

Searching for Accountability: British-Controlled Detention in Southeast Iraq, 2003–2008

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<A>ABSTRACT¹

This article examines violence against detainees in British-controlled detention facilities in southeast Iraq from 2003 to 2008. I argue that various legal frameworks, domestic and international, failed to protect Iraqi detainees from violence while in British custody. Law could not penetrate the thick culture of impunity surrounding security force actions in Iraq. This is linked to obstacles in securing the ‘truth’ about violent assault, death and degradation in these detention facilities. I examine patterns of violence, particularly harmful pre-interrogation techniques originally employed in Northern Ireland, subsequently banned by the UK government, only to reemerge in British detention facilities in Iraq. I argue that a culture of impunity surrounds these abuses, which does not lend itself to an open accounting, raising the question of whether the International Criminal Court will be able to prise open a space for an investigation of the facts without fear or favour.

<A>Keywords: southeast Iraq, British detention facilities, culture of impunity, pre-interrogation techniques

<A>INTRODUCTION

Extrajudicial detention creates optimal conditions for the emergence of detainee abuse and violence. A ‘thick description’ of abuses that occurred in British detention facilities in southeast Iraq aims to develop an understanding of this violence. The geospatial

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architecture of detention ensures detainee submission to camp authorities, who act as proxy agents of the state.² Whereas arbitrary detention challenges some of the foundational precepts of the democratic state, local ordinances, regulations and military orders give the detaining institution and its associated techniques a mantle of legitimacy, and the violence becomes invisible. Periodic outbursts or acts of aggression in sites of detention are generally portrayed as aberrant in the face of this invisible violence. To appreciate the violence of the camp in its totality, it is necessary to recognize the symbolic violence of language and law and the quiet systemic violence that accompanies the architecture of detention.

I argue that the violent framework of detention is sustained by an underlying culture of impunity. Whilst detention without trial makes individuals more vulnerable to violence, abuses and violations that occur in these sites have proven extremely difficult to prosecute, due to political and structural obstacles and the ‘consequences of the smooth functioning’ of emergency law regulatory frameworks.³ What emerges from the assessment is that protections and standards for security internees, whether drawn from international humanitarian law, international human rights law, military or municipal laws, largely failed in Iraq, and this failure is intimately related to detainee mistreatment. I start by examining the constitutional and military context in which the British army acted as a detaining authority in Iraq. I then examine accounts that have emerged regarding physical violence in sites of detention and detail the deaths that occurred in British custody. Thereafter, through reference to domestic proceedings, I identify an accountability deficit for violence that occurred in British sites of detention in Iraq. I argue that serious deficits with such proceedings have failed to make the situation inadmissible before the International Criminal Court (ICC), and that the prosecutor has a legitimate basis to reopen the preliminary examination into the matter. Whilst the UK may not be a transitional society emerging from conflict, it was involved in the ‘transformative occupation’ of Iraq and during that occupation

² Bulent Diken and Carsten B. Laustsen, *The Culture of Exception: Sociology Facing the Camp* (New York: Routledge, 2005).

³ Slavoj Žižek, *Violence: Six Sideways Reflections* (New York: Picador, 2008), 1.

abuses occurred that have ramifications for international justice, peace and security.⁴ Indeed, the progress of this case through the machinery of the ICC may help address long-standing criticisms regarding the political and geographical bias of the Office of the Prosecutor (OTP) with respect to selecting cases for the Court.⁵ In this context, exemplary prosecutions may inculcate a sense of justice at the international level, acknowledging past wrongs and the 'seeming subordination of third world states to the same international institutions that appear weak in the face of powerful states.'⁶ This could shore up the Court's legitimacy with a powerful message: that no one who commits 'serious crimes of concern to the international community' within the Court's jurisdiction is above the law.⁷

<A>CONSTITUTIONAL–MILITARY CONTEXT OF BRITISH DETENTION IN IRAQ (2003–2008)

Between 1 May 2003 and 28 June 2004, a US–UK coalition occupied Iraq and was bound by international humanitarian law rules and standards regarding the occupation. Once a belligerent occupier is in effective control of the territory, certain duties and obligations are assigned. The occupying forces must take measures 'to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'⁸ Outrages on personal dignity, torture, cruel and inhumane treatment are prohibited by customary humanitarian law applicable both in situations of international and noninternational armed conflict.⁹ In assuming the role of occupier, the US and the UK

⁴ Nehal Bhuta, 'The Antinomies of Transformative Occupation,' *European Journal of International Law* 16(4) (2005): 721.

⁵ William Schabas, 'Victor's Justice: Selecting "Situations" at the International Criminal Court,' *John Marshall Law Review* 43(3) (2010): 535–552.

⁶ Obiora Chinedu Okafor and Uchechukwu Ngwaba, 'The International Criminal Court as a "Transitional Justice" Mechanism in Africa: Some Critical Reflections,' *International Journal of Transitional Justice* 9(1) (2015): 102.

⁷ William Schabas, *An Introduction to the International Criminal Court*, 4th ed. (New York: Cambridge University Press, 2011), 196.

⁸ Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, art. 43.

⁹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I – Rules* (Cambridge: Cambridge University Press, 2005).

created a temporary governance structure, the Coalition Provisional Authority (CPA).¹⁰ Additionally, a UN Security Council (UNSC) resolution, formulated under Chapter VII of the UN Charter, recognized the commitments set out by the CPA ‘as occupying powers under a unified command,’ and called upon the states involved to fully comply with their international law obligations, in particular the Hague Regulations of 1907 and the 1949 Geneva Conventions.¹¹ The first regulation passed by the CPA affirmed the caretaker administration’s mandate to restore peace and security in Iraq, and to create conditions conducive to the reconstruction and development of the country. Section 2 of the regulation confirmed that Iraqi laws in force on 16 April 2003 would be respected, but if these laws conflicted with the CPA’s mandate, the law-making powers of the latter would prevail.¹² In a statement regarding its legislative and executive capacities, the CPA referenced Resolution 1483 and reiterated a commitment to act according to ‘the laws and usages of war.’¹³

Multinational forces (MNFs) on the ground enacted the CPA agenda. The coalition forces had six divisions, four under the command of the US army; the remaining two were multinational. Assuming control of Multinational Division South East, over 8,000 British troops were deployed to the 60,000 square mile area, which had a population of 4.6 million people. Whilst the southeast division covered four provinces (Al-Basrah, Maysan, Thi Qar and Al-Muthanna), British operations mainly centred in Al-Basrah and Maysan.¹⁴ The authority to intern civilians stemmed from the Fourth Geneva Convention. Security-related internment was further endorsed by UNSC Resolution 1546, authored under Chapter VII. Adopted on 8 June 2004, it welcomed the end of the formal occupation and the establishment of a sovereign Iraqi government, which assumed full authority on 28 June

¹⁰ For more on transitional state-building in Iraq, see, Toby Dodge, ‘Iraqi Transitions: From Regime Change to State Collapse,’ *Third World Quarterly* 26(4–5) (2005): 705–721; Toby Dodge, ‘A Sovereign Iraq?’ *Survival* 46(3) (2004): 39–58; Charles Tripp, ‘The United States and State-Building in Iraq,’ *Review of International Studies* 30(4) (2004): 545–558.

¹¹ UNSC Resolution 1483, 22 May 2003, preamble and para. 5.

¹² CPA, Regulation no. 1, 16 May 2003, para. 2.

¹³ *Ibid.*, para. 1(2).

¹⁴ Samantha Miko, ‘*Al-Skeini v. United Kingdom* and Extraterritorial Jurisdiction under the European Convention for Human Rights,’ *Boston College International and Comparative Law Review* 35(3) (2013): 63–79.

