

# The Iraq Abuse Allegations and the Limits of UK Law

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☞ Armed forces; Human rights; Iraq; Judicial decision-making; Jurisdiction; Justiciability; Politics and law; Right to effective remedy

Allegations of unlawful killing and systemic abuse of Iraqi civilians by the British Army in Iraq between 2003 and 2009 have attracted persistent attention over the past 15 years.<sup>1</sup> But amidst all the hyperbole of political and press representation of the affair, there has been remarkably little analysis of the efficacy and limits of public law as a means of holding the state and its officials accountable for its involvement in and response to alleged multiple and potentially systemic violations of fundamental human rights standards. This is surprising given the numerous public law issues that have arisen.

In this article, I attempt to redress this relative absence so as to interrogate the relationship between law and politics in this particularly charged field of overseas military operations. In doing so, I also consider whether this may shine some light on the current state of public law in general: in other words, I ask to what extent the case of the Iraq allegations is reflective of a legal system ill-structured to achieve accountability for (systemic) human rights violations.

To deal with these matters, I first review the history of fragmented government legal responses to the Iraq allegations since 2003. This can be divided into four distinct but overlapping phases. From initial preference for criminal justice processes and a general denial of jurisdiction to a convoluted investigative procedure overseen by a deferential court, I chart how the law has been deployed within a changing political environment.

Second, I then question whether this history reflects inherent limitations of UK public law as a means of ensuring government accountability and official responsibility for human rights abuses at one of its margins, namely conduct of state agents engaged in overseas military action particularly vis-à-vis allegations of systemic violations. I examine four issues that lie at the heart of the relationship between law and politics in this respect and which, like the four phases mentioned above, are inter-related: jurisdiction, justiciability, judicial deference and the availability of effective remedies. In this context, I query whether accountability (if not responsibility) for alleged serious wrongs committed by the state has been stalled for want of politics *and* law. And I ask if there has been undue deference

\* I am grateful for comments received at readings of an earlier version of this article at the Lauterpacht Institute for International Law, University of Cambridge. Comments by an anonymous reviewer and the editor were also greatly appreciated. All responsibility remains in the hands of the author.

<sup>1</sup> "The Iraq allegations" is used for ease of reference.

to the executive and Parliament, allowing government to determine how allegations should be investigated or how proven wrongdoings might be remedied.

Finally, whilst recognising the particularity of the Iraq allegations, I question whether this complicated affair casts doubt on the capacity of public law processes as a whole to resolve even substantiated claims of systemic violations of human rights levelled against British institutions of state. In other words, is this case reflective of principles, structures and processes of public law that enable politics to trump rights at every legal stage? If so, does it represent a general incapacity or weakness of law in the UK for the protection and enforcement of recognised human rights norms?

## The phases of legal response

The phases I outline are not exact categorisations: they intersect both in time and substance. Nonetheless, they assist in assessing the developing character of the legal responses to the Iraq allegations, in particular those regarding the systemic elements that have emerged.<sup>2</sup> Some reminder of the factual detail along the way is necessary.

### *First phase: jurisdictional denial*

Reports of unlawful killings and ill-treatment by British Forces emerged soon after the invasion of Iraq turned into occupation in May 2003. Though partial governmental acknowledgement of wrongdoing was forthcoming in some cases, these were presented as isolated, atypical and exceptional. They were treated (in so far as they were treated at all) through normal individualised criminal law processes of military investigation (by the Royal Military Police (RMP) or unit commanding officer) and, should it be necessary, army disciplinary procedures or prosecution (ultimately court martial). Embarking on that legal path meant political and media enquiry was constrained, having to leave scrutiny to standard military justice procedures.

The initial allegations centred on the treatment of Iraqis detained on grounds of security.<sup>3</sup> Installations such as Abu Ghraib and Camp Bucca and military bases throughout Iraq were used by the US and UK as holding and interrogation centres.<sup>4</sup> Stories of abuse there were first reported by Amnesty International, who alleged torture by US personnel at Abu Ghraib prison from July 2003.<sup>5</sup> In 2004, the *Wall Street Journal* revealed a confidential report by the International Committee of the Red Cross (ICRC) criticising the methods of detention and interrogation as “serious violations of international humanitarian law”.<sup>6</sup> Both American and British

<sup>2</sup> Stan Cohen describes such practices as “spatial isolation” in his typology of governmental denial of multiple human rights violations committed by state agents. See S. Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Cambridge: Polity, 2001).

<sup>3</sup> See Brian J. Bill, “Detention Operations in Iraq: A View from the Ground” in Raul A. Pedrozo (ed.), *The War in Iraq: A Legal Analysis* (Department of Defense, 2010), International Law Studies Vol.86.

<sup>4</sup> See Philip Gourevitch and Errol Morris, *Standard Operating Procedure: A War Story* (London: Picador, 2008) and Jack Fairweather, *A War of Choice: The British in Iraq 2003–9* (London: Jonathan Cape, 2011).

<sup>5</sup> Amnesty International, Iraq: A Decade of Abuses (11 March 2013), Amnesty International, <https://www.amnesty.org/en/documents/MDE14/001/2013/en> [Accessed 17 April 2018].

<sup>6</sup> *The Wall Street Journal*, 7 May 2004.

forces were censured. In May 2004, *The Times* recorded that the UK Ministry of Defence (MoD) were aware of such allegations from as early as May 2003.<sup>7</sup>

The death of Baha Mousa in British Army custody in Basra in September 2003 was one of the cases highlighted by the ICRC.<sup>8</sup> Disquiet related not just to the killing but also to the sustained ill-treatment of detainees that reportedly bore resemblance to interrogation techniques amounting to torture, inhuman or cruel treatment that had been banned by the UK Government in 1972 following their unlawful use in Northern Ireland. The MoD confirmed that the matter was in the hands of the RMP but denied that the European Convention on Human Rights (arts 2 and 3 particularly) imposed any specific investigative duties vis-à-vis operations in Iraq.

This denial of human rights jurisdiction was maintained when, in March 2004, an application was brought before the High Court on behalf of Mousa's family for a judicial review into the RMP investigation, claiming the Human Rights Act (HRA) *did* apply and the UK had failed in its human rights duties to carry out a sufficiently timely and independent inquiry into his death in custody.<sup>9</sup> Five other civilian deaths (involving alleged killings *outside* custody) were brought at the same time in *Al Skeini*, which became a test case to determine jurisdiction issues. Separate applications for judicial review were also registered for a number of other allegations soon after.<sup>10</sup>

A small number of courts martial followed. Convictions, even for junior ranks, were rare reinforcing fears that the Army was incapable of properly and fully investigating and prosecuting its own.<sup>11</sup> Concerns about what was known or sanctioned or tolerated by senior officers in the field and further up the command chain, particularly regarding the ill-treatment of suspected “looters”, the handling of detainees and interrogation techniques, could not be (and were not) confronted in these occasional criminal proceedings. This provoked political and press criticism. The Intelligence and Security Committee of Parliament investigated the issue of detainee treatment in Iraq (as well as Afghanistan and Guantanamo Bay) in 2005 though not for Army personnel in general only intelligence staff. It found that these operatives “were not sufficiently trained in the Geneva Conventions” and “were not aware of the interrogation techniques that the UK had specifically banned”.<sup>12</sup> Disapproval reached a relative crescendo in 2006–07 when seven soldiers were court martialled in relation to the Mousa case, but only one (Corporal Donald

<sup>7</sup> *The Times*, 10 May 2004, p.4.

<sup>8</sup> See *The Wall Street Journal*, 7 May 2004 and *The Times*, 4 October 2003, p.4.

