then Prime Minister Edward Heath and reiterated by the Attorney General during proceedings at the ECtHR in 1977, somehow came to be 'lost' in Iraq in the summer of 2003.[35]

In 2005, Brigadier General Sir Mike Jackson, Chief of the General Staff, appointed Brigadier Jonathan Aitken to look into how allegations of abuse had been dealt with, assess the measures taken to date and make further recommendations.[36] The Aitken Report, published in January 2008, reviewed six cases that were investigated by the RMP, including the four that resulted in court martial proceedings set out above, and two that did not result in any prosecution. The report considered two main aspects: (1) arrest, detention and interrogation policy; and (2) the military criminal justice system. On the latter, Aitken found the system to be "fit for purpose", with some "weaknesses" in the system now corrected. Moreover, "[t]he absence of a single conviction for murder or manslaughter for deliberate abuse in Iraq may appear worrying but is explicable". He went on to explain how evidence must be gathered and the case proven "beyond

32 *R v. Payne*, Opening statement by Mr Julian Bevan for the prosecution. Transcript, 22 September 2006.

33 The fifth, subjection to loud and continuous noise, is alleged to have been used on other occasions.

34 *R v. Payne*, Transcript, 13 February 2007.

35 REDRESS, 2017, p. 22, see *supra* note 21.

36 Aitken Report, 2008, see *supra* note 25.

reasonable doubt". This was, as he says, a "stiff test" but not an insurmountable one, surely.

Whilst Aitken raised concerns about how the directive not to use the "five techniques" was "lost" in Iraq in 2003, and highlighted serious shortcomings in training and preparation for deployment in Iraq, he concluded that the incidents of abuse were few and far between, the work of a few "rotten apples". Aitken also concluded that the incidents were limited to a relatively short period in 2003–04 and there was no evidence of abuse after around May 2004. In some quarters, this led the report to be dismissed as simply a 'whitewash'. It is somewhat incongruous in that whilst it discussed some very serious shortcomings – the loss of the direction not to use the 'five techniques', the inadequacies of training and preparation pre-deployment – also noted in the Chilcot Report – and the inability of the RMP properly to investigate allegations without undue delay, largely due to overstretch, the conclusions were that nothing was really all that wrong. However, coupled with the censure of the RMP investigation in the *Evans* court martial and the hint that something was amiss regarding some of the claims made, the seeds of what was to continue to be a problem were already clearly identified.

Aitken also neatly side-stepped the key issues arising from the abuse allegations, focusing on the steps taken since September 2003 to rectify the issue, with clear guidance promulgated and widely disseminated on what was deemed inappropriate conduct in detainee handling,[37] although it did acknowledge that some areas were to be investigated further. In its response to the report, the REDRESS Trust, responsible for bringing some of the abuse allegations to light, stressed the need for a full independent and public inquiry.[38] Subsequent developments, including the cases seeking judicial review discussed below, have brought us closer to

[37] These are set out in detail in the Appendix to the Aitken Report. The adequacy of these measures are disputed. The European Center for Constitutional and Human Rights ('ECCHR') and Public Interest Lawyers ('PIL') allege that abuses continued beyond 2003/4 and that the guidance was questionable. See, ECCHR and PIL, Communication to the Office of the Prosecutor of the International Criminal Court, *The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008*, 10 January 2014 ('ECCHR and PIL Communication, 2014'). Ian Cobain similarly argued that training was inadequate post-2004 in Cobain, 2012, see *supra* note 8.

[38] REDRESS, Memorandum to the UK Ministry of Defence on the Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq 2003 and 2004, 31 January 2008.

this outcome, but key questions remained unanswered, even as the volume of litigation increased.

14.4.2. Inquiries

The second set of cases were aimed not at ensuring *individual* criminal responsibility but at ensuring *institutional* accountability at the level of the State. Specifically, these cases sought to force the Government to conduct inquiries into alleged unlawful killing, abuse and mistreatment of Iraqi civilians. The claims were brought by PIL acting for Iraqi civilian claimants under the 1998 Human Rights Act, which incorporates the ECHR into English law.[39] Article 2 of the Convention protects the right to life and Article 3 prohibits torture and inhuman or degrading treatment. In both cases, there is an obligation on the State to investigate alleged breaches. The claimants in these cases contended that the Secretary of State for Defence was in breach of this obligation by deciding not to conduct inquiries and sought judicial review of the decision.

The first step in this long and "tortuous process"[40] was the *Al-Skeini* case. In 2004, relatives of six Iraqis killed by British soldiers in Iraq, including Baha Mousa's family, brought a claim against the British Government seeking judicial review of the Secretary of State's March 2004 decision not to conduct independent inquiries into their deaths, accept liability or pay compensation, in violation of Articles 2 and 3 of the ECHR. The UK Government, for its part, argued that there was no such duty in this case because the ECHR did not apply extra-territorially.

The UK courts ruled in the Government's favour, finding that the ECHR applied only to Mousa since he was physically in the custody of British forces whereas the other alleged incidents occurred outside the 'legal space' of the ECHR's jurisdiction. Unsatisfied with this judgment,

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[39] The cases are set out in Appendix 3. I have not included here the claims for judicial review brought by PIL on behalf of Campaign for Nuclear Disarmament and on behalf of relatives of British soldiers killed in Iraq who sought an inquiry into the legality of the Iraq War. United Kingdom, High Court of Justice, *Campaign for Nuclear Disarmament v. Prime Minister*, Judgment, 17 December 2002, (2002) EWHC 2777 (Admin); United Kingdom, House of Lords, *R (on the application of Gentle and another) v. The Prime Minister and others*, Opinion of the Lords of Appeal, 9 April 2008, [2008] UKHL 20 (http://www.legal-tools.org/doc/659cf3/).

[40] United Kingdom, High Court of Justice, *Al-Saadoon & Ors v. Secretary of State for Defence (Rev 1)*, Judgment, 7 April 2016, [2016] EWHC 773 (Admin), para. 1 ('Al-Saadoon (Rev. 1) Judgment') (http://www.legal-tools.org/doc/97d1d3/).

the families took their case to the ECtHR in Strasbourg, which made the landmark ruling in July 2011 that the ECHR did in fact apply on the basis that the UK in Iraq assumed the exercise of "public powers normally […] exercised by a sovereign government".[41] Given that the UK exercised authority and control over these individuals, there was a jurisdictional link. The Court also found that the UK's investigations had thus far been inadequate. The immediate result of this ruling was the setting up of a public inquiry into Mousa's death, the Baha Mousa Inquiry. Chaired by Sir William Gage, the Inquiry was established in 2008 to "investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him […] in particular where responsibility lay for approving the practice of conditioning detainees" and to make recommendations.[42] The Inquiry issued its Report on 8 September 2011.[43]