2004. It also pointed out that the MNF remained in Iraq at the request of the interim Iraqi government and two letters detailing this arrangement were annexed to the resolution.¹⁵ One letter, written by the US secretary of state and addressed to the president of the UNSC, outlined some of the measures to be taken by the MNF:

Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter on-going security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security.¹⁶

The language of internment for 'imperative reasons of security' is drawn from Article 78 of the Fourth Geneva Convention, so while the country was transitioning from a situation of occupation covered by international humanitarian law, Colin Powell restated the US government's commitment to work within that same legal framework. He assured the UNSC that the MNF would adhere to the laws of armed conflict, which would be critical to the success of the mission in his estimation. Individual state parties contributing to the MNF were reminded that they had to exercise 'jurisdiction over their personnel.'¹⁷ In British-controlled detention facilities, this signalled jurisdiction to prosecute violations of humanitarian law, service law,¹⁸ war crimes and crimes against humanity through the 2001 International Criminal Law Act, domestic criminal law,¹⁹ and, although this was subject to debate at the time, violations of the European Convention on Human Rights (ECHR).²⁰ Additionally, UNSCR 1546 gave the UN Assistance Mission for Iraq (UNAMI) a mandate to

¹⁵ Dodge, *supra* n 10. [this is the 2004 entry]

¹⁶ UNSC Resolution 1546, 8 June 2004, letter from Colin Powell to the president of the UNSC, dated 4 June 2004 (appendix).

¹⁷ *Ibid.*

¹⁸ ICC Act 2001, art. 67(3).

¹⁹ For example, the Criminal Justice Act 1988 criminalizes torture in sec. 134.

²⁰ Rachel Kerr, 'A Force for Good? War, Crime and Legitimacy: The British Army in Iraq,' *Defense and Security Analysis* 24(4) (2008): 401–419.

promote human rights in the country.²¹ UNAMI reported to the UNSC pursuant to UNSCR 1546, and in June 2005 it noted with concern that approximately 6,000 detainees were being held by MNF without due process and without access to lawyers, in violation of international law.²² Earlier, a leaked International Committee of the Red Cross (ICRC) report highlighted detainee ill-treatment in coalition-run detention facilities. These abuses were not isolated to the US Abu Ghraib detention facility and included the mistreatment of detainees in British-controlled facilities.²³

A network of detention sites received individuals arrested by UK forces during the occupation and continued to receive detainees after the MNF remained in the country at the behest of the new Iraqi government. At any given time, the British had one official detention facility in operation. The first official site was the Theatre Internment Facility (TIF) at Umm Qasr, established in April 2003. When the administration of the TIF transferred to the US military on 7 April 2003, it became known as Camp Bucca. However, a 'shadowy military intelligence unit' of the British army, the Joint Forward Interrogation Team (JFIT), remained at the camp while it was under American management.²⁴ On 25 September 2003, the British forces resumed administration of the camp. A new facility, the Divisional Temporary Detention Facility, opened at Shaibah and all UK detainees were transferred there in December 2003.²⁵ The average length of detention at the Shaibah facility was 198 days. Detainees had their cases reviewed on a monthly basis by the Divisional Internment Review Committee, comprised of British military and intelligence personnel.²⁶ A third official site was located near Basra airport – this base succeeded the Shaibah facility in accepting

²¹ Dodge, *supra* n 10. [2004]

²² Report of the secretary-general pursuant to para. 30 of Resolution 1546 (2004), S/2005/373, 7 June 2005, para. 72.

²³ The British-controlled facility at Umm Qasr and the Baha Mousa case were mentioned in the report.

²⁴ '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 Interrogation,' <http://www.informationclearinghouse.info/article6170.htm> (accessed 26 May 2016).

²⁵ Hansard, HC Deb 22 July 2004 vol. 424 cc527W.

²⁶ Andrew Mumford, 'Minimum Force Meets Brutality: Detention, Interrogation and Torture in British Counter-Insurgency Campaigns,' *Journal of Military Ethics* 11(1) (2012): 10–25.

security internees arrested and detained by British forces between 2007 and 2008.²⁷ Before being admitted to an official internment centre, detainees were often held at British army bases such as Battle-Group Main and Camp Stephen. British forces also had links to Abu Ghraib in Baghdad. Security internees and possibly prisoners of war (POWs) arrested by the British army after December 2003 were transferred to Abu Ghraib.²⁸ In addition, three British personnel from the Army Intelligence Corps were stationed at Abu Ghraib from January to April 2004.

The US–UK military partnership was also reflected in the administration of some detention facilities. Mark Urban maintains that UK special forces transferred prisoners to the US facility at Camp Nama, located west of Baghdad airport, where abuse was normalized and detainees ‘showed signs of having been mistreated (beaten) by their captors.’²⁹ After interviewing a suspect at a black site near Balad, the British intelligence agency MI6 raised concerns about detainee mistreatment. Consequently, Britain submitted a national caveat whereby its forces ‘would not hand over prisoners to the Americans if they were going to be detained at the Balad black site.’³⁰ In addition, there was complicity between US and UK special forces in managing at least two other secret detention facilities: H1, located at an oil pumping station in the desert (precise location unknown), and Station 22, located at a phosphate mine near the town of Al-Qaim.³¹ Both sites were hidden from the ICRC and senior legal advisors in the British army.

²⁷ *Case of Al-Saadoon and Mufdhi v. the United Kingdom*, Appl. no. 61498/08, Judgment (2 March 2010), para. 41.

²⁸ Hansard, HL Deb 12 May 2004 vol. 661 cc362-80, Lord Bach at paras. 374–375; Michael Welch, ‘Detained in Occupied Iraq: Deciphering the Narratives for Neocolonial Internment,’ *Punishment and Society* 12(2) (2010): 123–146.

²⁹ Mark Urban, *Task Force Black: The Explosive True Story of the SAS and the Secret War in Iraq* (New York: St. Martin’s Press, 2011), 55.

³⁰ *Ibid.*, 67.

³¹ David Rose, ‘UK Soldiers “Beat Innocent Iraqi Men in Black Ops Jails but New Secret Justice Law Means Their Torture Will Be Hidden Forever”,’ *Daily Mail*, 24 June 2012, <http://www.dailymail.co.uk/news/article-2163799/UK-soldiers-beat-innocent-iraqi-men-black-ops-jails-new-secret-justice-law-means-torture-hidden-forever.html> (accessed 26 May 2016).

The British had three detainee categories: POWs, security internees and criminal detainees.³² British forces held at least 3,000 POWs and 2,000 security internees, although the latter figure is likely a conservative estimate.³³ POWs were captured during the first phase of the conflict and were recognized by an early operational order. Lieutenant Colonel Nicholas Mercer, the most senior army legal expert in Iraq, testified at a public inquiry that by June 2003 approximately 3,000 POWs had been processed and all but two released.³⁴ Several directives were issued to remind army officers that handling POWs must be in accordance with the laws of armed conflict, in particular the Third Geneva Convention and the First Protocol, which stipulates that all such prisoners should be treated humanely and given adequate food, water, medical attention, shelter and clothing.³⁵ High-level guidance issued to officers emphasized that military operations, including prisoner handling, were to be conducted in accordance with the UK's obligations under international humanitarian law, as well as national laws.³⁶ Violence, threats and coercion were prohibited means of gathering intelligence; a POW was only obliged to divulge his name, rank and date of birth. All POWs had their status confirmed by a competent tribunal, as per Article 5 of the Third Geneva Convention.

When the formal occupation ended, people arrested and held in custody were categorized either as 'security internees' or 'criminal detainees.' Generally, there were two sets of circumstances in which arrests by the British military could lead to internment. Firstly, through 'pre-planned lift operations,' where the targets to be arrested and detained were identified in advance of the military operation. Alternatively, the internment of suspects sometimes occurred as a byproduct of military operations on the ground. Once arrested, the individual was considered a 'detainee' prior to further assessment, at which point he or

³² There was also a fourth category of 'voluntary detainee' – people who entered the camp voluntarily for protective custody.

³³ Hansard, HC Deb 23 July 2004 vol. 424, para. 716W.

³⁴ *Report of the Baha Mousa Inquiry*, vol. II, para. 9.79 [hereinafter '*Baha Mousa Report*'].