<sup>9</sup> *R. (on the application of Al-Skeini) v Secretary of State for Defence* [2004] EWHC 2911 (Admin); [2005] 2 W.L.R. 1401 DC; [2005] EWCA Civ 1609; [2007] Q.B. 140 CA (Civ Div).

<sup>10</sup> For instance, Ahmed Jabber Kareem Ali, a 15 year old boy, suspected of looting, drowned in the Shat' al-Arab waterway after being forced into the water by British troops and left despite being in obvious difficulty (“UK soldiers ‘saw Iraqi boy drown’” (2 May 2006), *BBC News*, <http://news.bbc.co.uk/1/hi/uk/4966046.stm> [Accessed 17 April 2018]); Nadhem Abdullah died of a fractured skull and brain haemorrhage after being stopped and searched and allegedly assaulted by soldiers of the Parachute Regiment (O. Bowcott, “Brutal attack by soldiers left innocent Iraqi dead, court told”, *The Guardian*, 6 September 2005, <https://www.theguardian.com/uk/2005/sep/06/world.iraq> [Accessed 17 April 2018]); Iraqi “looters” were photographed being abused in various disturbing (including sexual) ways at Camp Breadbasket in May 2003 (*Guardian's* “special report” at <http://www.theguardian.com/Iraq/breadbasket/0,15804,1419469,00.html> [Accessed 17 April 2018]).

<sup>11</sup> In 2005, two junior soldiers were convicted for the Camp Breadbasket abuse, see A. Gillan, “Four guilty, but questions remain”, *The Guardian*, 24 February 2005, <https://www.theguardian.com/uk/2005/feb/24/iraq.military> [Accessed 17 April 2018].

<sup>12</sup> Intelligence and Security Committee, *The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq* (TSO, 2005), Cm.6469, para.120, p.31.

Payne) was convicted, having already pleaded guilty to inhumane treatment.<sup>13</sup> No one was found responsible for the killing.<sup>14</sup> The case established, nonetheless, that abusive techniques had been regularly used by the Army unit concerned and may have been sanctioned higher up the command chain, a factor in the acquittal of some of the accused.

Despite media unease, the government refused to open up any of the existing or emerging claims (including the Baha Mousa case) to independent and general legal scrutiny. It maintained its denial of HRA jurisdiction. Instead, it conducted an internal Army review.<sup>15</sup> Brigadier Robert Aitken finally reported in 2008 that there had been several cases of “deliberate abuse” but these were the product of rogue soldiers not a systemic issue.<sup>16</sup>

The *Al Skeini* litigation eventually reached the House of Lords in 2007, where it was held the HRA and the ECHR did *not* generally and automatically apply to the occupation. Where an Iraqi citizen was taken into custody, however, the substantive and procedural obligations of arts 2 and 3 ECHR *were* applicable on the grounds that the abuse had occurred within UK jurisdiction. Specifically, it was found that the investigation into the Mousa case was inadequate and the government’s responses not ECHR compliant.<sup>17</sup> That was as much as the court could achieve. The government was placed under no judicial pressure to rectify or investigate any human rights failure other than in Mousa’s case. The other five claims in the litigation were denied on jurisdictional grounds and appeals to the European Court of Human Rights (ECtHR) ensued.

Another judicial review case was then launched, *Al Jedda*, involving a British citizen who alleged protracted unlawful detention in Iraq.<sup>18</sup> Although the House of Lords accepted art.5 ECHR applied, given that the appellant was again within the UK’s jurisdiction, it also accepted that detention was lawful on the ground suggested by the government, namely that of security.

### *Second phase: politically-constrained public inquiry*

The second phase of legal response developed as a product of the *Al Skeini* and *Al Jedda* decisions. Judicial review applications for similar fact allegations of ill-treatment within UK jurisdiction gradually increased. But even though issues of poor training, banned interrogation techniques and inadequate investigations had already been established, the government was placed under no legal pressure to look deeper at these or other systemic concerns.<sup>19</sup> Whatever action was taken was a matter of political choice. In Baha Mousa’s case alone, the government acknowledged that there had been a failure of substantive and procedural obligations following the *Al Skeini* judgment. Consequently, in May 2008, five years after the

<sup>13</sup> The charge of manslaughter against Payne was dismissed.

<sup>14</sup> The Judge Advocate noted that many soldiers who gave evidence had “closed ranks” making conviction impossible: *The Guardian*, 26 January 2008.

<sup>15</sup> *Hansard*, col.65WS (25 January 2008), Written Ministerial Statement by Des Browne Secretary of State for Defence.

<sup>16</sup> Ministry of Defence, *The Aitken Report: An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004* (TSO, 2008).

<sup>17</sup> *R. (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 A.C. 153.

<sup>18</sup> *R. (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; [2008] 1 A.C. 332.

<sup>19</sup> The Armed Forces Act 2006 reshaped processes of military investigation and prosecution. It also introduced limits to the powers of commanding officers to deal with allegations of wrongdoing within unit disciplinary processes.

killing, the Defence Secretary announced a limited judicial public inquiry under the Inquiries Act 2005.<sup>20</sup> No mandate was given, however, to examine other cases, though the inquiry would consider how banned interrogation techniques had been adopted as part of the general detainee handling process.

Another judicial review then attracted public attention. In the *Al-Sweady* case, the claimant was the uncle of a man killed by British troops in the “Battle of Danny Boy” in May 2004.<sup>21</sup> Various allegations were made, including that captured Iraqi fighters had been killed or ill-treated in British custody. Though the allegations were vehemently denied by the MoD, the judicial review claimed there had been insufficient investigation into the matter by the authorities.<sup>22</sup> The court condemned the MoD’s failure to disclose relevant documents and held that the investigation by the Army into the allegations was “not thorough or proficient” and ordered that a proper enquiry be undertaken.<sup>23</sup> The manner of that enquiry was again left in the hands of the government. In November 2009, the MoD chose to respond through another protracted public inquiry.<sup>24</sup>

The holding of the Baha Mousa and Al-Sweady inquiries did not change significantly the basic legal model evident in the first phase. Individual judicial review claims remained the only practicable route for legal examination of any alleged human rights violation. No other independent public institution was available to channel or consider patterns of actions that may or may not have pointed to systemic problems. The ad hoc inquiries ordered were restricted to their referred specific allegations, at least in terms of fault-finding, though the inquiry chairs were free to make general recommendations about “lessons to be learned”, potentially having a bearing on similar-fact cases and systemic issues.

Although both inquiries considered Army training and standard operating procedures regarding detainees, there was no co-ordination between them. Neither was empowered to consider any cases other than those before them, making impossible attributing responsibility for systemic issues that otherwise might have become apparent. In this respect, the acknowledgement of wrongdoing remained partial and the jurisdiction assumed determined strictly by the executive. This is by no means an unfamiliar critique of public inquiries in general.<sup>25</sup>

The Baha Mousa Inquiry report, delivered in 2012, was nonetheless an indictment of those involved in the killing and the interrogation and handling techniques adopted by the Army which were contributory factors in Mousa’s death. Hooding and “conditioning”, techniques to weaken the resistance of detainees prior to interrogation, were the same as used in Northern Ireland in the early 1970s and publicly banned in 1972 by the Conservative administration. The inquiry described this as a “lost doctrine”. But the chair, Sir William Gage, concluded that it was “unnecessary and inappropriate to blame or apportion blame to any individuals.

<sup>20</sup> *Hansard*, col.60WS (14 May 2008), Secretary of State for Defence, Written Parliamentary Statement on Mr Baha Mousa.