The Report was damning. It gave a detailed account of the events of 14–16 September, from the point at which Baha Mousa was taken into custody to the moment of his death on 15 September 2003 and its immediate aftermath. It was, in the words of Sir William Gage, an "appalling episode of serious, gratuitous violence" and a "very serious breach of discipline". Mousa, together with six others, were arrested by a group of soldiers from A Company, 1 Queen's Lancashire Regiment, during a raid on the Hotel Ibn Al Haitham in Basra on 14 September 2003. On arrival at headquarters, the men were searched, handcuffed and hooded and placed in the temporary detention facility, where they were made to adopt stress positions and kept in "extreme heat and conditions of some squalor". It condemned the "cowardly and violent" behaviour of British soldiers who, over the course of 36 hours, had subjected Mousa to numerous assaults inflicting 93 visible injuries, resulting eventually in his death. Corporal Payne was singled out, and others were also deemed to bear a "heavy responsibility", including Lieutenant Craig Rodgers (commander of A Company), Major Michael Peebles (Battle Group Internment Review Officer), and Colonel Jorge Mendonca (Commanding Officer), who should

41 ECtHR, *Al Skeini v. UK*, Judgment, 7 July 2011, Application no. 55721/07. For discussion, see Wells Bennett, "The Extraterritorial Effect of Human Rights: the ECHR's Al-Skieni Decision", *Lawfare*, 12 July 2011; Marko Milanovic, "European Court Decides Al-Skeini and Al-Jedda", *EJIL: Talk!*, 7 July 2011.

42 *Report of the Baha Mousa Inquiry*, 8 September 2011, Part XVII Summary and Findings (http://www.legal-tools.org/doc/3398de/). For detailed discussion, see Williams, 2012, see *supra* note 9.

43 *Ibid*.

have known what was going on in that building long before Baha Mousa died, and the Regiment's Chaplain and Medical Officer, Father Peter Madden and Dr. Derek Keilloh who turned a "blind eye" to the abuse.[44]

The Report demonstrated how the infamous 'five techniques' had come to be used by British forces in Iraq in 2003. As already discussed, the techniques, designed to prolong the 'shock of capture', were effectively banned from use in 1972 as a result of an inquiry into their use in Northern Ireland. The inquiry blamed their coming back into circulation on a "corporate failure" at the MoD. It also found that the use of such techniques, which was "unjustified and wholly unacceptable" had led inexorably to the death of Mousa in so far as it had created an environment in which the abuse took place. Gage concluded that there was "more than a hint" that hooding, if not other conditioning practices, was more widespread than just this incident, but he was unable to investigate how widespread.[45]

A second investigation was established in 2009 following claims brought by the relatives of Iraqi civilians who were alleged to have been taken into custody by British forces and killed or mistreated between May and September 2004, in the wake of the Battle of Danny Boy. In *R (Al-Sweady and others) v. Secretary of State for Defence*, the claimants sought judicial review of the decision not to investigate and in the course of proceedings, the Secretary of State conceded. The Hon. Sir Thayne Forbes was appointed to lead the Al-Sweady Inquiry, which commenced its hearings on 4 March 2013 and issued its report in December 2014. The Inquiry found that the conduct of some soldiers "fell below the high standards normally to be expected of the British Army" and echoed the Mousa Inquiry by questioning some of the procedures adopted for dealing the detainees which amounted to "actual or possible ill-treatment".[46]

However, it found the vast majority of the allegations, including the most serious involving torture and murder to be "wholly without foundation and entirely the product of deliberate lies, reckless speculation and ingrained hostility".[47] Both PIL and Leigh Day, the other law firm in-

44 Keilloh was later subject to disciplinary proceedings by the General Medical Council. Ian Cobain, "Baha Mousa doctor Derek Kellioh struck off after repeated dishonesty", in *The Guardian*, 21 December 2012.

45 Baha Mousa Inquiry, 2011, see *supra* note 42.

46 *Report of the Al-Sweady Inquiry*, 17 December 2014, para. 735.

47 *Ibid*., para. 740.

volved, were subsequently referred to the Solicitors Disciplinary Tribunal to answer complaints about its handling of the claims. This marked the beginning of the end for PIL. The *Al-Sweady* findings are also notable because they echoed some of the earlier court martial proceedings and the Mousa Inquiry about the quality of investigations and the veracity of claims. They also echoed concern regarding the procedures used by British forces when dealing with people in custody: "serious" allegations of torture and murder were set aside, but allegations of ill-treatment were substantiated.

Meanwhile, litigation rumbled on in the UK courts. Justice Leggatt described the process as "tortuous".[48] He was right. And to what end? The aim of all of this litigation was to force the government to convene a broadly-mandated public inquiry into British conduct in Iraq.[49] However, neither the Iraq Inquiry, nor the Baha Mousa and Al-Sweady inquiries has yet managed to satisfy this goal.

14.4.3. IHAT and the Iraqi Civilians Litigation

The third major set of litigation related to claims brought by a number of Iraqi citizens in February 2010 seeking orders for the Secretary of State to investigate allegations that they, or the relatives, were subject to serious ill-treatment or unlawfully killed by British forces. At the outset, there were 190 such claims, but in 2014, another 875 claims were added, and a further 165 in 2015, bringing the total number of claims to 1,230 by March 2015. The majority of claimants were represented by PIL with the exception of two individuals, Yunus Rahmatullah and Amanatullah Ali, who were represented by another legal firm, Leigh Day.[50] Many of these claimants (over 1,000) brought separate actions for compensation from the Ministry of Defence, but here we are primarily concerned with the judicial review proceedings.

In these cases, two key issues were in question. The first was whether the alleged incidents fell under the UK's jurisdiction for the purposes of the ECHR. Whilst it was accepted, following the *Al-Skeini* case, that individuals in the custody of British forces at the time of their death

48 Al-Saadoon (Rev. 1) Judgment, see *supra* note 40.

49 *British Forces in Iraq: The Emerging Picture of Human Rights Violations and the Role of Judicial Review*, Public Interest Lawyers, 30 June 2009 (on file with the author).

50 Al-Saadoon (No. 2) Judgment, see *supra* note 6.

or alleged ill-treatment were within the UK's jurisdiction, the Secretary of State for Defence continued to challenge the extent to which it applied to other individuals killed or injured by British forces in Iraq.[51] In March 2015, the Supreme Court followed the logic of the decision of the ECtHR in the *Al-Skeini* case that where British forces exercised public powers and physical power and control over individuals, those individuals were deemed to be under UK jurisdiction.[52] The second major issue was the extent of the duty to investigate and whether investigations undertaken to date were (a) independent, (b) prompt, (c) transparent and (d) sufficiently involving the victim's next of kin.

