



Fédération internationale des ACAT – Action des chrétiens pour l'abolition de la torture
International Federation of ACATs – Action by Christians for the Abolition of Torture

**Contribution of FIACAT and ACAT UK for
the review of the United Kingdom of Great
Britain and Northern Ireland by the
Committee against torture**

I. Article 2

5. Please provide detailed information on the measures taken to repeal section 134 (4) and (5) of the Criminal Justice Act 1988, which provides for the defence of “lawful authority, justification or excuse” to a charge of official intentional infliction of severe pain or suffering and the defence of conduct that is permitted under foreign law, even if unlawful under the State party’s law.

1. Article 134 (4) and (5) of the 1998 Criminal Justice Act provides:

“(4) It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct.

(5) For the purposes of this section “lawful authority, justification or excuse” means—

(a) in relation to pain or suffering inflicted in the United Kingdom, lawful authority, justification or excuse under the law of the part of the United Kingdom where it was inflicted;

(b) in relation to pain or suffering inflicted outside the United Kingdom—

(i) if it was inflicted by a United Kingdom official acting under the law of the United Kingdom or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law;

(ii) if it was inflicted by a United Kingdom official acting under the law of any part of the United Kingdom or by a person acting in an official capacity under such law, lawful authority, justification or excuse under the law of the part of the United Kingdom under whose law he was acting; and

(iii) in any other case, lawful authority, justification or excuse under the law of the place where it was inflicted.”

2. This provision is contrary to article 2 of the Convention against torture which provides that there is no exception to the absolute prohibition of torture and that there shall be no justification to torture. Despite several recommendations addressed by treaty bodies and by other member States during its UPR, the UK is still not considering repealing this provision. In fact, the State’s position remains the same since 2003. During its last UPR, the UK replied to a recommendation made by the Republic of Korea on the removal of this clause by referring to its rationale in its 4th periodic report to the CAT in 2003¹, knowingly: “*Lawful sanction. There is some overlap between the defence of lawful authority, justification or excuse in the 1988 Act and the exception in article 1 of the Convention, which concerns lawful sanction. Although the defence in the 1988 Act goes wider than the exception in article 1, this is because of the broader definition of torture in the 1988 Act (as explained above). Furthermore, the 1988 Act defence only applies where the public official etc., is acting lawfully. There is nothing in the current case law which authorizes, far less requires, the use of this defence in circumstances that would amount to torture within the terms of the Convention.*”².

3. It will be unclear to many why UK law needs to retain the defence of lawful authority for public officials when its application remains for all practical purposes unauthorised. However, it does not seem that any change of the legislation on this aspect is planned.

¹ [Annexe to the response to the recommendations received on 4 May 2017](#), 29 August 2017, p.53

² Fourth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, CAT/C/67/Add.2, para 41

FIACAT and ACAT UK invite the Committee against torture to recommend to the UK to:

- *Repeal sections 134 (4) and (5) of the Criminal Justice Act 1988 to ensure that no justification or excuse can be invoked for the commission of acts of torture.*

II. Articles 12 and 13

34. Bearing in mind the Committee's previous concluding observations regarding accountability for abuses in Iraq (para. 16), please indicate what measures the State party has put in place to ensure that all allegations of abuse of Iraqi citizens by British service personnel in Iraq between 2003 and 2009 will be fully investigated and addressed, and what steps are taken to ensure that systemic issues are identified and lessons learned. Please provide up-to-date information on the cases mentioned in paragraph 8 of the State party's follow-up replies. Please indicate the total number of allegations received and the number of investigations carried out by the Iraq Historic Allegations Team.²⁴ Please include information regarding the nature of the offences, the charges and types of convictions and penalties. Please also provide information on the outcome of the Al-Sweady public inquiry.