<sup>21</sup> *R. (on the application of Al-Sweady) v Secretary of State for the Defence* [2009] EWHC 2387 (Admin).

<sup>22</sup> See “Genesis of the Inquiry” in the *Al-Sweady Report*. Ministry of Defence, *Al-Sweady Inquiry Report* (TSO, 2014), available at <https://www.gov.uk/government/publications/al-sweady-inquiry-report> [Accessed 17 April 2018].

<sup>23</sup> Failure to hand over relevant papers was described as “lamentable” by the court. Evidence given by the senior RMP officer as the government’s witness to discuss disclosure, was called “unsatisfactory” and “seriously flawed”: *Al-Sweady* [2009] EWHC 2387 (Admin) at [8] and [58].

<sup>24</sup> *Hansard*, col 82WS (25 November 2009), Bob Ainsworth, Written Statement to the House of Commons.

<sup>25</sup> See Mark Elliott and Robert Thomas, *Public Law* 2nd edn (Oxford: Oxford University Press, 2014), pp.662–665.

It would also, in my opinion, be unfair to do so”.<sup>26</sup> He reported that the MoD had “conceded that there were corporate failures” which had arisen over “a lengthy period of time and involved a combination of failings and missed opportunities, some more serious than others”.<sup>27</sup>

This was as far as the inquiry went in determining responsibility for an established and proven serious systemic failure, one which contributed to serious human rights violations of potentially numerous civilians before doctrine was reformed. It did not provoke any commitment to investigate further as to when and where the abusive practices were used in Iraq. Indeed, it provided a blanket defence to *any* government or military official involved in the use of such illegal practices—all could point to the “lost doctrine” that Gage held was unattributable.<sup>28</sup>

Only when the ECtHR delivered its judgment in *Al Skeini* and *Al Jedda* in 2012, holding that the ECHR should apply to British Iraq operations in its exercise of “some of the public powers normally to be exercised by a sovereign government”, that the obligation for the UK to undertake full and proper inquiries into *all* alleged killings and ill-treatment by the armed forces, was finally resolved.<sup>29</sup> The decisions extended jurisdiction and opened the way for allegations to be addressed regardless of whether or not occurring in custody. The UK was obliged to conduct independent investigations, bringing prosecutions where the evidence merited it, involving the victims or their families, informing the public of what had happened and examining any evidence that pointed to systemic wrongs. It was nonetheless for the government to decide how to remedy these breaches both individually and systemically. The choice made introduced a third phase of legal response.

### *Third phase: return to criminal justice model*

Multiple judicial review applications made before and after the Baha Mousa Inquiry findings (and rendered superficially credible by its results, particularly the finding that various ill-treatment methods were the result partly of a corporate failure), together with the ECtHR’s judgments, required a government reaction. But rather than open up potential systemic abuses to general public scrutiny, a return to an exclusive criminal justice model was pursued.

In March 2010, the MoD established the Iraq Historic Allegations Team (IHAT) to investigate the mounting claims and fulfil the procedural requirements of the ECHR.<sup>30</sup> The alternative of an over-arching public inquiry was specifically denied, though not ruled out entirely “should serious and systemic issues emerge from

<sup>26</sup> Baha Mousa Inquiry, *The Report of the Baha Mousa Inquiry Volume II* (TSO, 2011), HC 1452-II, para.5.151, available at <https://www.gov.uk/government/publications/the-baha-mousa-public-inquiry-report> [Accessed 17 April 2018].

<sup>27</sup> Baha Mousa Inquiry, *The Report of the Baha Mousa Inquiry Volume II*, para.5.151, available at <https://www.gov.uk/government/publications/the-baha-mousa-public-inquiry-report> [Accessed 17 April 2018].

<sup>28</sup> Johnny Mercer MP posited just such a defence in the Defence Sub-committee report, *Who guards the guardians? MoD support for former and serving personnel*, *Sixth Report of Session 2016–17* (TSO, 2017), HC 109.

<sup>29</sup> *Al Skeini v United Kingdom* (2011) 53 E.H.R.R. 18 at [149]. The limits of jurisdiction remain in dispute: see the Court of Appeal ruling in *R. (on the application of Al-Saadoon) v Secretary of State for Defence* [2016] EWCA Civ 811; [2017] Q.B. 1015. Nonetheless, by November 2015 the MoD’s had paid out £19.6 million settling 323 claims for unspecified human rights violations. Ministry of Defence, “20151109 — Compensation Payments Made to Civilian Nationals, UK Service Personnel and the Families of UK Service Personnel as a Result of the Conflicts in Afghanistan and Iraq” (9 November 2015), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/476727/20151109-FOI2015-06481-RESPONSE-O.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/476727/20151109-FOI2015-06481-RESPONSE-O.pdf) [Accessed 17 April 2018].

<sup>30</sup> *Hansard*, HC col.93WS (1 March 2010) Written Ministerial Statements.

IHAT's investigations that might justify it".<sup>31</sup> As the number of allegations (particularly of ill-treatment in detention) then continued to increase, the lawyers acting for the majority of complainants brought a judicial review in *Ali Zaki Mousa (No.2)* arguing that only an over-arching public inquiry could fulfil the state's duties to uncover the truth of any systemic wrongdoing.<sup>32</sup>

The court accepted that the UK was not fulfilling its art.2 investigative obligations, pointing to the absence of any convictions and a lack of expertise, focus and direction.<sup>33</sup> The Iraq Historic Allegations Team was criticised for "recurring slippage" in its investigations,<sup>34</sup> the processes adopted being inaccessible for the public "on the broader issues of State responsibility",<sup>35</sup> the families of the deceased having not been sufficiently (or at all) involved,<sup>36</sup> and the MoD's steps "to deal with wider and systemic issues" not being "public or subject to independent scrutiny".<sup>37</sup>

Despite these failings, the court refused to "impugn" the Secretary of State's decision not to order an inquiry on the basis that it would be "extremely lengthy and open-ended" and too costly.<sup>38</sup> It noted, unfavourably, the delays of other unrelated inquiries, inferring that the perceived failures of these procedures made the Iraq claims (which appeared more widespread, complex and occurring over several years) even less likely to succeed.<sup>39</sup> The court thus left IHAT to continue its case-by-case criminal inquiries but recommended a coronial process for each of the individual "death cases" (as they were inelegantly called) that had already been dismissed in previous courts martial but were now damned as suffering from inadequate investigation. Article 3 allegations (deemed less important) were reserved for IHAT to pursue at its discretion.

After that decision in 2013, IHAT continued to undertake enquiries with a designated judge reviewing progress and deciding individual questions of jurisdiction. The caseload quickly reached over 1,500 matters.<sup>40</sup> However, no prosecutions followed. Even in Baha Mousa's case, where IHAT announced in September 2013 that it was pursuing "new lines of inquiry" following the Baha Mousa Inquiry report, nothing has been heard since.

Aware of its responsibilities to consider systemic matters, the MoD nevertheless established an internal Systemic Issues Working Group (SIWG) "identifying, reviewing, and correcting areas where doctrine, policy and training have been insufficient to prevent practices or individual conduct that breach its obligations

<sup>31</sup> *Hansard*, HC col.27WS (1 November 2010) Written Ministerial Statements. A successful judicial review found that IHAT was insufficiently independent given that the RMP, who provided the personnel for investigations, were too intimately connected with the serving forces in Iraq. The Royal Naval Police replaced them: see *R. (on the application of Ali Zaki Mousa) v Secretary of State for Defence (No.1)* [2011] EWCA Civ 1334.

<sup>32</sup> *R. (on the application of Ali Zaki Mousa) v Secretary of State for Defence (No.2)* [2013] EWHC 1412 (Admin); [2013] H.R.L.R. 32.