In March 2010, the Ministry of Defence decided to establish the IHAT. IHAT began work in November 2010 with a mandate to "investigate as expeditiously as possible those allegations of criminal conduct by HM forces in Iraq […] in order to ensure that all those allegations are, or have been, investigated appropriately".[53] It had two separate functions: (1) to discharge the responsibility of the State to investigate individuals alleged to have committed crimes; and (2) to discharge the responsibility of the State to investigate alleged violations of Articles 2 and 3 of the ECHR. IHAT encountered some early difficulties, compounded by difficulties in recruiting experienced staff and "performance issues" resulting from the "cocktail" of service personnel, police investigators and contractors.[54] It was initially expected to take two years but in June 2011, it was dismissed

[51] There is an additional set of issues revolving around the application of Article 5 regarding conditions of detention. The current position of the Government, upheld by the Supreme Court in January 2017, is that of United Nations Security Council Resolution 1546, 8 June 2004, S/RES/1546 (2004) (http://www.legal-tools.org/doc/6c586c/), which authorizes the UK to take all necessary measures to contribute to the maintenance of security and stability and specifically to intern where that was necessary for imperative reasons of security means that IHL applied and not IHRL so there is no obligation to investigate except in cases of 'enforced disappearance' which may fall under the UN Convention on Torture. United Kingdom Supreme Court, *Al-Waheed v. Ministry of Defence*, Judgment, 17 January 2017, [2017] UKSC 2 (http://www.legal-tools.org/doc/977ebb/).

[52] Al-Saadoon (No. 2) Judgment, see *supra* note 6. Upheld in United Kingdom, Court of Appeal, *Al-Saadoon & Ors v. The Secretary of State for Defence & Ors*, Judgment, 09 September 2016, [2016] EWCA Civ 811 (http://www.legal-tools.org/doc/564c51/).

[53] IHAT Terms of Reference.

[54] Attorney General's Office, Ministry of Defence, "Review of the Iraq Historic Allegations Team by Sir David Calvert-Smith", 15 September 2016.

as "shambles" as news emerged that only one person had been interviewed in its first six months of operation.[55]

Meanwhile, IHAT was the focus of "considerable judicial scrutiny".[56] Following its establishment in March 2010, the focus of the *Ali Zaki Mousa (No. 1)* proceedings switched to seeking judicial review of (a) whether IHAT was sufficiently independent and (b) whether a public inquiry was needed because of the wider systemic issues. In 2011, the Court of Appeal held that IHAT was not sufficiently independent because of the involvement of members of the RMP who were involved in operations in Iraq.[57] RMP personnel were replaced with personnel from the Royal Naval Police and in May 2013, the High Court was satisfied that this new constitution met the requirements for impartiality.[58] However, it found investigations into deaths in custody to be inadequate. The Court noted undue delay in investigating cases, lack of accessible information for the public or the victim's families and the failure to investigate any wider issues of State responsibility.[59] It did not order a full inquiry, but directed that there should be a "new approach" and ordered what approximated to coroner's inquiries in individual cases where investigations were concluded by no prosecution was brought. Mr. Justice Leggatt was appointed to have overview of the inquiries and to deal with issues arising.

Justice Leggatt, concerned at the lack of up-to-date information on IHAT's website and the slow progress of its investigations, held a hearing in April 2015. The information provided to the hearing by IHAT, the Director of Service Prosecutions ('DSP'), Andrew Cayley QC, and the Ministry of Defence showed that IHAT had concluded its investigations in only 19 of 53 cases of alleged unlawful killing in its original caseload and only two inquiries had been established.[60] In his order of 26 June 2015, Leggatt granted permission to proceed with claims for judicial review of

55 Angus Crawford, "Iraq Historic Allegations team probe 'is a shambles'", in *BBC News*, 14 June 2011.

56 Review of the Iraq Historic Allegations Team, 2016, see *supra* note 54.

57 United Kingsom Court of Appeals, *R (Ali Zaki Mousa) v. Secretary of State for Defence*, Judgment, 22 November 2011, [2011] EWCA Civ 1334 (AZM).

58 United Kingdom, High Court of Justice, *R (Ali Zaki Mousa) v. Secretary of State for Defence (No. 2)*, Judgment, 24 May 2013, [2013] EWHC 1412 (Admin).

59 *Ibid*., para. 14.

60 United Kingdom, High Court of Justice, *Al-Saadoon & Ors v. Secretary of State for Defence*, Judgment, 26 June 2015, [2015] EWHC 1769 (Admin) ('Al-Saadoon Judgment') (http://www.legal-tools.org/doc/97c5a7/).

the decision not to conduct inquiries in five other cases.[61] The slow progress was attributed to the "extreme difficulty of investigating events that took place in Iraq many years ago".[62] Leggatt also noted the huge expansion of IHAT's caseload as an inhibiting factor.[63]

And here was the crux of the problem. Not only was it an immensely difficult task to investigate historical allegations; the difficulties were compounded by the massive increase in IHAT's caseload. It was flooded with new allegations in 2014–15. At the same time as the increase in public law claims described above, between November 2014 and April 2015, IHAT's caseload increased from 165 cases involving 279 victims to 762 claims with 1,000 more notified but not yet formally submitted.[64] Although some of these resulted from IHAT's own investigations, the vast majority were submitted by PIL, and were the same as those in the *Ali Zaki Mousa* proceedings, which by April 2015 numbered 1,268 and by the following year, 1,386.[65] In April 2016, Justice Leggatt stated that "it is simply quite impossible for IHAT to investigate in any depth with anything approaching a reasonable timescale all the allegations of killing and ill-treatment which have so far been allocated to it – let alone any more which may yet be added".[66]

As of 30 September 2016, IHAT had received allegations relating to some 3,368 victims. 1,555 were not pursued for various reasons (duplicates, not within the jurisdiction of the Service Justice System, not a criminal offence, and so on, including four that were returned to PIL with a request for a witness statement) and 127 were still to be screened. This left 1,686 potential allegations comprising 325 of unlawful killing and 1361 of alleged ill-treatment. As of 23 November 2016, when IHAT issued its latest quarterly update, it was in the process of closing 192 allegations, of which 105 were of unlawful killing and the remaining 87 were of

61 In April 2016, the High Court ordered inquiries in two of these cases but not in the other three on the basis that there were slim prospects of obtaining evidence so the cost was unjustifiable and ruled that the DSP should be able to apply this test to other cases. In respect of one of these cases (Muhji), Justice Leggatt noted misconduct on the part of PIL: "I cannot let the matter pass without recording my concerns about the way in which this claim has been handled", Al-Saadoon (Rev. 1) Judgment, para. 128, see *supra* note 40.

62 *Ibid*., para. 15.

63 Al-Saadoon Judgment, para. 36, see *supra* note 60.

64 Al-Saadoon (Rev. 1) Judgment, para. 18, see *supra* note 40.

65 *Ibid*.

66 *Ibid*., para. 261.

ill-treatment. Of these, one case of unlawful killing was referred to the DSP and another to the RMP for further investigation, one soldier was fined for ill-treatment and one soldier referred to the DSP. In both of the cases referred to him, the DSP decided not to proceed with prosecution.[67] As at 30 September 2016, IHAT was dealing with 1494 remaining allegations, involving 1724 victims (the figures are hard to pin down – see table).

[67] *The Iraq Historic Allegations Team (IHAT) Quarterly Update*, 23 November 2016 (on file with the author).