³⁵ *Ibid.*, para. 7.23; 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts,' 1125 UNTS 3 (entered into force 7 December 1978), art. 43.

³⁶ CJO, Reith's Mission Directive to Burrridge, the National Contingent Commander, dated 19 March 2003, *Baha Mousa Report*, vol. II, para. 7.19.

she would be deemed a 'criminal detainee' or a 'security internee.'³⁷ Criminal detainees were individuals suspected of involvement in criminal activities. From the outset these detainees were transferred to the custody of the Royal Military Police (RMP), but from 1 June 2003 onwards, when domestic capacities improved, the Iraqi police force began to accept criminal detainees. Security internees were civilians deemed to be a threat to the coalition forces. They were interned according to procedures established in the Fourth Geneva Convention 1949.

An *aide-mémoire* containing instructions on internment procedures was issued to all brigade and battalion commanders. Moreover, it reminded commanders of the occupying powers' obligations towards civilians, 'including in respect of the practice of their religion, avoiding discrimination, and protection from violence, insults and public curiosity.'³⁸ Various standing orders and directives were issued relating to internment. The general procedure established that detainees were first to be brought before the army's military police, who decided whether the individual should be released or sent to the TIF for questioning, or, if a criminal suspect, transferred to the appropriate authority. The arresting officers had one to two hours to transfer the individual to the TIF following arrest, or six hours in exceptional cases. Significant changes were introduced to internment procedures through Fragmented Order (FRAGO) 29, which came into effect on 5 July 2003. The transfer window from arrest to reception at the TIF increased to 14 hours. Instead of military police making the transfer decision, a new post, the Battle Group Internment Review Officer (BGIRO), was created. It was staffed by an individual who was sometimes a member of the capturing party and had little or no training.³⁹ It was clear from an earlier order, FRAGO 163, that security internees were not supposed to be interrogated prior to transfer to the TIF. However, FRAGO 29 blurred the lines as to what was permissible at battle group level. During a public inquiry into a custodial death, the Ministry of Defence admitted that the extraction of intelligence by

³⁷ Criminal detainees had limited access to lawyers; 'security internees' could access a quasi-legal review of their detention.

³⁸ *Baha Mousa Report*, vol. II, para. 7.64

³⁹ *Ibid.*, paras. 9.110–9.111.

tactical questioners may have occurred in order to assist the BGIRO's transfer decision under the new system. Such was the violent interrogation culture that resulted in the untimely death of a young Iraqi man, Baha Mousa, after 36 hours in British detention.

<A>VIOLENCE IN DETENTION

In 2010, a group of former Iraqi detainees brought a case (*Ali Zaki Mousa & Others*) to the UK High Court, seeking the establishment of a public inquiry into systematic abuses that occurred in up to 14 different British-controlled facilities between 2003 and 2008. At that point there were 127 claimants, but, by the time the case came for judicial review in 2013, 180 statements had been gathered by Public Interest Lawyers (PIL), with hundreds forthcoming. Some of these testimonies are represented in the sample of 109 illustrative cases compiled in a dossier by the European Centre for Constitutional and Human Rights (ECCHR) and PIL and submitted to the ICC.⁴⁰ According to these accounts, detainees were exposed to racist and homophobic language, and subjected to sexual, cultural and religious abuse. These were not random acts. The strategic use of humiliation, combined with physical techniques, was designed to erode detainees' defences to make them compliant with the regime and more malleable to interrogation.

Five pre-interrogation techniques, also known as deep interrogation or interrogation in depth, were employed against 14 individuals in Northern Ireland in 1971:⁴¹ sleep deprivation, exposure to white noise, wall standing, reduced diet and hooding. The controversy surrounding their usage led Edward Heath, then prime minister, to announce their discontinuation in 1972, a commitment which was later reiterated by the attorney-general in the context of an interstate complaint made by Ireland against the UK under the

⁴⁰ 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,' 2014, https://medjunarodnokrivicnopravo.files.wordpress.com/2014/02/ukicc-communication-2014-01-10_public.pdf (accessed 26 May 2016).

⁴¹ John Newsinger, 'Britain's Noxious History of Imperial Warfare,' *Monthly Review* 65(6) (2013): 19–25.

ECHR.⁴² Part I of a 1972 army directive explicitly prohibited the use of such interrogation techniques. However, by the late 1990s there had been ‘a gradual loss of doctrine,’ to a point where the prohibition was not incorporated into any written military instructions.⁴³ The extent to which these methods remained a component of interrogation training within intelligence circles in the intervening years remains unclear. However, the joint doctrine covering the military operation of Iraq ‘contained no reference to the ban on the use of the five techniques.’⁴⁴ These insidious methods, along with new innovations, percolated into British detention facilities in Iraq, euphemistically called ‘conditioning.’ In essence, the techniques were used to ‘prolong, maintain or enhance the shock of capture,’ and ‘conditioning’ ensured that captured individuals ‘would become compliant with the system of detention.’⁴⁵ ‘Harshing,’ where the interrogator gets ‘within an individual’s intimate space’ and shouts aggressively at the interogatee, and humiliation were elements of conditioning. In addition, sensory deprivation, sleep deprivation, food and water deprivation and stress positions were integral to the pre-interrogation ‘softening-up’ process.⁴⁶

Hooding was used as a sensory deprivation pre-interrogation tool in Iraq. It had the twin effect of prolonging the ‘shock of capture’ and creating a profound sense of disorientation that could be exploited during interrogation. A hessian sack was placed over the detainee’s head and sometimes goggles and earmuffs were employed, often in combination with severe isolation, restricted movement (flexicuffs) and other techniques. Out of a sample of 85 former detainees, 34 were allegedly hooded in 59 separate incidents, and in one case two detainees were allegedly hooded and tightly handcuffed whilst confined in a tent for one month.⁴⁷ Following advice from Lieutenant Colonel Nicholas Mercer and debate between officers at the National Contingent Headquarters (NCHQ), verbal orders were issued by the NCHQ commander and the general officer commanding

⁴² Hansard HC Deb 2 March 1972 vol. 832 sec. The Prime Minister (Mr. Edward Heath), cc744.

⁴³ *Baha Mousa Report*, vol. III, paras. 4.174, 5.20.

⁴⁴ ECCHR and PIL, supra n 40 at 167.

⁴⁵ *Baha Mousa Report*, vol. I, para. 6.225.

⁴⁶ *Grounds of Claim in R (Kammash and Others) v. The Secretary of State for Defence and Another*, Case no. CO/6345/2008.

⁴⁷ ECCHR and PIL, supra n 40.

the 1st (UK) Division between 1 and 3 April, banning the use of hoods in theatre.⁴⁸ Mercer issued FRAGO 152, which was the only written instruction prior to Mousa's death prohibiting the use of hoods.⁴⁹ At the same time, there were difficulties with the way the ban was communicated. It was not consistently implemented and the role of hooding in Mousa's death was highlighted in a subsequent public inquiry. Fifty cases of hooding are alleged to have occurred *after* Mousa's death.⁵⁰ The hot desert climate of southeast Iraq, combined with stress postures and temperature manipulation, further aggravated the impact of hooding and the conditioning techniques on individual detainees.

Stress postures included forced kneeling in the sun, prolonged standing and maintaining specific sitting postures. Sustained wall standing was one of the five techniques utilized in Northern Ireland. Arguably, the 'ski' or 'chair' position characteristic of British methods in Iraq was far more painful. In 2006, the UN special rapporteur on torture asserted that forcing detainees to 'maintain uncomfortable positions, such as sitting, squatting, lying down, or standing for long periods of time,' amounted to torture.⁵¹ A video recording, known as the 'House of Payne' within British military circles, shows Corporal Donald Payne abusing Mousa and several other detainees, who were forced to maintain the 'ski position': their backs against the wall, legs bent in a semi-squatting position, with cuffed hands extended at a 90-degree angle, all while blindfolded. Mercer witnessed individuals squatting and kneeling in the 'burning' Iraqi sun on a visit to the JFIT between 28 and 29 March 2003:

as I passed the JFIT, I saw approximately forty prisoners kneeling or squatting in the sand (in lines) with their arms cuffed high behind their backs with bags on their heads.⁵²

⁴⁸ *Baha Mousa Report*, vol. II, paras. 8.153, 8.199.

