

Why the ICC examination into torture and other abuses by UK soldiers in Iraq must continue

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cont
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Royal Regiment of

Fusiliers preparing to engage enemy targets, south of Basra, March 2003. Wikicmmons/ Cpl Paul Jarvis/MOD. Some rights reserved. The International Criminal Court has received numerous submissions of information about the UK military's conduct in Iraq. An initial preliminary examination was opened and then later closed in 2006. Although there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed, namely wilful killing, torture and inhumane and degrading treatment of prisoners and civilians, the Prosecutor's view was that the gravity threshold was not met. The number of victims of alleged abuses at that time was very limited, totalling in all less than 20 persons, so the 'quantitative criteria' was not fulfilled.

Subsequently, more information on alleged crimes was supplied, and in May 2014 the ICC Prosecutor announced the re-opening of the previously terminated preliminary examination. This preliminary examination is ongoing. According to her latest report, the ICC Prosecutor is currently finalizing the assessment of whether the alleged crimes committed by UK nationals fall within the subject-matter jurisdiction of the Court. In other words, do the crimes fall within the definition of war crimes or crimes against humanity, and do they meet the Prosecutor's gravity threshold?

The Office of the Prosecutor is now under pressure to conclude the examination. But this examination must remain open. Instead, the Prosecutor should be taking it to the next logical step – a full-blown investigation.

Under the ICC Statute, the Court can only pursue an investigation and prosecution if it can be shown that the country with competence over the said crimes (in this case the UK) is unable or unwilling genuinely to pursue the matters which the ICC is specifically investigating, domestically. The UK has one of the strongest and most highly renowned legal systems in the world. Thus, it would be difficult to say that the competent UK authorities are unable to pursue an investigation or prosecution. Certainly they are able to do so. The issue is one of willingness and this is now seriously in question. It would be difficult to say that the competent UK authorities are unable to pursue an investigation or prosecution. Certainly they are able to do so. The issue is one of willingness and this is now seriously in question.

There have been numerous investigations, including criminal investigations but there have been no prosecutions of UK armed forces personnel since the creation of the Iraq Historical Allegations Team (IHAT), which was established to review and investigate the growing number of allegations of abuse of Iraqi civilians by UK armed forces personnel in Iraq during the period of 2003 to July 2009. This in itself is extraordinary given that the MOD has spent about £60 million on IHAT, and paid out £20 million in compensation for abuse in over 300 "civil" cases (a process separate from IHAT).

But IHAT's focus was mainly the rank and file soldiers. There has never been a genuine attempt to prosecute the high-ranking military commanders or the senior officials who ordered and/or who were complicit in the commission of torture in Iraq. The IHAT may have been held up by the UK Government to the ICC Prosecutor and others as evidence that it was investigating, in order to stand up to the ICC's 'complementarity' test. But has it all been an exercise in smoke and mirrors ?

Most alarmingly, a clear picture of abuse during interrogation has emerged. In 2003, British interrogators were challenged for their use of the outlawed '5 techniques' - deprivation of sleep, food and drink, stress positions, hooding and subjection to 'white noise' (loud static), on up to 40 prisoners. Six months later, Baha Mousa was beaten to death during 'tactical questioning'. In the Baha Mousa Inquiry in 2010, the MOD admitted it had breached the Geneva Conventions during interrogations and this is likely to have taken place between 2003-2009. According to sources, the typical practice was that Iraqis were taken into armoured vehicles, beaten, then either taken for a few days to an undisclosed location to be 'worked over', or taken straight to detention where they would be kept for about a month, during which time they were subjected to sleep and food deprivation, stress positions, physical, sexual and religious abuse and restricted access to toilets. Many of the detainees were photographed naked.

There are also allegations that special forces aided the rendition of Iraqi prisoners to and from secret detention facilities in the Western desert and that prisoners were not officially recorded in medical facilities, presumably so that their existence could be officially denied. Who was ultimately responsible for this?