Table 1: IHAT caseload

Case load	Date	Details	Number of victims (as at 30 September 2016)					Current caseloads (as of 31 Mar. 2016)	
			Unlawful killing	Ill-treatment	Total	Terminat-ed	Not allocated	Cases	Victims
1	1 Mar. 2010–18 Nov. 2014	Original IHAT caseload	63	218	281	46		166	281
2	18 Nov. 2014–	Allegations identified in civil claims		156	156	33		93	158
3	Aug.–Oct. 2014	PIL	108	207	315	16		315	315
4	18 Nov. 2014–	Identified by IHAT investigation teams	3	20	23			4	5
5	Oct.–Dec. 2014	PIL	18	393	411	15		411	411
6	Jan. 2015–	PIL	80	257	337	21		337	337
7	Mar 2015.	PIL from Al-Sweady Inquiry			9		9	9	9
8		Identified in claim register			36		36	-	
9	Apr. 2015–	PIL and others	6	30	36	8		36	36
10	10 Sep. 2015–	Identified by IHAT investigation teams		4	4			1	4
11	22 Oct. 2015–	PIL	37	75	112	3		2	2
12	23 Mar. 2016	PIL			4		4	-	
		Total	315	1,360	1,724	142	49	1,374	1,558

The task before IHAT was immense. In April 2016, IHAT employed 140–150 people and the scale of its operations "mirrors that of a major domestic police force". Total funding committed to the end of 2019 was £57.2 million.[68] The investigations themselves were challenging and suffered severe setbacks, such as the limits on the numbers of 'Operation MENSA' interviews (with vulnerable complainants in third countries). Sir George Newman, the Inspector appointed to conduct the inquisitorial inquiries established to date, expressed the view that, however desirable it may be to give close attention to these allegations, "some regard has to be paid to the practical difficulties and the likely time it will take" to investigate all incidents.[69] He also pointed out duplication of efforts by IHAT and a potential inquiry, and suggested that IHAT's work might be expedited by the Service Prosecuting Authority making an earlier assessment of the likelihood of prosecution.

The tone of judicial oversight appeared to be focused on speeding up IHAT's work where possible and some changes in procedure were recommended that might allow more boldness in dismissing allegations at an early stage, where justified. It was also noted that whilst the earlier submissions to IHAT comprised letters of claim and a first witness statement, which allowed investigators to identify the date and location of the relevant incident, later submissions by PIL lacked this information and in many cases only contained the claim summary. Filling the gaps added significantly to IHAT's workload. It was also noted by the DSP that in some cases, the information provided by the complainant when interviewed by IHAT was "starkly different" to that in the summary of claim.[70] As a result, Justice Leggatt considered that IHAT could properly decline to investigate allegations that were brought solely on the basis of a claim summary, and lacking any witness statement, thus separating out allegations that were reported as criminal misconduct from those seeking damages and potentially reducing the number of claims IHAT would need to investigate.

However, hanging over any efforts to make IHAT's work more expeditious was the added complication of the ICC's preliminary investigation. The DSP said that while he remained confident that IHAT and the

68 Al-Saadoon (Rev. 1) Judgment, para. 8, see *supra* note 40.

69 *Ibid*., para. 263.

70 *Ibid*., para. 286.

Service Prosecuting Authority could fulfil the requirements of Article 17 of the Rome Statute (on admissibility), "he would not wish to create any possible doubt about the willingness of the United Kingdom to investigate and prosecute cases by improperly abridging the criminal investigation process".[71] In his September 2016 Review, Sir David Calvert-Smith, former Director of Public Prosecutions, concluded that "the processes now employed would certainly satisfy the requirements of civilian investigation and prosecution organizations in England and Wales, and [I] would be very surprised therefore if an international tribunal were to take a different view".[72]

IHAT was scheduled to complete its work by the end of 2019 but in April 2017 it was announced that it would be shut down in a matter of months following a scathing report by the House of Commons Defence Sub-Committee in February 2017, which concluded that IHAT had become "a seemingly unstoppable self-perpetuating machine, deaf to the concerns of the armed forces, blind to their needs, and profligate with its own resources".[73] The report also echoed concerns highlighted in both Calvert-Smith's report and by Justice Leggatt that "both the MoD and IHAT have focused too much on satisfying the accusers and too little on defending those under investigation". The shadow of the ICC loomed large: "The focus has been on satisfying perceived international obligations and outside bodies, with far too little regard for those who have fought under the UK's flag".[74] Which brings us, finally, back to the ICC.

14.4.4. The ICC's Preliminary Examination

As already discussed, on 13 May 2014, the ICC Prosecutor announced that she was re-opening a preliminary examination of the situation in Iraq, previously closed in 2006, following the submission of new information relating to alleged crimes committed by UK forces in Iraq from 2003 to 2008. The examination was conducted pursuant to Article 15(2) of the Rome Statute to determine whether or not there is a "reasonable basis" to

71 *Ibid*., para. 268.

72 Review of the Iraq Historic Allegations Team, 2016, Section 14, para. 14.22, see *supra* note 54.

73 *Who guards the guardians? MOD support for serving and former personnel*, House of Commons Defence Committee Report, 10 February 2017 (http://www.legal-tools.org/doc/7a0253/).

74 *Ibid*.

proceed to the next stage, which is to request a Pre-Trial Chamber to authorize an investigation. In accordance with Article 53(1) of the Rome Statute, in making this determination, the Prosecutor must consider (a) jurisdiction; (b) admissibility (complementarity and gravity) and (c) the interests of justice. In relation to (a) there are two aspects. The first is clearly met: the UK deposited its instrument of ratification with the Court on 4 October 2001, so the ICC has jurisdiction over UK nationals, regardless of where the crimes were committed. But the Office of the Prosecutor ('OTP') has yet to determine whether there is "reasonable basis" to believe that alleged crimes were committed that fall within the Court's jurisdiction. The second and third criteria will involve a qualitative judgment as to the adequacy and 'genuineness' of national investigations, the nature of the alleged crimes and what is deemed to be 'in the interests of justice'. The Prosecutor's determination on the second criteria concerning the genuineness of national investigations will likely be the most contentious in this case, given the catalogue of litigation and investigations underway in the UK, and will shed some light on how aggressively positive complementarity is interpreted.

The first examination was closed by the previous Prosecutor, Luis Moreno-Ocampo, on the basis that the required threshold for ICC jurisdiction was not met.[75] Many of the allegations related to the legality of the war, over which the ICC did not have jurisdiction whilst those involving allegations of crimes against humanity and genocide lacked indicia relating to the widespread and systematic nature, or requisite intent for genocide, and allegations of war crimes involving civilian deaths in the course of military operations were without reasonable basis. It was only with regard to allegations of wilful killing and inhuman treatment of Iraqi civilians that the Prosecutor found reasonable basis to believe that crimes had been committed under the jurisdiction of the Court, but they did not meet the gravity threshold. The number of alleged victims was relatively small: somewhere between 4 and 12 victims of wilful killing and a limited number of victims of inhuman treatment, making a total of less than 20 persons.

So, what changed in 2014? The decision to re-open the preliminary examination was based on an initial assessment of "substantial" new information in a dossier transmitted by the ECCHR and PIL to the OTP on

[75] OTP response to communications received concerning Iraq, *see* supra note 1.