A. Al Sweady Inquiry

4. In 2009 the Administrative Court of the UK High Court of Justice conducted a judicial review on behalf of the uncle of one of a number of Iraqis alleged to have been unlawfully killed whilst in the custody of British troops at Camp Abu Naji. The review also considered claims by five other detainees that they were ill-treated at Abu Naji and later at Shaibah Logistics Base. It was alleged that the Secretary of State of Defence had failed to conduct an independent review into the claims and to accept liability for the deaths. When the Secretary of State conceded that inadequacies in the disclosure of evidence prevented the court from making a satisfactory ruling, the review was postponed. As a result, the Al Sweady inquiry was set up under the Inquiries Act 2005 on 29 November 2009 to examine allegations of ill-treatments and unlawful killings of Iraqis by British soldiers between 14 May 2004 and 23 September 2004. The Inquiry was concluded in 2014 and found that some cases of ill-treatment (including food and sleep deprivation, blindfolding) occurred during this period in breach of international law and the Ministry of Defence rules. In fact, the final report of the Inquiry states : *"Thus, as I make clear at various stages of this Report, I have come to the conclusion that certain aspects of the way in which the nine Iraqi detainees, with whom this Inquiry is primarily concerned, were treated by the British military, during the time they were in British custody during 2004, amounted to actual or possible ill-treatment."*³. However, the more serious allegations, including those of unlawful killings, were rejected as *"wholly and entirely without merit or justification"*⁴.

5. As a conclusion, the report of the Al Sweady Inquiry drew up a list of 9 recommendations on the treatment of prisoners.

B. The Iraq Historic Allegations Team (IHAT)

6. The IHAT was established by the British government in 2010 to review and investigate allegations of offences ranging from murder to low-level violence by UK armed forces against Iraqi civilians from the start of the military campaign in Iraq (in March 2003) through the major combat operations of April 2003 and the following years spent maintaining security as part of a

³ [Al-Sweady inquiry report](#), 17 December 2014, para 5.196

⁴ Ibid, para 5.198

multi-national force until 2009. It had the power to refer cases of potential criminal acts to the Director of Service Prosecutions (DSP - military courts). At its peak, IHAT had over 147 staff.

7. Unfortunately, IHAT was bogged down from the outset by disputes over its structure, composition and independence, not to mention the sheer volume of its case workload. In fact, IHAT was criticised because of the involvement of members of the Royal Military Police (RMP) in the investigation of matters in which they had been involved in Iraq. In *R (Ali Zaki Mousa) v. Secretary of State for Defence* [2011] EWCA Civ 1334, the Court of Appeal held that the IHAT was not sufficiently independent because of those reasons. As a result, the members of the RMP within the IHAT were replaced by other investigators (retired from civilian police forces or serving the Royal Navy Police personnel).

8. In *R (Ali Zaki Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin) and [2013] EWHC 2941 (Admin) (“AZM2”) while criticising the absence of appropriate input from the Director of Service Prosecutions, the Court found that the IHAT was sufficiently independent of the executive to meet the requirements of the ECHR.

9. Re-staffed with more civilians in place of members of the military police, IHAT started work in earnest in 2013. The caseload rapidly expanded to hundreds of claims, with many alleged victims and witnesses being interviewed in Turkey since war-torn Iraq was deemed too dangerous. Aside from the genuine difficulties of assembling direct evidence in challenging conditions, the process proved expensive and cumbersome, with Iraqis feeling that obstacles to travel to the UK placed them at a clear disadvantage. Limited to prosecuting low-ranking individual soldiers, the inquiry was criticised for failing to pursue systemic issues of accountability higher up the military command chain (e. g. how soldiers were trained and who told them to do what).

10. In 2016 the UK Attorney General commissioned a review of IHAT's systems and processes⁵ and in 2017 a parliamentary defence sub-committee inquiry concluded that IHAT failed to distinguish between credible and non-credible cases and ignored the welfare of soldiers and their families⁶. One army officer claimed that the Ministry of Defence was keen to sacrifice its soldiers in order to cover up lack of training, infrastructure and leadership⁷. A popular feeling emerged that most claims were spurious and undermined the courage and sacrifices of British troops. Professional misconduct on the part of the now-defunct legal firm Public Interest Lawyers (PIL) in gathering and presenting evidence from some claimants was quickly seized on by Defence Minister Michael Fallon, with the support of the prime minister and numerous politicians and officials, to discredit the allegations brought by the firm and to close IHAT.

11. Finally, IHAT was wound down on 30 June 2017. By then it had received allegations relating to 3405 victims, decided not to pursue 1,668 allegations after an initial assessment and was closing 700. The main criteria for closing a case were lack of credible evidence or 'proportionality' (the allegations did not merit further investigative effort given the length of elapsed time). 34 allegations, relating to 108 victims, remained ongoing.