<sup>33</sup> *Mousa (No.2)* [2013] EWHC 1412 (Admin); [2013] H.R.L.R. 32 at [184].

<sup>34</sup> *Mousa (No.2)* [2013] EWHC 1412 (Admin); [2013] H.R.L.R. 32 at [187].

<sup>35</sup> *Mousa (No.2)* [2013] EWHC 1412 (Admin); [2013] H.R.L.R. 32 at [188].

<sup>36</sup> *Mousa (No.2)* [2013] EWHC 1412 (Admin); [2013] H.R.L.R. 32 at [190].

<sup>37</sup> *Mousa (No.2)* [2013] EWHC 1412 (Admin); [2013] H.R.L.R. 32 at [194].

<sup>38</sup> *Mousa (No.2)* [2013] EWHC 1412 (Admin); [2013] H.R.L.R. 32 at [4].

<sup>39</sup> Reasoning for refusing an inquiry was set out at *Mousa (No.2)* [2013] EWHC 1412 (Admin); [2013] H.R.L.R. 32 at [198]–[211].

<sup>40</sup> IHAT, *Iraq Historical Allegations Team (IHAT), Quarterly Report* (TSO, 2016), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/545281/20160725-IHAT-Quarterly\\_Update\\_website\\_Jun16.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/545281/20160725-IHAT-Quarterly_Update_website_Jun16.pdf) [Accessed 17 April 2018].

under international humanitarian law”.<sup>41</sup> It has no mandate to identify persons responsible for any systemic issues it might uncover. Accountability is limited to noting “gaps in doctrine, policy and training” and checking whether those gaps have been filled. Its function is restricted to fulfil the “lessons learned” component of the Convention procedural duties.<sup>42</sup> It explicitly excludes examining “intentional breaches” of doctrine, which are deemed *not* to be systemic issues.<sup>43</sup>

The Iraq Fatalities Investigations (IFI) was then instituted in 2013 in order to fulfil the coronial duties demanded in *Ali Zaki Mousa (No.2)*. Sir George Newman was appointed as chair with the remit that he must *not* “consider issues of individual or collective culpability, and no prosecutions will result from his examination of these cases”.<sup>44</sup> Several killings have been referred and reported on to date with variable outcomes.<sup>45</sup> Only one, the killing of Kareem Ali, a 15 year old boy arrested in May 2003 by members of the Irish Guards on suspicion of looting, might lead to consideration of a systemic matter. Newman decided that abusive processes of dealing with suspected looters in Basra was seriously questionable and announced he would examine the broader issue to determine whether the practices were a routine mode of punishment known and tacitly accepted by senior commanders. There is, however, still no means for collective culpability to be assessed through this process.

#### *Fourth phase: institutional denial*

The government’s approach to the multiple allegations and the role of law arguably entered a fourth phase in 2014. General and principled denial of systemic wrongdoing was now accompanied by a demonisation of those lawyers who had brought judicial review or civil compensation claims on behalf of Iraqis. Although only two law firms were involved (Public Interest Lawyers and Leigh Day & Co) the narrative of “left wing activist lawyers” establishing an industry of false claims became entrenched. The full force of the criminal law was still promised in the (unlikely) event of allegations being proven to be true. But, ironically the established processes for uncovering that “truth”, most notably IHAT, was simultaneously condemned politically and in the press for giving excessive credence to the claims made and pursuing investigations of ex-service people in reportedly intrusive ways.

<sup>41</sup> See MoD, “Systemic Issues identified from Investigations into Military Operations Overseas, July 2014”, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/327180/Systemic\\_Issues\\_identified\\_from\\_investigations\\_into\\_military\\_operations\\_overseas.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/327180/Systemic_Issues_identified_from_investigations_into_military_operations_overseas.pdf) [Accessed 17 April 2018].

<sup>42</sup> MoD, “Systemic Issues identified from Investigations into Military Operations Overseas, July 2014”, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/327180/Systemic\\_Issues\\_identified\\_from\\_investigations\\_into\\_military\\_operations\\_overseas.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/327180/Systemic_Issues_identified_from_investigations_into_military_operations_overseas.pdf) [Accessed 17 April 2018], p.3

<sup>43</sup> See Systemic Issues Working Group, *Annual Report 2016* (TSO, 2017), fn.1.

<sup>44</sup> See Ministry of Defence, Letter to Sir George Newman (Confirmation of Appointment) (23 December 2015), available at [http://www.iraq-judicial-investigations.org/linkedfiles/ahmed\\_ali/key\\_documents/letterofappointmentandtermsofreference\(ahmedjabbarcareemali\).pdf](http://www.iraq-judicial-investigations.org/linkedfiles/ahmed_ali/key_documents/letterofappointmentandtermsofreference(ahmedjabbarcareemali).pdf).

<sup>45</sup> In Nadheem Abdullah’s case, use of excessive force was found to have led to his death. In Hassan Said death had resulted from soldiers acting in self-defence. See The Iraq Fatality Investigations, *Consolidated Report into the Death of Nadheem Abdullah and the death of Hassan Abbas Said* (TSO, 2015), Cm.9023, available at <http://www.iraq-judicial-investigations.org/linkedfiles/reports/consolidatedreportintothedeathsofnadheemabdullahandhassansaid.pdf> [Accessed 17 April 2018]. The case of Muhammad Salim also found that the shooting was likely an act of self-defence. See The Iraq Fatality Investigations, *Report into the Death of Muhammad Abdul Ridha Salim* (TSO, 2016), Cm.9238, para.6.40, available at [http://www.iraq-judicial-investigations.org/linkedfiles/reports/reportintothedeathofmuhammadsalim\(accessible\)part1.pdf](http://www.iraq-judicial-investigations.org/linkedfiles/reports/reportintothedeathofmuhammadsalim(accessible)part1.pdf) [Accessed 17 April 2018].

The political position hardened when the Al-Sweady Inquiry reported that although aspects of the Army's detention of Iraqi detainees concerned "amounted to actual or possible ill-treatment", the most serious allegations of unlawful killing and torture were rejected as "wholly and entirely without merit or justification".<sup>46</sup> It established that evidence given by a number of "Iraqi witnesses [was] unprincipled in the extreme". Michael Fallon announced regret that "instances of ill-treatment"<sup>47</sup> had occurred but laid the blame for the "protracted nature and £31 million cost of this unnecessary public inquiry" on the Iraqi detainees and the two legal firms who represented them (PIL and Leigh Day & Co). Despite acknowledging that the inquiry resulted from the MoD's disclosure failings in the earlier judicial review, Fallon accused the lawyers of failing to disclose a vital document which would have shown the detainees to be members of an insurgent force (not civilians) and which would have, in his opinion, led to the denial of legal aid received by the claimants. Fallon announced that both firms were to be referred to the SRA for their alleged misconduct.

The charges of ethical breaches coupled with the Al-Sweady findings allowed the government's assumption that the Iraq allegations were generally spurious and the product of malice and greed to become the dominant narrative.<sup>48</sup> When a number of the accusations of ethical breaches laid against Phil Shiner (principal of PIL) were either admitted or finally proven in 2017, he was struck off the roll of solicitors. Those claims brought by PIL were then treated as wholly discredited. The government said the allegations were largely lacking in hard evidence, were the product of enticement by local agents, and all with the intent to malign the British Army. IHAT was therefore to be closed down. Even the 300 cases settled by the government (details of which have never been revealed) were presented as arising from nothing more than unlawful detention. The limited space for public examination of individual *and* systemic wrongs (as envisaged by the court in *Ali Zaki Mousa (No.2)*) was thus further curtailed. When Leigh Day & Co solicitors were acquitted of all charges laid against them before the Solicitor's Disciplinary Tribunal, the government's position did not change. Deflecting all outrage to the conduct of solicitors was entrenched. Whether or not this will preclude legal analysis of systemic wrongs in the future, as part of some criminal or judicial review proceedings, remains to be seen.