10 January 2014. The initial dossier contained numerous allegations of systematic detainee abuse involving 412 victims.[76] Later submissions brought the total allegations to 1,390, of which 391 related to alleged unlawful killings and 1,071 to alleged ill-treatment.[77] What was different this time around was that, first, the dossier focused exclusively on allegations of wilful killing and ill-treatment of Iraqi detainees, not the crime of aggression, or genocide, or allegations of war crimes relating to the conduct of military operations. Second, it alleged *systemic* abuse, with culpability reaching to the highest levels of political and military leadership. This appeared to be the primary motivation behind the submission of the dossier; the demands for accountability contained therein were directed up the chain of command from the soldiers responsible for meting out the abuse, to those bearing the "greatest responsibility" in the political and military chain of command.[78] It was alleged that not only was the abuse widespread, but that it was "ordered, sanctioned or enabled by higher level officers in the military chain of command, and with the knowledge of higher level civilian officers".[79] And third, it alleged many more victims than the relatively small handful of cases assessed in 2006. On this basis, it may be concluded that it met the gravity threshold since they would meet the criteria of Article 8 of the Rome Statute: "The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or *as part of a large-scale commission of such crimes*".

As of November 2016, the OTP had analysed 831 victim accounts from which they had identified 841 incidents involving 2,350 separate allegations of abuse against detainees between 2003 and 2009. The alleged victims were mostly male, and over two-thirds were between 18 and 34 years of age. The OTP categorized the most frequently reported methods of abuse including beatings, restraints, sensory deprivation or overstimulation, deprivation of clothes, water, food, medical care privacy, sleep, toilet, forced exertion, harsh environments, isolation, stress positions, sexual assault and humiliation, electrocution and burning, suspension, waterboarding and verbal threats and abuse. The OTP also analysed 204 of 319 witness statements in relation to unlawful killing and identified 133 separate incidents, including 20 incidents resulting in the death of

76 ECCHR and PIL Communication, 2014, see *supra* note 37.

77 ICC-OTP, *Report on Preliminary Examination Activities* 2016, see *supra* note 2.

78 ECCHR and PIL Communication, 2014, see *supra* note 37.

79 *Ibid.*, p. 250.

two or more people. The majority of these incidents occurred in the course of conventional military or counter-insurgency operations in air attacks, crossfire incidents, search and arrest operations, non-combat vehicle accidents, and escalation of force. In the remaining 35 cases, the OTP cited a lack of information on the circumstances.

In its November report, the OTP noted the ongoing proceedings against PIL and Leigh Day by the Solicitors Regulation Authority and the closing down of PIL following withdrawal of legal aid funding. It also noted that it was "mindful" that domestic proceedings were underway, involving judicial review of IHAT.[80] The former had a bearing on the OTP's decision as to whether there is a reasonable basis to believe that alleged crimes were committed that fall within the Court's jurisdiction and all the cases already considered by the OTP will need to be reviewed in this light. The latter related to admissibility as noted above, and it remains to be seen what the implications of IHAT's closure might be, although the shadow of the ICC was surely a significant factor in ensuring that a legacy team was established to continue IHAT's work.

What tests will the OTP apply to determine the adequacy of UK investigations? Article 17 of the Rome Statute sets out the rules for admissibility. Because of the complementary function of the Court, the onus is on the Prosecutor to prove admissibility with the assumption that cases will be inadmissible unless it can be shown that (a) the State is unwilling or unable genuinely to carry out the investigation or prosecution; or (b) where an investigation has been carried out and a decision has been made not to prosecute, this has resulted from unwillingness or inability. The third criteria rules out double jeopardy by requiring that the person concerned has not already been tried for the *same conduct*. And the fourth criteria relates to gravity – the case is inadmissible if not of sufficient gravity to justify the Court's intervention. In other cases, the Court has applied a two-step process to determining admissibility, asking first, whether there are ongoing investigations or investigations that have resulted in a decision not to prosecute, which is an objective or factual test, and second, whether such investigations have been genuine, which could be understood as more of a qualitative or subjective test.[81]

[80] ICC-OTP, *Report on Preliminary Examination Activities* 2016, see *supra* note 2.

[81] For discussion see, Paul Seils, *Handbook on Complementarity*, International Center for Transitional Justice, New York, 2016.

If the two-step test is applied to the UK case, the answer to the first question is yes. The answer to the second question is more debatable. If the British courts were satisfied that the State was discharging its duty to investigate under the ECHR, will that also suffice to satisfy the ICC that the UK is both "able" and "willing" to prosecute, even if no prosecution resulted? ECCPR and PIL think not. They argue that the record of RMP investigations and small number of courts martial demonstrated unwillingness on the UK Government's part properly to investigate, especially higher ranking officials,[82] and that the few investigations that did occur were undertaken "in a limited and deeply reluctant manner" and designed to shield those at higher levels from responsibility.[83] In this regard, the dossier echoed Shiner's earlier criticisms of the *R v. Payne* court martial, which he labelled a "travesty".[84]

For its part, if it were to challenge admissibility, the UK Government would need to show that national proceedings are "progressive, concrete and tangible".[85] The potential weakness in the UK's case is that whilst they can show convincingly that serious crimes that might fall within the Court's jurisdiction have been investigated, and in some cases prosecuted, at the national level, those investigations have focused only on low- and mid-level perpetrators, not high-ranking officials and further that the investigations have not resulted in an overall picture.[86] Rather, the picture has emerged piecemeal from the different prosecutions and inquiries, specifically in the *Mousa* case.

The OTP appears unlikely to come to a decision anytime soon in any case, not least because it did not have enough people to commit to the examination and it had a large volume of allegations through which to wade through for a second time. Any decision it does take will have enormous political repercussions, although it is not suggested that it is being held back on that basis. Unlike Afghanistan, there is no sign that a decision is "imminent".

82 ECCHR and PIL Communication, 2014, p. 221, see *supra* note 37.

83 *Ibid.*, p. 236.

84 Phil Shiner, "A cover-up of torture, racism and complicity in war crimes", in *The Guardian*, 23 April 2007.

85 Seils, 2016, p. 71, see *supra* note 81.

86 As such, they fall short of what the ICTJ suggests a national prosecutor might do to forestall an ICC investigation. See *ibid.*, pp. 78–81.

14.5. The Fallout: Law(yers), Politics and War (Crimes)

And so, 15 years after the initial invasion, the "tortuous process" of dealing with the Iraq legacy looked set to continue. The cost of all of this has been huge. To date, the litigation has cost the UK Government £150 million (see table). But the costs are not only financial. The process has also imposed damages to the credibility of the legal profession, the army, and the State.

	£ million
Settlements to Iraqi complainants	£21.8
Government legal costs	£13.1
IHAT	£59.7
Mousa Inquiry	£25.0
Al-Sweady Inquiry	£31.0
Total	£150.6

Table 2: Costs.