⁴⁹ *Ibid.*, Summary of Findings, paras. 360, 382, 388, 390, 402.

⁵⁰ ECCHR and PIL, *supra* n 40.

⁵¹ 'Civil and Political Rights, Including the Question of Torture and Detention,' UN Doc. E/CN.4/2006/6/Add.6, 10 March 2006, para. 45.

⁵² *Baha Mousa Report*, vol. II, para. 8.62.

Mercer wrote to his commanding officer and warned him that such methods were in violation of international law, leading to Major Robin Brims issuing a prohibition on 3 April 2003.⁵³

Food and water deprivation was another element of detainee conditioning in Iraq. Of a representative sample of 109 claimants, 33 alleged food deprivation and 68 claimed that they were refused water or given inadequate amounts of water.⁵⁴ The consequences of this were extremely serious in Iraq. Although the body can go for some days without food, it starts 'to burn fat and muscle relatively quickly and cannot last longer than a few hours without water in normal temperatures without suffering ill-effects.'⁵⁵ Without a sufficient intake of water, the body is unable to flush out a blood enzyme that builds up as a result of bruising and beatings. Water deprivation probably contributed to the renal damage experienced by Mousa and other detainees.⁵⁶

Sleep deprivation was refined as a British counterinsurgency interrogation method in the 1950s and 1960s, but may have had earlier origins as an element of the 'special treatment' given to a select number of British fascists during World War II.⁵⁷ Contemporaneous to its use by British intelligence services, laboratory studies were conducted by pioneers of sleep medicine. These studies demonstrated that severe psychological effects could be elicited rapidly in sleep-deprived subjects.⁵⁸ In Iraq, sleep deprivation was used to enhance the results of interrogation. For example, a logbook recording the movement of detainees has the following entry: 'TQ [tactical questioner] request 987 + 984 be kept awake till 0400 then 0800 onwards.' There are also several references to 'Operation Wideawake': 'Op wide awake conducted using white light.'⁵⁹ In the

⁵³ *Ibid.*, para. 8.153.

⁵⁴ ECCHR and PIL, *supra* n 40.

⁵⁵ *Ibid.*, 145.

⁵⁶ *Baha Mousa Report*, vol. 1, para. 2.273.

⁵⁷ Brian Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Oxford: Clarendon Press, 1992), 241.

⁵⁸ Laverne Johnson, Elaine Slye and William Dement, 'Electroencephalographic and Autonomic Activity during and after Prolonged Sleep Deprivation,' *Psychosomatic Medicine* 27(5) (1965): 415–423.

⁵⁹ ECCHR and PIL, *supra* n 40 at 113.

Kvočka case before the International Criminal Tribunal for the former Yugoslavia, the Court concluded that sleep deprivation is a method of torture.⁶⁰

An argument presented by the applicants in *R (Mousa) v. Secretary of State for Defence* was that the sheer volume of statements collated pointed to widespread and systemic abuse.⁶¹ The Court ruled against establishing an inquiry, but concluded that because the Iraq Historic Allegations Team (IHAT) was mandated to examine systemic issues, it was reasonable to await the findings of IHAT investigations. Regarding the Mousa inquiry, the Court found that it might 'have a substantial bearing on the extent to which the systemic issues alleged in the present proceedings require further independent investigation.'⁶² The Court grossly overestimated the extent to which systemic issues could be analyzed by the Mousa inquiry, which was demarcated by narrow terms of reference that precluded an examination of allegations beyond the incident itself. In the dossier forwarded to the ICC, an argument pertaining to the systematic nature of abuses is advanced, perhaps with a view to establishing jurisdiction for war crimes 'committed as part of a plan or policy or as part of a large-scale commission of such crimes.'⁶³ In a sample of 85 cases, virtually all the individuals complained of physical beatings, totalling 162 incidents.⁶⁴ There were 77 further allegations of punching and 92 of kicking. There were certain points at which detainees were particularly vulnerable to this violence, such as during the initial arrest. Several former detainees reported being beaten in their homes, in front of their families or immediately outside their houses. This trend continued in military vehicles en route to detention facilities, and violence was also associated with interrogations and the enforcement of stress positions.

The Mousa inquiry report concludes that most, if not all, detainees held with Mousa at the Temporary Detention Facility (TDF) were 'victims of serious abuse and mistreatment by

⁶⁰ *Kvočka et al.*, Case no. IT-98-30/1, Trial Chamber Judgment (2 November 2001), para. 144.

⁶¹ *R (Mousa) v. Secretary of State for Defence* (2010) EWHC 3304 (Admin), para. 13.

⁶² *Ibid.*, para. 126.

⁶³ Rome Statute of the ICC, art. 8(1).

⁶⁴ ECCHR and PIL, *supra* n 40.

soldiers.⁶⁵ Notably, a number of soldiers revealed that they had witnessed detainees being abused at the TDF. One soldier observed that Donald Payne, the provost corporal in charge of the detention facility, singled out Kifah Matairi for particular abuse.⁶⁶ Matairi developed acute renal failure as a result and a medical examination one week after his release from the TDF revealed evidence of 28 separate injuries on his body.⁶⁷ Three other soldiers confirmed that Payne had demonstrated the ‘choir’ or ‘chorus,’ which involved arranging the detainees in a row and kicking each one in succession so that he would ‘sing.’⁶⁸ Furthermore, Private Lee Graham stated that ‘due to the repeated nature of these kicks, always to the same area on the sides of the prisoners, I’d describe his treatment of these prisoners amounted to torture.’⁶⁹ In a BBC documentary about the incident, a soldier (whose identity was concealed) described the detainees after 36 hours of captivity as ‘whimpering and shaking’ and unable to cope with the abuse, which was ‘torture as far as I’m concerned.’⁷⁰

In assessing whether the Mousa incident was a ‘one off,’ the inquiry examined other 1st Queen’s Lancashire Regiment (QLR) subunits, including the A, B and C Companies. The Special Investigation Branch (SIB) of the RMP impounded Private Stuart Mackenzie’s diary during their investigation into the killing. Mackenzie was a member of the Rodger’s Multiple, a subunit of A Company, and his diary lists a litany of abuses meted out on Iraqi civilians by the subunit as they carried out their duties in and around Basra.⁷¹ The entries reveal that at least 17 civilians were assaulted or mistreated over a three-month period. Five soldiers and one officer are implicated in the incidents. Other members of the Rodgers Multiple confirmed the general patterns of violence depicted in the diary, and some corroborated specific events detailed therein.

⁶⁵ *Baha Mousa Report*, vol. III, para. 40.

⁶⁶ *Ibid.*, paras. 2.679, 2.656.

⁶⁷ *Ibid.*, vol. I, para. 2.320.

⁶⁸ *Ibid.*, para. 2.681.

⁶⁹ *Ibid.*, para. 2.653.

⁷⁰ BBC One, ‘A Good Kicking,’ 15 March 2007, <http://news.bbc.co.uk/1/hi/programmes/panorama/6435815.stm> (accessed 26 May 2016).

⁷¹ *Baha Mousa Report*, vol. I, sec. 3.6.