## The limits of law

What does this four phase history tell us about the capacity of public law to confront allegations of systemic violations of human rights by state institutions in situations of overseas military action? What, if anything, does it also have to say about the current state of the relationship between law and politics?

These questions inevitably engage long-standing constitutional debates about the appropriateness of when and to what extent the judiciary should intervene in the exercise of power by the executive and the legislature. Matters of jurisdiction,

<sup>46</sup> Ministry of Defence, *Al-Sweady Inquiry Report*, paras 5.196–5.198.

<sup>47</sup> See *Hansard*, HC Vol.589, col.1407 (17 December 2014).

<sup>48</sup> See Ministry of Defence, "IHAT: What it is and what it does" (13 January 2016), *Defence in the Media blog*, <https://modmedia.blog.gov.uk/2016/01/13/ihat-what-it-is-and-what-it-does> [Accessed 17 April 2018]: "This Government has consistently voiced concerns about the volume of sometimes spurious claims made against our service people and believes the legal firms involved have questions to answer over their role in the current situation."

justiciability, judicial deference and the availability of effective remedies all have relevance here. The Diceyan vision of parliamentary sovereignty, minimally constrained, may remain an underpinning feature of these debates, demonstrating a persistent preference for politics, but it is also common ground that there has developed over the past few decades a willingness for the judiciary to loosen those constraints in favour of the protection of human rights.<sup>49</sup> The HRA made this significantly more possible and has focused minds since on the rightfulness of judicial intervention. Whether or not this has alone shifted the balance too far towards law and judicial activism, weakening the coherence of the rule of law as a “necessary but not sufficient condition” for protecting “civic virtues” such as freedom and justice, is debatable.<sup>50</sup> This is an inevitable tension when the law is given the opportunity to judge politics within a state.

But whatever the contemporary arguments regarding this relationship, it seems uncontroversial to claim that public law should provide for some independent oversight of the executive in a modern functioning democracy. Nor does it seem controversial to claim that this, in part, should involve a process whereby government is held to account whenever credible allegations of the most serious violations of human rights come to light. Whether that would accord with a rights-based approach to public law is perhaps beside the point.<sup>51</sup> Even if there may be strong arguments against judicial interference in the operational matters of the military or security services (on the grounds that they have to be unfettered in the interests of the protection of the nation) and even if complex social questions of fundamental values may be arguably better considered by political rather than judicial means, the presence of credible allegations of systemic rights violations would for most be an exception allowing judicial and/or public scrutiny. Specifically that would accord with the recognised procedural requirement for independent review in the matter of examining state responsibility for breaches of arts 2 and 3 ECHR.<sup>52</sup> Even where there is doubt over the veracity of some of the substantive claims, the principle of taking their investigation seriously by according with such procedural human rights norms is firmly established in law.

The question then is the degree to which responses to the Iraq allegations are reflective of what Conor Gearty describes as “judicial restraint” on the one hand and/or “judicial deference” on the other. The former relates to the judiciary’s autonomous determination that a matter lies outside the “competence of the judicial branch to adjudicate”.<sup>53</sup> The latter, a recognition that even where competence is not in issue, the courts *should* defer to Parliament and the executive on the basis that those institutions are best placed to decide how to respond to any particular contentious issue. Both of these responses have been prominent across the four phases I outlined in the previous section. They have manifested themselves through contestation over both jurisdiction and justiciability ever since the *Al Skeini* litigation began. For the former, there is little doubt that the government’s position was that human rights had no relevance to the Iraq invasion or occupation. It was

<sup>49</sup> See for instance Martin Loughlin, “Rights, Discourse and Public Law Thought in the UK” in Gavin Anderson (ed.), *Rights and Democracy: essays in UK-Canadian Constitutionalism* (London: Blackstone Press, 1999), p.193.

<sup>50</sup> J. Laws, “The Rule of Law—form or substance” (2007) 4 *Justice Journal* 24.

<sup>51</sup> For a critical review see Thomas Poole, “Legitimacy, Rights and Judicial Review” (2005) 25(4) *O.J.L.S.* 697.

<sup>52</sup> See *R. (on the application of Amin) v Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 A.C. 653 at [31].

<sup>53</sup> Conor Gearty, *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2015), p.119.

the common political and governmental legal position that UK law had very little purchase in overseas military operations. If there was any doubt about the domestic position, *CND v Prime Minister* established in 2002 that the courts had no jurisdiction over the decision to go to war and lacked the competence to intervene in such a matter.<sup>54</sup> If any alleged wrongdoing by state agents in the conduct of hostilities occurred, this would be the preserve of individual criminal processes governed by military law. The only recognised caveat to that was (and remains) contained in the International Criminal Court Act 2001, which gives the Attorney General power to authorise criminal proceedings against any military or command personnel for committing one of the three acknowledged international crimes (war crimes, genocide and crimes against humanity). But there was no governmental acceptance that human rights norms (those contained within the ECHR) and by extension public law had any role to play. The decision whether to investigate or institute prosecutions for either individual criminal proceedings or suspected (though continuously denied) systemic wrongdoing remained wholly the preserve of the established military legal process.

The courts have been generally compliant with this jurisdictional approach. However, this has sat uneasily within the developing human rights respecting culture of public law. The assumption that there are “no category of decisions *a priori* beyond the scope of review” (though the standard may vary depending on circumstances), as Paul Daly suggests, and that there should therefore be no “no-go areas” for the application of legal scrutiny of executive action on human rights related grounds, has become an established doctrine providing a strong counterweight to denials of jurisdiction.<sup>55</sup> Of course, that does not mean, and has not meant, the judiciary is prepared to interrogate any and all executive decisions. In *R. (on the application of Gentle) v Prime Minister* the House of Lords recognised the need for restraint in intervening in “matters of high policy” (the decision to go to war) without ruling out intervention altogether.<sup>56</sup> Nonetheless, merely determining whether a matter is within the competence of the courts and thus justiciable provides a moment for reflection as to whether any particular matter is appropriate for judicial scrutiny. Though this “moment” might encourage judicial wariness as regards intruding on political questions, the court’s competence in examining human rights standards is taken as read. Indeed, Daley suggests the dangers for the judiciary in avoiding “the ‘moral cost’ of the law” failing to subject “possibly illegal state actions to judicial scrutiny” has proven to be a strong incentive to examine allegations of human rights abuse even in traditionally non-justiciable areas.<sup>57</sup> So, in *Abbasi*, the court showed its willingness to adjudge any government decisions where human rights were in issue.<sup>58</sup> The Court of Appeal in *Al Rawi* also recognised the capacity as well as importance of doing so, stating that the “force which seeks to press the courts into this area [foreign affairs], and within it to

<sup>54</sup> *Re Campaign for Nuclear Disarmament* [2002] EWHC 2759 (Admin).

<sup>55</sup> Paul Daly, “Justiciability and the ‘political question’ doctrine” [2010] P.L. 160.

<sup>56</sup> *R. (on the application of Gentle) v Prime Minister* [2008] UKHL 20; [2008] 1 A.C. 1356 at [8].

<sup>57</sup> Daly, “Justiciability and the ‘political question’ doctrine” [2010] P.L. 160, 163.