Public discourse in the UK has been polarized on the issue for many years. At one end of the spectrum were those that argued that soldiers were being used as scapegoats to 'cover up' systematic abuse and evade responsibility on the part of the MoD; at the other end are those who argued that 'brave soldiers' were being subjected to a 'witch-hunt' by 'ambulance chasing lawyers' at huge cost. In a 2013 report, the right-wing think tank Policy Exchange stated that Britain's armed forces were under threat from a "sustained legal assault that could paralyse the effectiveness of the military with catastrophic consequences for the safety of the nation".[87]

The first group presented the proven allegations as just the 'tip of the iceberg' whereas the second group maintained it was simply the actions of a few 'rotten apples'. The latter group, represented most vociferously in right-wing newspapers such as *The Daily Mail* and *The Telegraph*, seemed to have gained the upper hand following the disgrace of PIL, the decision to close IHAT and the announcement that the UK would seek to

[87] *The Fog of Law: An Introduction to the Legal Erosion of UK Fighting Power*, Policy Exchange, London, 18 October 2013.

derogate from the ECHR in times of war in order to prevent the armed forces being "crippled" by bogus claims.[88]

For those on the left, the allegations represented something rotten at the core of the establishment. *Guardian* journalist Ian Cobain said that there was something "very British" about torture and linked the abuse in Iraq to a legacy of torture stretching back to the Second World War and played out in colonial wars in Aden, Malaya and Kenya (the latter two have been subject of recent claims). For this camp, these were not "isolated tragic incidents"[89] but evidence of an endemic problem. PIL, writing in 2009, cast it is as a deeper moral issue: "Ultimately, the Courts will decide the legal questions, but the Government has yet to meet the moral challenge presented by these cases".[90] So, for some the litigation has cost the army's reputation, in particularly its ability to police itself. Whereas for others, it has imposed huge costs to the integrity of the legal profession, compounded by the misconduct of PIL and Leigh Day.

In February 2015, the MoD sent a dossier to the Solicitors Regulation Authority alleging misconduct relating to evidence submitted to the Al-Sweady Inquiry. In December 2014, the Inquiry found that the most serious allegations were "wholly without foundation and the product of deliberate lies, reckless speculation and ingrained hostility". Leigh Day was also accused of professional misconduct in nine cases, but cleared in June 2017. Martyn Day said they were "hoodwinked" by "fantastic Iraqi liars". Both were accused of delaying disclosure of contradictory evidence, and Shiner was accused of using an agent to "tout for business" in Iraq (Abu Jamal). Shiner since admitted paying more than £25,000 in "referral fees". In August 2016, PIL announced that it would close. It lodged a statement that it had ceased to act for the 187 Iraqi claimants in cases at the High Court. The immediate catalyst was the termination of their legal aid contract which ensured that the firm was no longer financially viable. The contract was terminated following allegations that PIL had breached contractual requirements by paying claimants. In February 2017, Phil Shiner was struck off by the Solicitor's Regulation Authority for misconduct.

88 "A great day for British justice", in *The Daily Mail*, 2 March 2013.

89 Brigadier Geoffrey Sheldon, cited in the Aitken Report, 2008, see *supra* note 25.

90 *British Forces in Iraq: The Emerging Picture of Human Rights Violations and the Role of Judicial Review*, Public Interest Lawyers, 30 June 2009 (on file with the author).

There were earlier hints that some of the witnesses might be unreliable in the *R v. Evans* court martial, but the most damning criticism came as a result of the findings of the Al-Sweady Inquiry. According to A.T. Williams: "The Inquiry findings gave a fillip to the MoD's argument long-maintained that there was no need for any wide-scale scrutiny into the army or the government's planning for and conduct in Iraq". It justified resisting every case at each stage of the legal process. And it re-directed the story to one of fat-cat lawyers and dubious Iraqi claims. Though the proven cases of unlawful killing and ill-treatment still stood (Baha Mousa, Camp Breadbasket, Ahmed Ali and others) and were still being uncovered, the Al-Sweady findings changed the atmosphere.

Then, in April 2016, Justice Leggatt questioned PIL's integrity as he dismissed one of the claims for an order to institute an inquiry in *Al-Saadoon* on the basis that the evidence submitted was not credible. The claim concerned the death of a 13-year-old boy, Jaafar Majeed Muhyi, in May 2003. Muhyi's father claimed that he was killed by unexploded munitions that blew up when he was playing nearby. PIL had apparently failed to notice that the inconsistency between the witness statement obtained from the father of the victim in June 2004 and the later witness statement, obtained in 2013, for the purposes of making a civil damages claim, which alleged that he was killed by a bomb dropped from a helicopter and in another statement he alleged that "a British plane bombarded the house", and so had failed to inform IHAT of the inconsistency, leading to wasted effort investigation on unexploded munitions. More seriously though, even after the inconsistency was pointed out by counsel acting for the claimant, PIL proceeded with the claim and in so doing misled the court and "caused the Secretary of State for Defence to incur the trouble and expense of preparing evidence and argument in response to a claim for which there was no proper basis".[91] The incident appeared to be isolated, however, and Leggatt praised the "dedicated and responsible way in which [PIL] have represented the interests of their clients and ensured that important issues are raised and argued", an observation that made the "serious failure to observe essential ethical standards" in this instance all the more "disappointing".[92] In similar vein Williams concluded in his book that, "With hindsight, Shiner got it wrong, but equally, serious alle-

[91] Al-Saadoon (Rev. 1) Judgment, para. 130, see *supra* note 40.

[92] *Ibid.*, para. 131.

gations needed investigation and some were not spurious". PIL should be credited for some very important work without which none of the allegations would have come to light, including notably the *Mousa* case. But something went very wrong in the process to the extent that the entire corpus risks being discredited and delegitimized, allowing *The Daily Mail* and *The Telegraph* to score a win in the battle of competing narratives.

The situation was also potentially costly for the ICC. Given that the dossier on which the preliminary examination was based was compiled by PIL on the basis of claims that have now been judged to have been largely spurious, the ICC Prosecutor might have been expected to close the examination. But she found herself in a bind given the broader politics of the ICC. Closing the examination might have been another nail in the coffin of African support for the ICC. Even if entirely justifiable on legal grounds, the impression would have been given that the ICC shied away from investigation one of the permanent five, on whose support the Court relied. On the other hand, proceeding with an investigation, notwithstanding the difficulties of so doing, would have harmed the Court in other ways. The UK might have been expected to be less vocal in its support and to seek alternatives to the ICC as a mechanism for accountability. The UK's public commitment to international criminal justice and accountability was unlikely to be reversed, and indeed was reinforced with regard to Syria, but we might see is a retreat to a more pragmatic stance. Indeed, the stance that informed the UK position at Rome until it was persuaded by the 'Singapore compromise' to migrate to the Like-Minded Group. At such a difficult time for the Court, it did not need this particular headache.