In contrast to the High Court's assertion that the inquiry might be able to reach some conclusions about the wider systemic issues surrounding the Mousa incident, Sir William Gage, chair of the inquiry, was unwilling to analyze 'satellite issues and events' as these were, in his estimation, only of 'slender relevance to the main issues in the Inquiry.'⁷² He conceded, however, that the events surrounding Mousa's death were not a 'one off' and concluded that

in my opinion, although they [the other incidents] show that the incident involving the Op Salerno Detainees [Baha Mousa detainees] was not an isolated incident, they do not demonstrate that such disciplinary failures were so widespread throughout 1 QLR as to amount to an entrenched culture of violence in the Battlegroup.⁷³

However, the inquiry's narrow terms of reference do not lend themselves to such a finding. In any event, a cursory examination of all the incidents reported to the inquiry involving scores of detainees raises another possible interpretation: that violence underpinned administrative detention practices, and even if not all service personnel were directly responsible for that violence, it was not considered unusual and did not merit reporting. Aside from Payne's conviction for 'inhuman treatment' in connection with Mousa's killing, no criminal accountability for torture, inhuman treatment or wilfully causing suffering or serious injury to body or health has been established through the meaningful prosecution of military offenders, including military commanders who bear responsibility for the criminal actions of subordinates that they fail to prevent or punish, as per Article 28 of the Rome Statute. Occasionally, detention violence reached a threshold of severe assault and death in custody.

⁷² *Ibid.*, para. 3.60.

⁷³ *Ibid.*, paras. 3.61, 3.68.

<A>DEATHS IN CUSTODY

Article 2 of the ECHR protects the right to life of everyone within the state party's territory. There are two limbs to Article 2: firstly, a substantive prohibition on violating the right to life (with exceptions listed), and secondly, a procedural limb elaborated by European Court jurisprudence that places a duty on states to effectively investigate Article 2 violations. The extent to which the application of domestic and international standards failed in Iraq will be examined through the prism of several contentious deaths that occurred in British detention. Approximately a dozen people died while in British custody in Iraq, but the prosecution of soldiers responsible for these deaths has proven extremely difficult. Mousa's killing resulted in a slew of legal claims and inquiries in different jurisdictions, such as an ineffective SIB investigation, court martial proceedings against seven soldiers, High Court litigation, a submission to the European Court of Human Rights, a costly public inquiry and an out-of-court settlement through a civil lawsuit.⁷⁴ That said, very little criminal accountability has been achieved: only one man, Payne, was convicted and received a custodial sentence for the killing.⁷⁵ Payne pleaded guilty to 'inhuman treatment,' a war crime defined by Section 51(1) of the UK's ICC Act 2001, and the manslaughter charge was dropped.⁷⁶ Signalling deficits in command responsibility, Major Michael Peebles and Colonel Jorge Mendonça were charged with negligence in the performance of their duties under the Army Act 1955. Unfortunately, charges against all the men other than Payne were abandoned, because, in Justice Stuart McKinnon's estimation, evidence was being withheld due to 'a more or less obvious closing of ranks.'⁷⁷ Given the passage of time, it is now unlikely that any other soldier will be prosecuted for Mousa's killing. It is arguable as to whether this situation

⁷⁴ Mousa was one of six al-Skeini claimants. Rachel Kerr suggests that these claimants were together awarded £2.83 million in compensation for unlawful killings by the state in her chapter 'The UK in Basra and the Death of Baha Mousa,' in *Investigating Operational Incidents in a Military Context: Law, Justice, Politics*, ed. David Lovell (Leiden: Brill, 2014).

⁷⁵ Payne served 12 months in military detention for the mistreatment of Mousa. See, Rachel Kerr, *The Military on Trial: The British Army in Iraq* (Nijmegen: Wolf Legal Publishers, 2008).

⁷⁶ *R v. Payne and Others*, General Court Martial Charge Sheet (2006); Gerry Simpson, 'The Death of Baha Mousa,' *Melbourne Journal of International Law* 8(2) (2007): 340–355.

⁷⁷ *R v. Payne and Others*, Transcript (13 February 2007), 8.

demonstrates the UK government's unwillingness to prosecute international crimes, thus giving rise to ICC jurisdiction under the complementarity principle.⁷⁸

The IHAT was tasked with investigating approximately a dozen other suspicious deaths that occurred in British custody, which remain unresolved. One case relates to the killing of Tariq Sabri al-Fahdawi, who was allegedly beaten to death while aboard a Royal Air Force (RAF) Chinook helicopter on 11 April 2003. Sabri was apparently one of 64 detainees being transported to a detention site known as H1, located at a 'desert oil pumping station' in western Iraq, outside the British area of operations.⁷⁹ An RAF investigation was launched two months after Sabri's death and another 10 months elapsed before a decision was made on whether his body should be exhumed for a postmortem.⁸⁰ A pathologist advised RAF investigators that such an examination would be worthless due to the body's advanced state of decomposition. The investigation was consequently abandoned. However, a leading forensic pathologist disputed this opinion, concluding that 'the examination could still reveal evidence of an assault, particularly if any ribs or facial bones had been damaged.'⁸¹ A leaked RAF report revealed that prisoners on the helicopter 'were assaulted while they were handcuffed, hooded, and were knelt on if they "refused to adopt the required position".⁸² There were two distinct legal services operating in Iraq, the Army Legal Services with its own chain of command, and the Ministry of Defence Legal Advisers (MODLA), composed of civilian lawyers that take precedence in a situation of war. The latter agency controlled the inquiry into Sabri's death, but it was 'highly irregular' for MODLA, which was neither impartial nor independent, to have taken charge of an investigation of this nature.⁸³ Ian Cobain suggests that the Ministry of Defence interfered in

⁷⁸ Louise Chappell, Rosemary Grey and Emily Waller, 'The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court's Preliminary Examinations in Guinea and Colombia,' *International Journal of Transitional Justice* 7(3) (2013): 455–475.

⁷⁹ Rose, supra n 31.

⁸⁰ Ian Cobain, *Cruel Britannia: A Secret History of Torture* (London: Portobello Books, 2013).

⁸¹ Ian Cobain, 'British Servicemen Suspected of Murdering Iraqi Civilians,' *Guardian*, 12 September 2010, <http://www.theguardian.com/uk/2010/sep/12/iraqi-citizen-murders-servicemen-suspects> (accessed 26 May 2016).

⁸² Rose, supra n 31.

⁸³ *Ibid.*

the case because Sabri was being transported to an illegal detention site under the joint management of US and UK forces, but concealed from the ICRC and British Army Legal Services.⁸⁴

In another case, British soldiers mistakenly arrested Radhi Nama at his home in May 2003. Nama was taken to Camp Stephen, where he was reportedly 'softened up' for interrogation. Within hours of arriving at the base, Nama was dead. His death certificate, signed by someone without the appropriate medical qualification, indicated that the cause of death was cardiac failure. The RMP subsequently concluded that he had died of natural causes.⁸⁵ Recently, IHAT confirmed that the RMP investigation into Nama's death had not been 'sufficiently thorough' and was thus 'incomplete.'⁸⁶ IHAT reached a similar conclusion regarding the case of Jabbar Kareem Ali, a 55-year-old schoolteacher arrested with his son in May 2003, who also died at Camp Stephen.⁸⁷ In a separate incident, three members of the Irish Guards and one Coldstream Guard were court-martialled in connection with the death of 15-year-old Ahmed Jabber Kareem, arrested on suspicion of looting. Kareem was beaten and taken in a British military vehicle to the fast-flowing Shatt al-Basra canal, where he was forced into the water at gunpoint and drowned. At the court martial in Colchester, Judge Michael Hunter concluded that the soldiers could not be found guilty of manslaughter on a legal technicality.⁸⁸ Following is a wider discussion of attempts to secure domestic accountability for abuses in Iraq.

<A>DOMESTIC ACCOUNTABILITY?

British military investigators examining deaths that occurred in British custody in southeast Iraq should have been familiar with three main bodies of law: military standards and orders

⁸⁴ Ian Cobain, 'Deaths of Prisoners in British Custody in Iraq to Be Re-Investigated, Court Told' *Guardian*, 30 January 2013, <http://www.theguardian.com/world/2013/jan/30/iraq-prisoners-deaths-fresh-inquiries> (accessed 26 May 2016).

⁸⁵ Cobain, *supra* n 80.