<sup>58</sup> *R. (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; [2003] U.K.H.R.R. 76.

exercise a robust independent judgment, is the legal and ethical muscle of human rights”.<sup>59</sup>

The court certainly found little difficulty in establishing in *Al Skeini* that allegations of breaches of substantive and procedural aspects of the right to life and right not to be subjected to torture and ill-treatment occurring within the confines of UK territory (deemed to include UK military bases or vehicles), fell within its jurisdiction and were justiciable. However, the effect was twofold: it reinforced the *exceptional* nature of this intervention (restricting jurisdiction to very limited situations); and it maintained the *individualised* nature of its review. In other words, the court would only consider matters of principle in the light of the specific circumstances of an individual victim. The ECtHR’s *Al Skeini* ruling may have expanded the notion of extraterritorial jurisdiction of the ECHR to any geographic location under the command and control of a signatory state, but this did not alter the exceptional and individualised character of legal involvement.

Even so, the ECtHR’s intervention and the various actions brought against the MoD over the last dozen years (including on behalf and for the benefit of army personnel as well as Iraqi civilians) has caused some to argue a juridification of the armed forces through this human rights channel has developed. A new “legal context” is said to exist, one which favours a putative rights-based approach of public law over traditional military autonomy which was previously absent of judicial scrutiny or critique.<sup>60</sup> (In *Smith v Ministry of Defence*, for instance, the Supreme Court held that service personnel carried the protection of UK human rights law wherever they served.)<sup>61</sup> This has in turn provoked a political desire to amend the law to restrict application of human rights standards in relation to the conduct of the military overseas. Much political opposition to “lawfare”, as it is derisively called, is premised on the deemed unwelcome intrusion into the military’s capacity to undertake operations, hampering the fulfilment of its duties. Some academics agree. Richard Ekins and Guglielmo Verdirame, for instance, focus on the perceived mistake of the ECtHR in *Al Skeini* extending the ECHR’s extraterritorial application to military interventions wherever they may take place.<sup>62</sup> Ekins has also given evidence before the Parliamentary Defence Sub-committee decrying the intrusion of law in this area.<sup>63</sup>

The government has subsequently proposed a variety of legislative measures designed to restrict even further judicial scrutiny of allegations of human rights violations regarding the military. Foremost is the introduction of combat immunity from human rights grounded examination.<sup>64</sup> A no fault system has been proposed whereby compensation would be paid for harm suffered by service personnel regardless of government negligence. The measure has been described as freeing

<sup>59</sup> *R. (on the application of Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279; [2008] Q.B. 289 at [2]–[4].

<sup>60</sup> See Anthony Forster, “British Judicial Engagement and the Juridification of the Armed Forces” (2012) 88:2 *International Affairs* 283.

<sup>61</sup> *Smith v Ministry of Defence* [2013] UKSC 41; [2014] A.C. 52.

<sup>62</sup> Richard Ekins and Guglielmo Verdirame, “Judicial power and military action” (2016) 132 L.Q.R. 206.

<sup>63</sup> See R. Ekins, “How to Address the Reach of Human Rights Law” (17 October 2016), Judicial Power Project: Written Evidence, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/written/41201.pdf> [Accessed 17 April 2018].

<sup>64</sup> Ministry of Defence, *Better Combat Compensation: Consultation Document* (TSO, 2016), <https://www.gov.uk/government/consultations/better-combat-compensation> [Accessed 17 April 2018].

the armed forces “from increasing judicial constraints whilst on operations”.<sup>65</sup> Though ostensibly only applicable to members of the armed forces suing the MoD following injury or death (avoiding costly litigation by British troops or their families), the principle of taking military operations out of the court’s jurisdiction has been criticised by the Law Society, amongst others, on the basis that it would remove any possibility of objective review of policy or practice, potentially allowing government to avoid public scrutiny even in the systemic ill-treatment of its own personnel.<sup>66</sup>

The Defence Secretary also announced in October 2016 that the government would derogate from the ECHR (under art.15) “before embarking on significant future military operations”. It has, however, already been pointed out that such derogation cannot include arts 2 and 3 ECHR, nor is it possible to avoid application of UK criminal law which applies to serving personnel wherever they operate under the Armed Forces Act 2006.<sup>67</sup>

Even without these political developments and proposals, anxiety over jurisdiction and justiciability in relation to military operations overseas remains a feature of legal consideration of the allegations. Though significant overturn of the doctrine that human rights issues *should* be the subject of judicial scrutiny is unlikely to emanate from the courts where an individual has suffered violation, the Iraq cases have seen a judiciary generally uncertain about examining the possibility of *systemic* abuse.<sup>68</sup> This has been accentuated by the nature of judicial review and public law in general which, as I have already intimated, places the individual at the core of its practice. Access to legal scrutiny is made contingent on criminal proceedings (investigations as well as prosecutions) being exhausted and the alleged victims obtaining the resources to bring an action if such proceedings are unsuccessful or delayed unreasonably. There may be good reasons for this contingency: preference for the rights of the individual is deeply set in common law and in thicker conceptions of the rule of law as well as western notions of human rights. And if judicial review is to be more of “a precision instrument”, as Tom Bingham argued, then its deployment has to be restricted in the interests of good administration.<sup>69</sup> But the Iraq cases suggest that this practical structure is not well suited to address systemic problems, assuming that this is an important legal concern in the first place. It becomes a matter of luck whether any individual case (or cases) is able to be heard, provokes sufficient public outcry to place pressure on government to respond, and thus starts some process for uncovering any systemic issues.

The four phases described in the previous section may imply *some* success in this respect, but the priority shown for the criminal process (IHAT is the latest example of its trumping effect) and the tortuous and flawed procedure by which

<sup>65</sup> Ministry of Defence, *Better Combat Compensation: Consultation Document*, foreword, p.3.

<sup>66</sup> See O. Bowcott and D. Gayle, “Combat immunity plan will deny soldiers justice, says Law Society”, *The Guardian*, 14 February 2017, <https://www.theguardian.com/uk-news/2017/feb/14/soldiers-denied-justice-combat-immunity-plans-military-court> [Accessed 17 April 2018].

<sup>67</sup> See Joint Committee on Human Rights, “The Government’s proposed derogation from the ECHR inquiry”, <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/government-proposed-echr-derogation-16-17/> [Accessed 17 April 2018].

<sup>68</sup> See *R. (on the application of Al-Saadoon) v Secretary of State for Defence* [2016] EWCA Civ 811; [2017] Q.B. 1015.

<sup>69</sup> Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (Oxford: Oxford University Press, 2000), p.194.

individual claims have been brought by private lawyers, raises the question whether this is an efficient approach that can command public and political confidence that systems of abuse will be fully exposed. Even if the particular procedural requirements of arts 2 and 3 ECHR have been reaffirmed as requiring “lessons to be learned” and those responsible to be held accountable, the procedures of judicial review do not easily look beyond the individual to the broader and deeper picture. Though the Iraq cases heard to date have led to some judicial criticism of government and military practice (particularly in the investigation of individual allegations), the possibility for considering effectively who might be responsible for systemic human rights concerns has been absent. Even in the potentially less restricted environment of the public inquiry, Sir William Gage’s unwillingness to identify those responsible for allowing banned interrogation techniques to become part of the system is indicative of this tendency. But it is also perhaps more indicative of the law’s structural inability to transcend the individual to examine the collective problem in the first place.