Nor did the UK, for that matter. There is little doubt that the UK remained committed in principle to international criminal justice but that was somewhat undermined by its conduct. Ian Cobain and Laura Newbury both traced a lineage from British conduct in the context of counter-insurgency and colonial operations (Aden, Malaya, Kenya, Northern Ireland) to some of the alleged abuse in Iraq. In particular, there was a direct link between the "loss" of the banning of the "five techniques" following their use in Northern Ireland and the treatment of Iraqi detainees in British custody. Even if steps were taken since to rectify the loss and new training explicitly ruled out these techniques, one of the big questions that remained unanswered is how the MoD had 'lost the fact' that certain tech-

niques had been banned somewhere between the 1970s and 2003.[93] How did this "corporate failure" identified by the Mousa Inquiry happen and who was responsible? What were the consequences, beyond the tragedy of Baha Mousa's death? As a result, there remained deep suspicion regarding UK conduct in Iraq that did not serve the majority of soldiers well. Moreover, the fact that abuse was alleged to have continued as late as 2008 suggested that new procedures and training were not wholly successful. Even if there was not widespread and systematic abuse, the muddled and "tortuous" process of dealing with the allegations was problematic. As David Whetham noted in relation to allegations of unlawful killing, "There is a difference between killing an innocent person accidentally and deliberately targeting them. However, if such accidents become routine and are seen to be taking place with impunity, it is difficult to see how anyone is supposed to tell the difference, least of all those who have lost loved ones".[94]

If the problem at the heart of this sorry mess was (a) the illegitimacy of the Iraq War and the desire to hold Blair accountable and/or (b) the systemic abuse that may have resulted, in part, from (a), the ICC was not the answer to either. But in the absence of a way of getting the answer, PIL pursued every avenue and may, in the end, have defeated their own objectives by flooding IHAT and the courts with claims and getting so carried away with the idea that they were a force for good that they forgot to adhere to ethical standards. The result is that all their work now risks being discredited, whereas in reality, they did a great service in pursuing these cases in the first place. We would not know about Mousa and others without Shiner. But no one has yet been held responsible for his death either. Not Corporal Payne, not his comrades in arms and certainly not Blair. It seemed unlikely that the ICC preliminary examination was going to help with any of that and in the current climate it may simply make things worse.

It was potentially very politically sensitive for the ICC, too. The Prosecutor had to take care not to be drawn into a public spat with the MoD, via the right-wing press and a firm of human rights lawyers. She needed to be careful to ensure that the case did not have wider ramifica-

[93] *Who guards the guardians? MOD support for serving and former personnel*, House of Commons Defence Committee Report, see *supra* note 73.

[94] David Whetham, "Killing Within the Rules", in *Small Wars and Insurgencies*, 2007, vol. 18, no. 4, p. 727.

tions internationally either in terms of UK support for the court, which was withstanding, but might have buckled, and in terms of its public image problem as a court of the strong against the weak. These political questions fall outside the remit of the Prosecutor but nevertheless presented great risks. In those circumstances, it may well be that *no* decision was the least worst of the available options.

Appendix 1: Amnesty Report (2004)

Victim	Details	Case?
Wa'el Rahim Jabar	Killed by UK forces in al Amara on 26 May 2003. Carrying a rifle over his shoulder. Shot by a UK patrol from a distance of around 6m. Victim was armed so no warning given.	RMP investigation
Hassan Hameed Naser	Killed by UK forces in Basra on 10 August 2003 during violent demonstration. Part of a group who had thrown stones at UK armoured vehicle upon which British forces opened fire.	
Hazam Juma Kati and Abed Abd al Karim Hassan	Killed by UK forces on 4 August 2003 in al Majdiyeh when they went out to investigate gun fire. Unarmed but UK soldiers said it looked like they were carrying weapons.	Al-Skeini
Hanan Saleh Matrud	8-year old girl killed on 21 August 2003 by UK soldier. Military say that she was hit by a warning shot fired into the air; her family say the soldier aimed and fired at her family.	
Walid Fayay Muzban	Killed by UK forces at a checkpoint on 24 August 2003 after warnings to stop were ignored.	RMP investigation; *Al-Skeini*
Assad Kadhem Jasem	Killed by UK forces at a checkpoint north of Basra on 4 September 2003, having approached at speed and refused to stop at the first checkpoint he was shot at the second. The passenger said that it had been too dark to see the first barrier.	
Hilal Finjam Salman	Killed by UK forces on 4 October 2003 when he fired a warning shot into the air to disperse a riot. He was authorized to carry a weapon but was not wearing his orange jacket.	
Ghanem Kadhem Kati	Killed by UK forces in Basra on 1 January 2004. Fired upon from a distance even though unarmed. Shots were fired earlier to celebrate a wedding.	RMP investigation

Victim	Details	Case?
Mohammed Jasem Jureid, Rahim Hanoun Adion and Maher Abd al Wahid Muften	Killed by UK forces during an unauthorized demonstration in al Amara on 10 January 2004.	

Appendix 2: Courts Martial

Date	Details	Outcome
2005	*R v. Kenyon, Larkin and Cooley* (Osnabruck, Germany) Soldiers from the Royal Regiment of Fusiliers accused of abuse of Iraqi civilian detainees at a UK base in May 2003. Photographs came to light of Iraqis being forced to simulate oral and anal sex and a man being tied up and suspended from a forklift truck.	Three soldiers were convicted of conduct to the prejudice of good order and military discipline and disgraceful conduct of a cruel kind, contrary to Sections 69 and 66 of the Army Act, and the criminal law offence of battery or of aiding and abetting such conduct, dismissed from the army and sentenced to between 140 days and 2 years imprisonment. A fourth soldier had earlier pleaded guilty to taking the pictures.
2005	*R v. Evans and others* (Colchester, UK). Seven soldiers of the 3rd Battalion, Parachute Regiment were charged with a "joint enterprise" of murder and violent disorder in relation to an alleged unprovoked attack on several Iraqi civilians in Al-Ferkah, north of Basra, in May 2003, resulting in the death of one man, 18-year old Nadhem Abdullah.	The Judge Advocate General, Jeff Blackett, stopped the case and ordered the prosecution to drop the charges on grounds of insufficient evidence.
2006	*R v. Selman, McCleary and McGing* (Colchester, UK). Three soldiers from the Irish Guards and one from the Coldstream Guards accused of manslaughter and aiding and abetting manslaughter in relation to an incident in which an Iraqi civil-	All four were acquitted on all charges. The court determined that the practice of "wetting" constituted minimum force in the circumstances.

Date	Details	Outcome
	ian, 15-year old Ahmed Jabber Kareem, was allegedly forced into a canal and drowned.	
2006–07	*R v. Payne* (Bulford, UK). An Iraqi civilian, Baha Mousa, died whilst in the custody of UK forces in Basra. He and eight others suffered varying degrees of abuse. Seven soldiers were charged with inhuman treatment as a war crime under Section 51 of the International Criminal Court Act and assault occasioning actual bodily harm.	The case against six of the accused collapsed and the seventh, Corporal Donald Payne, pleaded guilty to a charge of inhumane treatment and was sentenced to 12-months imprisonment.