⁸⁶ *Ali Zaki Mousa & Others v. Secretary of State for Defence*, Case no. CO/5503/2012 (2013) EWHC 1412, para. 114.

⁸⁷ Cobain, *supra* n 80.

⁸⁸ Kerr, *supra* n 75.

in theatre regarding the conduct of such investigations; common law standards for investigating deaths in custody; and international humanitarian, international criminal law and international human rights law obligations.⁸⁹ In-theatre standing orders issued by Brigadier William Moore on 21 June 2003 gave the SIB of the RMP a mandate to investigate the use of force outside the normal rules of engagement that resulted in death or serious injury.⁹⁰ Having a separate command structure independent to the regular army, the SIB seemed the most appropriate provost organization to pursue these investigations. Moore amended the investigatory model in July 2003, when responsibility for triggering lethal force investigations shifted to the soldier's commanding officer. As brigade commander, Moore reserved the power to instigate an investigation if he was dissatisfied with the commanding officer's report. However, pressure was brought to bear on the British army due to a number of controversial cases 'in which Iraqis had been killed by the security forces.'⁹¹ In response, the commander of Multinational Division (South East) introduced a new policy that restored investigative control to the SIB. Furthermore, the stipulation that the rules of engagement had to be violated was removed, to the effect that 'all shooting incidents involving United Kingdom forces which resulted in a civilian being killed or injured [were] to be investigated by the Special Investigation Branch.'⁹² A veto power to suspend the investigation was delegated to the brigade commander, but this could only be exercised in exceptional circumstances. Modes of inquiry marked by a lack of independence may be relevant to the Pre-Trial Chamber when ruling on the admissibility of the petition before the ICC.

A detailed military doctrine relating to the treatment of POWs and detainees was published in 2006.⁹³ The manual explains the core military responsibilities regarding such

⁸⁹ Kerr, *supra* n 74.

⁹⁰ *Al-Skeini and Others v. United Kingdom*, Appl. no. 55721/07, Judgment (7 July 2011), para. 25.

⁹¹ *Ibid.*, para. 27.

⁹² *Ibid.*

⁹³ 'Prisoners of War, Internees and Detainees: Joint Doctrine Publication 1-10 & Joint Doctrine Publications 1-10.1 to 1-10.3,' May 2006, <http://webarchive.nationalarchives.gov.uk/20120215203912/http://www.bahamousainquiry.org/linkdef>

issues as prisoner handling, the categorization of prisoners and the duties of the protecting power, but contains very little information about the investigatory standards that should be adhered to when dealing with death-in-custody cases. cursory references are made to some procedural requirements, such as preserving the crime scene, taking statements and liaising with family and media, but the manual omits any reference to the relevant bodies of law that ought to frame these investigations. The common law duty to investigate a death in custody is overlooked, and although there is a perfunctory reference to international human rights law standards, international humanitarian law and international criminal law obligations are neglected.

During the military occupation (20 March–28 June 2004), detainees were protected persons for the purposes of the four 1949 Geneva Conventions. The Third Convention stipulates that an official inquiry ‘must be held by the detaining power following the suspected homicide of a prisoner of war.’⁹⁴ Similarly, Article 131 of the Fourth Convention delineates the duties of the detaining power vis-à-vis protected persons. Investigatory and prosecutorial obligations may be found elsewhere in international humanitarian law for grave breaches of the Conventions, including the ‘wilful killing of protected persons.’⁹⁵ Although the 2006 manual suggested that human rights standards ‘may’ apply in ‘UK-run holding facilities,’ it is questionable whether the investigatory system promulgated in the manual could have satisfied the rigorous procedural standards set out by European Court jurisprudence on Article 2 of the Convention, or remove ICC jurisdiction through effective prosecutions at national level.⁹⁶

In *Al-Skeini v. the United Kingdom*, the European Court of Human Rights confirmed the extraterritorial application of the ECHR to the geographical areas of Iraq which had

[iles/baha_mousa/module_4/mod_4_witness_statem/exhibit_btb/mod028624.pdf](#) (accessed 26 May 2016).

⁹⁴ *Al-Skeini and Others*, supra n 90 at para. 92, citing art. 121 of the Third Geneva Convention.

⁹⁵ *Al-Skeini and Others*, supra n 90 at para. 92.

⁹⁶ *Ibid.*

been under British control.⁹⁷ In addition, the Court affirmed that Article 2 obligations continue even in the difficult circumstances of conflict, whereby ‘all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into the alleged breaches of the right to life.’⁹⁸ In reaching its decision, the Court drew from various sources, including Philip Alston’s 2006 report ‘Extrajudicial, Summary or Arbitrary Executions,’⁹⁹ a decision by the Inter-American Court of Human Rights in *Case of the Mapiripán Massacre*,¹⁰⁰ specific right-to-life investigatory obligations and relevant European Court jurisprudence.¹⁰¹ European case law has elaborated the procedural limb of Article 2 to incorporate four important cornerstones: independence, promptness, efficacy and accessibility.¹⁰² In *Al-Skeini*, the Court ruled that an ‘independent examination’ ought to be accessible to both the victim’s family and the wider public and capable of investigating ‘broader issues of State responsibility, for the death, including the instructions, training and supervision given to soldiers undertaking tasks such as this in the aftermath of the invasion.’¹⁰³ An Article 2 compliant investigation ought to be ‘broad enough’ to allow investigators to consider not only the use of lethal force by agents of the state but also ‘all the surrounding circumstances,’ including the planning and management of ground operations.¹⁰⁴

When considering the second *Ali Zaki Mousa* (2013) application, Justice Stephen Silber ruled that the investigation should include a ‘lessons learned’ mandate, which might be able to identify wider systemic issues.¹⁰⁵ SIB investigations into deaths that occurred in

⁹⁷ Marko Milanovic, ‘*Al-Skeini* and *Al-Jedda* in Strasbourg,’ *European Journal of International Law* 23(1) (2012): 121–139.

⁹⁸ *Al-Skeini and Others*, supra n 90 at para. 164.

⁹⁹ ‘Civil and Political Rights, Including the Questions of Disappearances and Summary Executions,’ UN Doc. E/CN.4/2006/53 (8 March 2006).

¹⁰⁰ *Case of the ‘Mapiripán Massacre’ v. Colombia*, Judgment (15 September 2005), para. 238.

¹⁰¹ *Al-Skeini and Others*, supra n 90.

¹⁰² *Hugh Jordan v. United Kingdom*, Appl. no. 24746/94, Judgment (4 May 2001); *McKerr v. United Kingdom*, Appl. no. 28883/95, Judgment (4 May 2001); *Kelly and Others v. United Kingdom*, Appl. no. 30054/96, Judgment (4 May 2001); *Shanaghan v. United Kingdom*, Application no. 37715/97, Judgment (4 May 2001).

¹⁰³ *Al-Skeini and Others*, supra n 90 at para. 174.

¹⁰⁴ *Ibid.*, para. 163.

¹⁰⁵ *Ali Zaki Mousa & Others v. Secretary of State for Defence* (no. 2) (2013), para. 147, citing *R (Amin) v. Secretary of State for the Home Department* (2004) 1 AC 653, para. 31.