Arguably, the UK Government has undermined the very investigative body they originally championed. They have painted a set of simple narratives: 'Our brave troops', 'ambulance chasing lawyers', 'vexatious', 'spurious' and 'baseless' claims. This painting of narratives was easy

to do; one of the claimant lawyers was dramatically struck off by the Solicitors' Disciplinary Tribunal for his improper actions, which helped to reinforce the Government's narrative. On the other hand, another firm has been cleared of any wrongdoing, but this has passed almost without mention. The ethics of a lawyer in a single case doesn't say anything about the strength or weakness of the evidence itself, which should have been independently investigated and any underlying crimes prosecuted.

But the ethics of a lawyer in a single case doesn't say anything about the strength or weakness of the evidence itself, which should have been independently investigated and any underlying crimes prosecuted. Indeed, IHAT never relied exclusively on claimant lawyers for its evidence; IHAT undertook its own investigations, and there were a number of ICRC reports of abuse along with service personnel witnesses, some of whom had sounded their alarm about mistreatment as early as 2003.

Over the last year, there has been a dramatic reduction in the number of allegations being investigated, with hundreds of ongoing investigations shut down prematurely, some because of the so-called taint of the providence of the allegations – the 'ambulance-chasing lawyers'. But many credible investigations were not being pursued, including the death of Tariq Sabri al-Fahdawi on board an RAF helicopter in Iraq in April 2003, and the death of Ahmed Jabbar Kareem Ali, an Iraqi teenager who drowned after being forced into a river by British soldiers, or even the beating of children captured on video by News of the World. And there has been an entirely unacceptable delay in investigating and prosecuting crimes where there is clear evidence of abuse.

There have been a number of deaths in custody and almost six years after a major public inquiry found that Baha Mousa, a hotel receptionist, had been beaten to death by British soldiers in Basra, no new prosecutions have yet been brought. The High Court judge overseeing the ongoing civil claims against the MOD, Mr Justice Leggatt, recently described this delay as 'extraordinarily difficult to understand.' Apparently, Ministry of Defence civil servants began to interfere in the conduct of investigations and the vetting of evidence. Months before the plans were put in place to close IHAT down, the MOD instructed investigators that it could no longer interview service personnel as part of its investigations.

Some of these tactics are similar to what has recently been revealed in the Sunday Times' exposé on the SAS in Afghanistan – Operation Northmoor, where about 90% of the 600 allegations had been shelved. These Afghanistan allegations were generated in part by evidence supplied by soldiers and through ICRC reports. Operation Northmoor is being run by the SIB – the Army police investigating army alleged offences. It was determined that the Army police wasn't sufficiently independent to carry out the investigations in Iraq; this begs the question why they are leading the investigations in Afghanistan.

The MOD has confirmed to REDRESS that 752 of the IHAT cases concern interrogation and that the videos of some of the interrogations are held in the archives of Defence Intelligence and with IHAT. The MOD will know whether these allegations are true or not and to what extent they are to blame. It seems extraordinary that the MOD is now responsible for closing down an investigation which could legitimately question members of their own Ministry.

Now that the IHAT investigation has effectively closed, the few investigations that remain open will be transferred to a less independent process – reportedly, the Airforce police will be leading the investigations, overseen by the Provost Marshall of the RAF. This ignores the appellate ruling in respect of IHAT which required that the investigators be hierarchically, institutionally and practically independent from those they were investigating.

All that this shows is that the UK Government is unwilling to pay anything more than lip-service to its obligation to investigate and prosecute abuses allegedly perpetrated by service personnel and the higher echelons who ordered or condoned such acts. The UK Government is unwilling to pay anything more than lip-service to its obligation to investigate and prosecute abuses allegedly perpetrated by service personnel and the higher echelons who ordered or condoned such acts.

This is why the ICC should maintain its preliminary examination and take it to the next logical step: a full blown investigation. The fact that the competent UK authorities are able to prosecute but have chosen not to do so, is a sad testament of the respect for the rule of law in this country. That the UK Government is unwilling to pursue these matters itself has now become clear. The numbers of allegations which have not been subject to independent scrutiny remains high and problematic. But furthermore, the assessment of the gravity of the alleged crimes should also take into account the abuse of power and the high prospects for impunity.

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