Some will undoubtedly argue that this is how it should be. Those veering towards restricted interference in the operations of government, particularly in matters of security and military action, oppose anything other than a very light touch. Even with a more liberal view of the role of law and an expressed prioritisation of fundamental human rights, the Iraq example questions whether John Griffith’s condemnation of the judiciary’s “political position, which is primarily concerned to protect and conserve certain values and institutions” continues to hold true.<sup>70</sup> Undoubtedly, the role of the judiciary in its rights-based review of government actions has developed extensively since Griffith first made this observation, particularly following the introduction of the HRA. The story of asylum litigation was one area charted by Richard Rawlins in 2005 suggesting the law’s limitations had been reduced.<sup>71</sup> He pointed to the “[o]fficial policy and practice” of the asylum system which had “thrown up a ready supply of targets” that campaigning litigation could exploit to challenge the system on rights grounds. Rawlins described this as part of a “developing practice in the UK of legal politics fuelled by the intense lobbying and networking activities of interest groups”.<sup>72</sup>

Though this may be true, in the case of the Iraq allegations, with an absence of such lobbying, (political or otherwise) and indeed a seeming absence of political concern, “legal politics” remains limited, if it exists at all. Indeed, they suggest severe limits to the potential of law as a means of uncovering systemic human rights matters when there is little or no political movement to channel concern in Parliament or the media. The individual test case approach allowed as an exception in the law to the general rule that government has the power to act as it decides, may provide some counterweight. But even when the court intervenes (as it has in various Iraq cases) it has no power to prompt wider investigation or inquiry to examine patterns or policies of abuse. There is no independent body in the UK which can intercede effectively to make that decision and no court has the power to order such a process. The most that appears to be possible is an application for review on a case-by-case basis, hoping that with the weight of individual judicial

<sup>70</sup> J.A.G. Griffith, *The Politics of the Judiciary* (Manchester: Manchester University Press, 1977), p.52.

<sup>71</sup> Richard Rawlins, ‘Review, Revenge and Retreat’, (2005) 68(3) M.L.R. 378.

<sup>72</sup> Rawlins, ‘Review, Revenge and Retreat’ (2005) 68(3) M.L.R. 378, 409.

decisions politicians will be encouraged to undertake some investigation. Whether a systemic issue attracts sufficient public opprobrium to lead to political action to investigate and obtain accountability (leaving aside any responsibility) remains contingent. Law in this respect is thus subservient to political power and does not offer an external forum for that form of accountability to operate unless or until an agency of criminal justice (the civilian or military authorities) assumes responsibility for investigation. Indeed, the judgment in *Ali Zaki Mousa (No.2)* also suggests that the larger the scale of abuse, the less the courts may be prepared to intervene substantially, fearing the political impact of their actions and the resultant economic costs. The argument that an independent inquiry was too expensive in those proceedings was accepted as a trump over rights rather than the other way around.

This takes us into the territory of “judicial deference”. In the Iraq cases *systemic* human rights violations have been easily interpreted by the judiciary as a political rather than legal matter. Even in terms of individual abuses, Lord Hope in *R. v DPP Ex p. Kebeline* expressed the need for the judiciary to “defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention”.<sup>73</sup> Others have emphasised the exercise of this deference in human rights matters to allow Parliament to debate if, how and when rights apply in differing circumstances. There is general recognition that the courts should not be the determining body for all these questions. Though there is no fixed criteria for exercising deference, the assumption is that the executive and the legislature (and public bodies more widely) possess “superior expertise, competence or democratic legitimacy”.<sup>74</sup> An evaluation of the circumstances in any particular case allows deference to then be a matter of practice rather than theory. Bingham J.’s dictum in *Smith v Ministry of Defence* that “the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable” remains an important if vague guide.<sup>75</sup> But some have observed that adjudicating human rights has been rendered futile by excessive deference in practice.<sup>76</sup> T.R.S. Allan has also condemned the tendency of judicial capitulation informed by a fear of political criticism.<sup>77</sup>

The recent decision of *Keyu* may be an example of this judicial failing.<sup>78</sup> There a challenge against the government decision not to order a public inquiry into the killing of 23 unarmed civilians by British troops in Malaysia in 1948 was denied. Though the court could overrule or quash the exercise of discretion, it could only do so in accordance with *Wednesbury* rules.<sup>79</sup> Being highly restrictive these well-established grounds are difficult to satisfy. Lord Kerr recognised this case was “an instance where the law has proved itself unable to respond positively to

<sup>73</sup> *R. v DPP Ex p. Kebeline* [1999] 3 W.L.R. 175.

<sup>74</sup> Aileen Kavanagh, “Defending deference in public law and constitutional theory” (2010) 126 L.Q.R. 222, 223.

<sup>75</sup> *R. v Minister of Defence Ex p. Smith* [1996] Q.B. 517 CA.

<sup>76</sup> K. Ewing, “The Futility of the Human Rights Act” [2004] P.L. 829.

<sup>77</sup> T.R.S. Allan, “Human Rights and Judicial Review: a Critique of ‘Due Deference’” (2006) 65(3) C.L.J. 671.

<sup>78</sup> *R. (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2015] 3 W.L.R. 1665. The court, however, took little account of the difficulties or cost implications when advising the government to reconsider the necessity of conducting a public inquiry in *R. (on the application of Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194 (Admin). For a critique of that decision, see Jason N.E. Varuhas, “Ministerial Refusals to Initiate Public Inquiries: Review or Appeal” (2014) 73(2) C.L.J. 238.

<sup>79</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223.

the demand that there be redress for the historical wrong that the appellants so passionately believe has been perpetrated".<sup>80</sup> But is the law predisposed against a positive response in the context of systemic human rights abuses? Is the balance heavily weighted in favour of the political decision even if the matter relates to possible governmental responsibility for committing those abuses or failing to prevent or provide redress for their committal?

The four phases suggest that though legal decisions have intermittently recognised the need for independent and impartial investigations into allegations of human rights abuse, the courts have appeared unable or unwilling to encourage a solution that would fulfil the acknowledged procedural obligation. The space then is opened for government manoeuvre to ensure that systemic issues, which by their nature potentially implicate the executive through the actions or inaction of government departments and personnel, go unscrutinised. So, for instance, following the *Al Skeini* ECtHR judgment, the establishment of the Systemic Issues Working Group within the MoD was presented as its means of achieving compliance. But that group's efforts have remained out of public gaze save for the publication of annual reports. The quality of these is reflected in the first published in 2014, which identified 19 "distinct issues" of concern, but stressed that these related to the "potential" for these "issues to occur" and did not "necessarily mean that these failings actually occurred in every case".<sup>81</sup> The "issues" represented a range of abusive practices against detainees: improper use of blindfolds, hooding, restriction of food and water, threats of or actual physical abuse, and sleep deprivation. For each issue, the SIWG noted where changes in policy, operation procedures or monitoring processes had been introduced by the armed forces to address perceived deficiencies. No review or comment was made in this or the subsequent reports on whether actual breaches had been uncovered. There is no indication that any investigation had taken place into the responsibility of those in command positions for any abusive systems adopted despite the tacit admission of unlawful systems or practices operating.

These efforts could have been fully inspected by the courts, but *Ali Zaki Mousa* (No.2) still stands as the framing judgment in this respect. Judicial deference operated there so as to accept issues of cost and time and value for money as justifications for avoiding close review of the state's obligations to investigate allegations of human rights violations of the most serious kind. Despite acknowledging that the investigative duty should "identify the culpable and discreditable conduct of those involved, including their acts, omissions as well as identifying the steps needed for the rectification of dangerous practices and procedures" the judgment provided for no effective means by which responsibility for systemic failings could be attributed.<sup>82</sup> The court acknowledged that:

"If, as there is some evidence to suggest, there was a lack of training and a failure to investigate early misconduct promptly, the question arises as to

<sup>80</sup> *R. (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2015] 3 W.L.R. 1665 at [285].