British custody were marked by huge shortcomings. In a 2008 report, Brigadier Robert Aitken attributed the problems that the RMP experienced in the field to the lack of a 'civilian infrastructure.' Local customs also

hampered the execution of British standards of justice: in the case of Nadhem Abdullah, for instance, the family of the deceased refused to hand over the body for forensic examination – significantly reducing the quality of evidence surrounding his death.¹⁰⁶

The strategic articulation of 'local customs' in this context is a technique of 'othering,' which creates a disjuncture between actual responsibility for the violence and legal accountability. Notwithstanding the 'local customs' and the fractured civilian infrastructure that the coalition forces inherited, military investigators failed to complete even the most rudimentary tasks. Andrew Williams lists a series of problems with the original investigation into Mousa's killing, from failing to preserve the crime scene (even though it was obvious that a violent death had occurred), to a delay in interviewing key participants, compiling a list of suspects or forming a case on command-chain responsibility.¹⁰⁷ These investigative possibilities were all 'in-house,' and the failure to pursue them cannot be attributed to a lack of civilian infrastructure or to local customs. In the second *Ali Zaki Mousa* application to the High Court, Silber had to determine not whether the original investigations were Article 2 compliant, but whether the IHAT complied with human rights standards.¹⁰⁸

IHAT was established following a Ministry of Defence statement to parliament on 1 March 2010. Initially, IHAT was mandated with investigating allegations of British security force misconduct which occurred between March 2003 and July 2009.¹⁰⁹ By December 2010 the army provost marshal decided that IHAT should investigate the use of lethal force

¹⁰⁶ 'The Aitken Report: An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004,' 25 January 2008, http://webarchive.nationalarchives.gov.uk/20121026065214/http://www.mod.uk/NR/rdonlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf (accessed 26 May 2016), para. 13.

¹⁰⁷ Andrew T. Williams, *A Very British Killing: The Death of Baha Mousa* (London: Jonathan Cape, 2012).

¹⁰⁸ *Ali Zaki Mousa*, supra n 105.

¹⁰⁹ *R (Ali Zaki Mousa) v. Secretary of State for Defence* (2010) EWHC 3304 (Admin), para. 15.

by the security forces in Iraq, including deaths in custody. By 31 December 2015, IHAT had assumed responsibility for investigating 283 allegations of unlawful killing and 1,267 cases of ill-treatment, although it is not indicated what percentage of each category occurred in detention.¹¹⁰ In 2011 the High Court raised questions regarding the structural and practical independence of IHAT, leading to a massive system overhaul.¹¹¹ Thereafter, the three main functions of IHAT were articulated as investigative, prosecutorial and reporting on wider systemic issues.

Notwithstanding these structural reforms, the *Ali Zaki Mousa* claimants maintained that the restructured body still did not meet ECHR standards for effectively investigating death in custody cases. Whilst Silber found IHAT to be adequately independent in its reconstituted form, it was not fit for the purpose of investigating suspicious death cases. In fulfilment of its Article 2 obligations, the government needs to establish a

full, fair and fearless investigation accessible to the victim's families and to the public into each death, which must look into and consider the immediate and surrounding circumstances in which each of the deaths occurred.¹¹²

Silber cited common law and international law standards for investigating deaths in custody and affirmed the extended jurisdiction of the ECHR to the custody cases.¹¹³ The Court found that IHAT failed to satisfy its Article 2 obligations, particularly due to delays in its proceedings. Moreover, IHAT was not accessible to the public or to victims' families, and the Court noted that the director of Service Prosecutions was not engaged in decision making on prosecutions.¹¹⁴ Indeed, the divisional court ruled that due to its lack of independence, 'an inquisitorial inquiry modelled on a coroner's inquest' should be

¹¹⁰ Iraq Historic Allegations Team, 'The Iraq Historic Allegations Team (IHAT) Quarterly update,' https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504671/20160222-Quarterly_Update_website.pdf (accessed 26 May 2016).

¹¹¹ Laura Williamson, '*R (Mousa) v Secretary of State for Defence – Investigating Allegations of Torture: The Importance of Independence*,' *Judicial Review* 17(2) (2012): 133–135. See, *Ali Zaki Mousa*, supra n 105 at paras. 24–26.

¹¹² *Ali Zaki Mousa*, supra n 105 at para. 148.

¹¹³ *Ibid.*, para. 149.

¹¹⁴ An 'unjustified delay in proceedings' may also make the matter admissible before the ICC under art. 17(2)(b) of the Rome Statute.

established for fatality cases and should be accessible to families of the deceased, therefore satisfying one criterion of an Article 2 compliant investigation.¹¹⁵ However, as this mechanism, the Iraq Fatality Investigations (IFI), only considers cases after IHAT and the director of Service Prosecutions have concluded that ‘there is no realistic case for prosecution,’ it cannot discharge criminal liability for international crimes.¹¹⁶

<A>INTERNATIONAL CRIMINAL COURT

Currently there are 124 state parties to the ICC’s Rome Statute. The UK signed the Statute in 1998 and became a state party when it entered into force on 4 October 2001. William Schabas notes that the OTP received almost 2,000 communications within its first three years of operation, but approximately 80 percent were deemed to be outside the Court’s jurisdiction.¹¹⁷ The OTP must decide whether there is a reasonable basis to proceed with an investigation, whether the case will be admissible before the Court and if it is in the interests of justice to proceed with the matter.¹¹⁸ The first petition arising from the situation in Iraq was deemed inadmissible by the prosecutor in 2006, because it had not met the gravity threshold required for a case to be admissible. However, ‘the Statute explicitly contemplates the possibility of new facts being submitted,’ which occurred when the prosecutor reopened a preliminary examination into the case upon receipt of the PIL/ECCHR dossier in 2014.¹¹⁹ Of course, the prosecutor can, acting in *proprio motu*, select a case for further examination, one of three triggering mechanisms through which a case may proceed to the Court (the other two being a state party referral or referral through the UNSC). Essentially, for the first time in international criminal law, ‘the choice of situations for prosecution is the prerogative of a judicial official within the institution and not a political body outside it.’¹²⁰

¹¹⁵ Iraq Fatality Investigations, ‘General Background to the Iraq Fatality Investigations,’ <http://www.iraq-judicial-investigations.org/index.aspx> (accessed 26 May 2016).

¹¹⁶ Ibid.

¹¹⁷ Schabas, *supra* n 7.

¹¹⁸ Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 3rd ed. (Cambridge: Cambridge University Press, 2014).

¹¹⁹ Schabas, *supra* n 7 at 180.

¹²⁰ Schabas, *supra* n 5 at 541.

The parameters of the preliminary examination are such that the prosecutor must first consider the issue of jurisdiction, the components of which include subject matter, temporal jurisdiction, geophysical jurisdiction and jurisdiction over individuals. Although Iraq is not a state party to the Rome Statute, the Court would have jurisdiction with regard to the latter criterion (jurisdiction *ratione personae*) by virtue of the offender(s)' nationality. In 2006, the OTP developed a prosecutorial strategy focusing its efforts on the most serious crimes committed by 'those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.'¹²¹ Schabas notes that a connection was made between the strategy to focus on senior leaders and the gravity threshold by the Pre-Trial Chamber in the Thomas Lubanga case, in which the Chamber stated 'that the gravity threshold was intended to ensure that the Court pursued cases only against "the most senior leaders" in any given situation under investigation.'¹²² Pursuing cases only against those most responsible is based on the reasoning that such individuals would be best placed 'to stop the commission of those crimes,' and the gravity threshold is key to maximizing the Court's deterrent effect.¹²³ In the context of the current submission, those 'most serious criminals' named are Adam Ingram, former defence minister, and Geoff Hoon, former defence secretary. Determining their criminal liability would be done if the matter proceeds to a full investigation.

Before deciding whether there is a reasonable basis to proceed with a full investigation, which must be sanctioned by the Pre-Trial Chamber, the prosecutor must analyze admissibility in terms of gravity and complementarity. When elaborating its prosecutorial strategy, the OTP stated that relevant factors in determining whether a case meets the gravity threshold for further investigation are 'the scale of the crimes, the nature of the crimes, the manner of their commission and their impact.'¹²⁴ And whilst the prosecutor stated

¹²¹ Alexander Greenawalt, 'Justice without Politics: Prosecutorial Discretion and the International Criminal Court,' *Journal of International Law and Politics* 39(3) (2007): 628.

¹²² William Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court,' *Journal of International Criminal Justice* 6(4) (2008): 745–746.