Appendix 3: Judicial Review Cases

Case	Details	Outcome
R (Al-Skieni and others) v. Secretary of State for Defence	6 claimants, relatives respectively of Iraqi citizens who have died in provinces of Iraq where and at a time when the United Kingdom was recognized as an occupying power (*viz* between 1 May 2003 and 28 June 2004). The first five claimants' relatives were shot in separate armed incidents involving British troops. The sixth claimant's son, Mr Baha Mousa, died in a military prison in British custody.	UK courts ruled that ECHR only applied to Mousa as in custody of British forces. ECtHR made landmark ruling in July 2011 (*Al-Skieni v. UK*) that ECHR applied to all six.
R (Al Jedda) v. Secretary of State for Defence	The claimant is an Iraqi who made a successful claim to asylum in the United Kingdom in the 1990s and now holds dual British and Iraqi nationality. He was detained in October 2004 on a visit to Iraq. Challenged the lawfulness of his detention by British forces in Iraq and the	His claim was denied by UK courts on the basis that they were acting in accordance with the UNSC mandate in Resolution 1546 so IHL applied not ECHR but in July 2011 this was overruled by the ECtHR in *Al Jedda v. UK* (2011).

Case	Details	Outcome
	refusal by the Secretary of State to return him to the United Kingdom. Said his detention was in breach of his rights under Article 5 of the ECHR.	
R (Al Sweady and others) v. Secretary of State for Defence	Alleged that members of the British army killed or ill-treated Iraqis, whom they had taken prisoners on 14 May 2004, following a battle near to a permanent vehicle checkpoint known as Danny Boy. In 2009, relatives sought judicial review.	Because of difficulties meeting disclosure obligations, Secretary of State agreed to set up an independent inquiry and proceedings were put on hold while that happened. The Al Sweady Inquiry, which ran from 2009-2014, concluded that the allegations of torture and murder were 'wholly without foundation and entirely the product of deliberate lies, reckless speculation and ingrained hostility.'
R (Khadim Hassan) v. Secretary of State for Defence	Tarek Resaan Hassan was detained by UK forces in Iraq on 22 April 2003 and taken to Camp Bucca, regarded as a US facility. On 1 September, his dead body was found in the countryside with both hands tied with plastic wire and evidence of bruises. According to UK records he was released from custody in May 2003. His brother, Khadim Hassan brought judicial review proceedings against the UK seeking an independent inquiry.	In February 2009, the High Court decided that the ECHR did not extend to this case. The case was taken to the ECtHR which upheld the High Court's decision (*Hassan v. UK* (2014)). It found no evidence to suggest that Tarek Hassan had been ill-treated while in UK detention such as to give rise to an obligation under Article 3 to carry out an official investigation. Nor was there any evidence that the United Kingdom authorities were responsible in any way, directly or indirectly, for his death, which had occurred some four months after his release from Camp Bucca, in a distant part of the country not controlled by United Kingdom forces.

Case	Details	Outcome
R (Ali and others) v. Secretary of State for Defence	Relates to alleged abuse at Camp Breadbasket which was the subject of a 2005 Court Martial (*R v. Kenyon, Larkin and Cooley).* In October 2008, Ra'aid Ali and another Iraqi civilian held at the camp and subjected to sexual humiliation and other abuse lodged judicial review proceedings seeking an investigation.	Subsumed under *Ali Zaki Mousa* proceedings (see below).
R (Abdul-Razzaq and others)	Concerns alleged beatings of Iraqi civilians by UK forces in Al Amarah captured in a video made public in 2006. RMP investigation closed on basis of insufficient evidence. Judicial review sought.	Put on hold pending Al-Sweady Inquiry.
R (Al Fartoosi) v. Secretary of State for Defence	Alleged abuse whilst in custody of UK forces from 2004-7. RMP investigation conducted.	
R (Khazaal and others) v. Secretary of State for Defence	Alleged mistreatment of 4 Iraqi civilians in UK custody 2005-7. Letters of notice before action served.	
R (Kammash and others) v. Secretary of State for Defence	Alleged abuse including beatings when arrested in 2007. Judicial review proceedings commenced in 2009.	
R (Al-Saadoon and Mufdhi) v. Secretary of State for Defence	Challenged transfer into Iraqi custody for murder of two British soldiers in 2003 to be put on trial by the Iraqi High Tribunal.	ECtHR in *Al-Saadoon and Mufdii v. UK* (2010)) said that the UK were in breach of its obligations by transferring the men to a jurisdiction with the death penalty (reintroduced in Iraq in 2005).

Case	Details	Outcome
R (Ali Zaki Mousa and others) v. Secretary of State for Defence	Iraqi citizens claiming abuse by British forces or relatives of those killed by British forces. Sought judicial review of IHAT claiming it was not sufficiently independent and seeking a more wide-ranging public inquiry.	High Court denied claim but Court of Appeal found that IHAT was not sufficiently independent. RMP were replaced with RNP following the 2010 ruling. In subsequent case, the High Court upheld IHAT's independence but some further reconsideration must be given to a new approach given the very large number of deaths occurring at different times and in different locations as well as the need to assess wider systemic issues and take account of lessons learned. Ordered inquisitorial form of inquiry rather than full public inquiry.
R (Haider Hussain) v. Secretary of State for Defence	Iraqi national arrested in April 2007 and questioned. Alleged ill-treatment, including being shouted at.	Denied (2013).
R (Al-Saadoon and others) v. Secretary of State for Defence	Continuing review process of investigation into numerous claims brought by Iraqi civilians.	

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Quality Control in Preliminary Examination: Volume 1

Morten Bergsmo and Carsten Stahn (editors)

This is the first of two volumes entitled *Quality Control in Preliminary Examination*. They form part of a wider research project led by the Centre for International Law Research and Policy (CILRAP) on how we ensure the highest quality and cost-efficiency during the more fact-intensive phases of work on core international crimes. The 2013 volume *Quality Control in Fact-Finding* considers fact-finding outside the criminal justice system. An upcoming volume concerns quality control in criminal investigations. The present volume deals with 'preliminary examination', the phase when criminal justice seeks to determine whether there is a reasonable basis to proceed to full criminal investigation. The book does not specifically recommend that prosecutorial discretion in this phase should be further regulated, but that its exercise should be more vigilantly assessed. It promotes an awareness and culture of quality control, including freedom and motivation to challenge the quality of work.

Volumes 1 and 2 are organized in five parts. The present volume covers 'The Practice of Preliminary Examination: Realities and Constraints' and 'Case Studies or Situation Analysis', with chapters by the editors, Andrew T. Cayley, Runar Torgersen, Franklin D. Rosenblatt, Abraham Joseph, Matthias Neuner, Matilde E. Gawronski, Amitis Khojasteh, Marina Aksenova, Christian M. De Vos, Benson Chinedu Olugbuo, Iryna Marchuk, Thomas Obel Hansen, Rachel Kerr, Sharon Weill, Nino Tsereteli and Ali Emrah Bozbayindir, in that order, and with forewords by LIU Daqun and Martin Sørby.

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