⁵ Sir David Calvert-Smith, [Review of the Iraq Historic Allegations Team](#).

⁶ The Guardian, [Why we may never know if British troops committed war crimes in Iraq](#), 7 June 2018

⁷ Commons Select Committee, [Close IHAT this year and immediately dismiss remaining weak cases](#), 10 February 2017

12. Two cases had been referred for prosecution to the DSP but were abandoned. Another two cases were referred to the RAF Police for further investigation and one soldier was referred to his Commanding Officer for disciplinary action and was fined £3 000. Pending investigations were taken over by the Service Police Legacy Investigations (SPLI - the military police of the armed forces) although information on this body is limited and most remaining cases seem to have been discontinued⁸. By September 2018, it had either closed or was in the processing of closing 1 122 allegations. 144 remained under investigation. The SPLI was expected to complete its work by the end of 2018 but no further information was available at the time of writing this contribution.

13. As a conclusion, costing over £50 million, IHAT failed to secure a single prosecution and the prospect of any serious investigation into alleged war crimes is now remote.

C. Other national mechanisms:

14. The above two inquiries are the most prominent of a variety of legal processes established to address the issue of abuses committed during the Iraq war and occupation⁹. These include investigations by the Royal Military Police, reports conducted by senior military personnel (2008, 2010), a coroner-type, inquest-based process called the Iraq Fatality Investigations (IFI, 2014-2018), and civil suits. Four courts martial led to the conviction of seven soldiers, with most cases either discontinued or resulting in acquittal. IFI has to date investigated a number of deaths and made recommendations in several cases but is not a prosecutorial body¹⁰.

15. The Ministry of Defence (MoD) also conducted investigations into alleged breaches of articles 2 and 3 of the European Convention on Human Rights (ECHR) during military operations in Iraq. The purpose of the investigations was to establish grounds for further inquisitorial inquiry. Over 3,700 cases involving article 3 and more than 100 for article 2 were considered. In all but 5, the decision 'no inquiry' was reached.

D. ICC preliminary examination

16. Partly at the instigation of the European Centre for Constitutional and Human Rights (ECCHR) and PIL, the International Criminal Court (ICC) instituted a 'preliminary examination' of whether detainee abuse was systematic. The preliminary examination of this situation was reopened on 13 May 2014 after being previously concluded in 2006. Since 2006 this has been undertaken with the full engagement of the UK government, which has, however, made it clear that it wants the process to be closed, claiming (a) that the court lacks jurisdiction since the crimes were committed on a small scale, (b) existing judicial measures in the UK complement and therefore preclude such an examination under the ICC's own statutes, and (c) the examination is not based on credible information¹¹.

17. On the issue of complementarity, it should be noted that independent researchers have raised serious concerns about the adequacy of domestic inquiries encumbered by structural constraints,

⁸ Iraq Historic Allegations Team, *IHAT Quarterly update – April to June 2017*, paras 2 – 6.

⁹ Dr Carla Ferstman, Dr Thomas Obel Hansen and Dr Noora Arajärvi, *The UK military in Iraq: efforts and prospect for accountability for international crimes allegations?*, 1 October 2018, p.12.

¹⁰ For more information on the Iraq Fatality Investigations see : <https://www.gov.uk/government/collections/iraq-fatality-investigations>

¹¹ Dr Carla Ferstman, Dr Thomas Obel Hansen and Dr Noora Arajärvi, *The UK military in Iraq: efforts and prospect for accountability for international crimes allegations?*, 1 October 2018, p.25

political opposition and government interference. They also mention the negative impact of the lack of finality of investigations on the soldiers and victims and call into question the government willingness to ensure a genuine justice process¹².

18. In its report on Preliminary Examination Activities 2018, the Office of the Prosecutor of the ICC, announced that it expected to finalise its admissibility assessment in the near future¹³.

FIACAT and ACAT UK invite the Committee against torture to recommend to the UK to:

- *Ensure that all perpetrators of torture and ill-treatment are adequately prosecuted and punished in proportion with the gravity of the act and that effective reparation is granted to all victims.*

¹² *Ibid.*, p.50.

¹³ The Office of the Prosecutor, [Report on Preliminary Examination Activities – 2018](#).