¹²³ *Ibid.*

¹²⁴ Citing the OTP, Report on Prosecutorial Strategy, 14 September 2006, p. 5.

that there was a 'reasonable basis' to conclude that war crimes – wilful killing, and torture and inhumane treatment¹²⁵ – had been committed by British troops in Iraq, Luis Moreno-Ocampo advanced a quantitative notion of gravity, stating that

4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment was of a different order than the number of victims found in other situations under investigation or analysis by the Office.¹²⁶

Moreno-Ocampo referred to the 'specific gravity threshold' set down in Article 8(1) of the Rome Statute, which notes that the Court will 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.' He then juxtaposed the Iraq case with situations arising from conflicts in northern Uganda, the Democratic Republic of the Congo (DRC) and Darfur, a quantitative comparative assessment which Schabas has described as 'flawed':

the Prosecutor could not have been comparing the total number of deaths in Iraq with the total in the DRC or Uganda, because he might have been forced to conclude that the situation in Iraq is more serious ... the quantitative analysis of gravity, which has a certain persuasive authority, appears to get totally muddled in imprecise comparisons.¹²⁷

Now that the dossier contains many more killings and hundreds of allegations of torture and inhumane treatment, the current prosecutor, Fatou Bensouda, will have to tackle the quantitative criterion set out by her predecessor to dispel the suggestion that this was a politically expedient decision in 2006. Indeed, Bensouda highlighted that the 'communication alleges a higher number of cases of ill-treatment of detainees and provides further details on the factual circumstances and the geographical and temporal scope of the alleged crimes.'¹²⁸ Other factors that could weigh on a consideration of gravity would be whether the actions

¹²⁵ Art. 8(2)(a)(i)(ii) of the Rome Statute.

¹²⁶ 'Statement on Communications Concerning Iraq,' The Hague, 9 February 2006, pp. 8, 9.

¹²⁷ Schabas, *supra* n 122 at 747.

¹²⁸ Gabriele Steinhauser, 'International Criminal Court Reopens Probe of Alleged U.K. Soldiers' Abuse of Detainees in Iraq,' *Wall Street Journal*, 13 May 2014, <http://www.wsj.com/articles/SB10001424052702303851804579559862296089956> (accessed 26 May 2016).

were committed by an individual acting on behalf of the state, or whether the crimes occurred within the context of a war of aggression. However, a reading of Article 8(1) – which forces a higher threshold to war crimes committed ‘in particular as part of a plan or policy or as part of a large-scale commission of such crimes’ – that removes the understanding conveyed by the words ‘in particular’ could be potentially problematic to the current submission arising from Iraq. Due to its decision on gravity in 2006, the prosecutor did not consider the issue of complementarity.

The role of the ICC is to complement rather than displace national courts; a ‘compromise built into the heart of the ICC system, intended to strike the balance between the promotion of international justice and the preservation of state sovereignty.’¹²⁹ Article 17(1) of the Rome Statute holds that a case will be rendered admissible before the Court if the prosecutor can show that the state in question is ‘unwilling’ or ‘unable’ to carry out the ostensible proceedings genuinely. If national proceedings are already underway, ‘the case will be admissible only where those efforts cannot be considered genuine.’¹³⁰ There are several aspects to unwillingness, such as state proceedings that are actually an effort to shield individuals from criminal responsibility, or unjustified delays in proceedings. With respect to due process under international law, the Court may examine whether the national proceedings were

conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.¹³¹

The lack of independence of the IHATs was one criticism levelled by the complainants in *Ali Zaki Mousa* (II) (2013). It was sufficiently serious and credible with respect to the unlawful killing cases to lead to the establishment of the IFI to satisfy the criteria set out by the European Court of Human Rights for investigating Article 2 violations. To date, the IFI

¹²⁹ Chappell et al., supra n 78 at 458.

¹³⁰ Cryer et al., supra n 118 at 154.

¹³¹ Rome Statute, art. 17(2)(c).

has completed investigations of three cases, but without a criminal prosecutorial mandate it cannot be said to make these cases inadmissible before the ICC.

The proliferation of retrospective mechanisms to tackle abuses that occurred in British detention facilities in Iraq appears to have atomized or compartmentalized narratives of violence, resulting in very little accountability. For example, although several court martials were established to investigate allegations of abuse in Iraq, only two resulted in convictions and ‘not a single officer has been found guilty of any offence.’¹³² Indeed, following the publication of the Mousa inquiry report, PIL submitted a complaint to the Director of Public Prosecutions (DPP) regarding 25 individual suspects. However, the DPP concluded that there was no longer ‘any concern in relation to the further investigation of these matters.’¹³³ Similar problems are associated with IHAT. An examination of work completed by IHAT to date reveals that criminal cases are not being contemplated for various reasons, including insufficient evidence, a lack of viable lines of inquiry and failure to meet the standards of evidential sufficiency. With no prosecutions flowing from the IFI, it is difficult to see how the UK can argue that it is genuinely willing to prosecute international crimes. However, the government could point to the attempted prosecutions of other soldiers and officers in the Mousa case, and argue that these prosecutions failed not because of a lack of willingness on the government’s behalf to prosecute the offenders, but due to the entrenched culture of silence within the army that more or less led to a ‘closing of ranks’ with respect to truth seeking about the killing.

<A>CONCLUSION

This article explored the politico-legal architecture of British-controlled detention in southeast Iraq. In sum, various legal frameworks, domestic and international, failed to protect Iraqi detainees from violence that occurred while in British custody. Law could not penetrate the

¹³² Phil Shiner, ‘The Abject Failure of British Military Justice,’ *Criminal Justice Matters* 74(1) (2008): 5.

¹³³ ECCHR and PIL, *supra* n 40 at 225.

thick culture of impunity surrounding security force actions in Iraq, and this explains the ongoing difficulty faced by those seeking to secure the truth about what happened in these detention facilities. To challenge the hegemonic narrative of the state with respect to detention is not straightforward, and can leave whistleblowers, victims and their advocates vulnerable to state-sanctioned criticism, smear campaigns, prosecutions or other proceedings. Indeed, a law firm which represented former Iraqi detainees during the Al-Sweady public inquiry has been referred to the Solicitors Disciplinary Tribunal, accused of misconduct in relation to these cases.¹³⁴ Whilst one must treat detainee testimony presented to the ICC with caution, this can be counterbalanced by the way in which the general trends contained therein are consonant with testimonies provided by military witnesses to public inquiries and court martials, NGO reports and official documentation. Moreover, there is historical precedent to this tendency to cover up detainee abuse. The situation in Iraq bears a striking similarity to the manner in which allegations of detainee mistreatment were handled in Northern Ireland, and, before that, in the British colonies. Memories of utter powerlessness in which detention-based violence occurred may resurface years after the abusive treatment, manifested by a recent claim stemming from mid-20th-century Kenyan detention camps, an incident litigated in the UK high courts from British Malaya, and the Irish government's 2014 application to Strasbourg seeking a reexamination of the European Court's 1978 judgment on the basis that it was incongruent with what the 'hooded men' actually experienced in Ballykelly. These historical claims exemplify a pressing need to set the record straight. Generally, a historical culture of impunity for specific abuses in the past is very difficult to overcome, especially if supported by contemporary denials. A culture of impunity does not lend itself to an open auditing, which raises the question of whether an international court or tribunal could possibly prise open a space where the facts of what occurred in British-controlled detention facilities in southeast Iraq might be examined without fear or favour. This is especially true if one accepts an argument proposed by Schabas that the ICC prosecutor

¹³⁴ Owen Bowcott, 'Law Firm Referred to Disciplinary Tribunal over Al-Sweady Inquiry,' *Guardian*, 5 January 2016, <http://www.theguardian.com/uk-news/2016/jan/05/law-firm-leigh-day-solicitors-disciplinary-tribunal-al-sweady-inquiry> (accessed 26 May 2016).

is not above politics and 'does, in fact, make political choices.'¹³⁵ The politics of international justice weighs against the possibility of arrest warrants being issued for Hoon and Ingram, but no doubt these individuals are watching how the prosecutor's preliminary examination progresses with great interest.

¹³⁵ Schabas, *supra* n 5 at 549.