<sup>81</sup> Ministry of Defence, "Systemic Issues identified from investigation into Military Operations Overseas" (July 2014), pp.2–3, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/327180/Systemic\\_Issues\\_identified\\_from\\_investigations\\_into\\_military\\_operations\\_overseas.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/327180/Systemic_Issues_identified_from_investigations_into_military_operations_overseas.pdf) [Accessed 17 April 2018].

<sup>82</sup> Ministry of Defence, "Systemic Issues identified from investigation into Military Operations Overseas", para.148.

whether any responsibility for that arises in the higher ranks of the armed forces and in Government.”<sup>83</sup>

But the judgment failed to identify how that responsibility might be assessed through a process of law in the absence of direct evidence against an individual officer or official. The matter was instead left to government and to Parliament. According to Mr Justice Silber there was

“no reason why a Parliamentary Committee cannot scrutinise the wider or systemic issues and the recommendations made; whether it does so or how it does so must be a matter for Parliament, whether it be through the Select Committee on Defence or another Committee or Parliamentary Commission”.<sup>84</sup>

This discretion has not, however, been exercised. Beyond the SIWG (an internal MoD affair in any event), the Intelligence and Security Parliamentary Committee has purportedly been inquiring into detainee treatment as a theme since 2013. But claims of extraordinary rendition and the UK’s implication in *other* countries’ abusive practises has been its focus. Its concern is restricted to “the role of the UK Government and the intelligence and security Agencies in relation to detainee treatment and rendition, and not the Armed Forces”.<sup>85</sup>

Similarly, the Defence Sub-committee has ignored the issue, instead examining threats to the military and its personnel by multiple human rights challenges. In 2017 it criticised IHAT, stating its “focus has been on satisfying perceived international obligations and outside bodies, with far too little regard for those who have fought under the UK’s flag”.<sup>86</sup> It acknowledged that banned abusive interrogation techniques had been practiced in Iraq, but blame was attributed to the MoD not forces personnel for this failure. The committee’s conclusion was that as “training material for interrogations contained information which could have placed service personnel outside of domestic or international law represents a failing of the highest order” those who followed such “flawed guidance” should be supported by the MoD if not protected from prosecution.<sup>87</sup> There was no commensurate call for public examination of how and when that training came to be adopted and the unlawful practices implemented.

What happens, then, when Parliament chooses not to examine such human rights matters? Is this a fulfilment of the democratic imperative? Superficially it would seem so, even if the parliamentary response is to avoid further scrutiny. But how can law be viewed on such occasions? Is it entirely a matter of trust in politics that systemic problems, even those where members of Parliament may be implicated (for instance with regard to the on-going child abuse inquiry) should remain principally outside the practice of law? One possible reading is that if the judiciary is engaged in assuaging the “moral cost” of turning a blind eye to the state’s human rights failings, then it only does so at a superficial level, passing on legal responsibility to engage seriously on systemic matters under the guise of deference. This can only reinforce the argument that the law is less independent, and more a creature, of politics.

<sup>83</sup> Ministry of Defence, “Systemic Issues identified from investigation into Military Operations Overseas”, para.177.

<sup>84</sup> Ministry of Defence, “Systemic Issues identified from investigation into Military Operations Overseas”, para.224.

<sup>85</sup> Intelligence and Security Committee of Parliament Annual Report 2015-2016, 5 July 2016, fn5 at 6

<sup>86</sup> Defence Sub-committee, *Who Guards the Guardians?*

<sup>87</sup> Defence Sub-committee, *Who Guards the Guardians?*, para.86.

All four phases of public law response to alleged systemic abuse in Iraq show there may have been entry level scrutiny, as it might be called, in determining matters of jurisdiction or justiciability. Yet this has been followed by a reluctance or perceived inability to pursue a deeper, legally enforceable and overseen examination, with all that that might imply with regard to lack of accountability and individual responsibility. Whether this suggests a challenge to the rule of law at a fundamental level or a reinforcement of Tom Bingham's assertion that the judiciary are "auditors of legality: no more, no less" is an open question.<sup>88</sup> But in *Ali Zaki Mousa (No.2)*, as I have indicated, deference regarding systemic issues has been informed by economic cost arguments rather than issues of expertise, competence or democratic legitimacy. Where cost enters the frame at the point of adjudication, and where government not the court determines such cost is too heavy, then the practice of deference appears as an in-built resistance to judicial scrutiny for *any* complex allegations of systemic wrongdoing by the state.

What then can be made of the remedies that *have* been offered through law in relation to the Iraq allegations? Across the four phases, the public inquiry has become the pre-eminent goal for litigants. This is in the context of the inquiry being seen as a potential link between law and politics where alleged state failure can supposedly be examined by an independent body intent on getting to the truth. If successful, the supposition is that there will be a political cost and an attribution of responsibility. Indeed, with no other judicial remedy available to examine the details and hear victims of systemic wrongs, the public inquiry has developed into what Harlow and Rawlings have described as part of the "standard machinery of accountability".<sup>89</sup> The Iraq related proceedings have thus, perhaps unsurprisingly, frequently sought a declaration from the courts calling on government to order such a procedure.

However, even though a number of Iraq related inquiries have been provoked in this way (suggesting the value of law in achieving some accountability), the history of these procedures show their deficiency in addressing systemic human rights issues. Three aspects in particular are relevant for my general argument.

First, the bar is set extremely high for any court to recommend, let alone instruct, the government to order any public inquiry. Judicial deference manifested itself here to the extent that in *Ali Zaki Mousa (No.2)* there was no desire to "impugn" the decision of the Secretary of State to refuse an overarching inquiry into the hundreds of allegations. The court accepted the government's contentions on excessive cost and time even though it made no reference to any cost/benefit analysis that might have justified the decision.<sup>90</sup>

Second, even when a decision is made to hold an inquiry, the executive determine the terms upon which it operates. Though members of the executive may bear responsibility for alleged wrongdoing, political calculation dictates the character of these initiatives, allowing government, as Blom-Cooper observed some years ago, to "distract the critics or deflect criticism".<sup>91</sup> Given their likely prolonged nature, attention can also be diverted long enough for *individual* accountability to

<sup>88</sup> Tom Bingham, *The Rule of Law* (London: Penguin 2010), p.61.

<sup>89</sup> C. Harlow and R. Rawlings, *Law and Administration*, 3rd edn (CUP, 2009), p. 614.

<sup>90</sup> See *Al-Saadoon* [2016] EWCA Civ 811; [2017] Q.B. 1015, which continues to wrestle with the convoluted processes that were installed by the government rather than hold a public inquiry.

<sup>91</sup> Louis Blom-Cooper, "Public Inquiries" (1993) 46(2) C.L.P. 203, 205.

become unlikely if irrelevant for most involved. The history of public inquiries shows that this supposed remedy, accepted as satisfying the procedural requirements of arts 2 and 3 ECHR for instance, rarely succeeds in attributing responsibility speedily or at all. Though they may eventually make public the truth of an allegation, political control of their mandates and limited resources can reduce their value to one of historical interest rather than attainment of justice. When used in relation to an individual case, such as the unlawful killing of Baha Mousa or the treatment of those participants in the Al Sweady inquiry, there may well have been a good resolution that served to prove or discount an allegation of violation, but neither were capable of addressing wider issues. That lay beyond their remit. The most that could be achieved was fulfilment of the “lessons to be learned” procedural requirement in cases of human rights failing. Though of clear value in itself, the inquiry model actively enhances rather than counters the state’s avoidance of the attribution of responsibility.

Third, the inherent privileging of criminal justice processes (apparent in all phases) as applied to individual wrongdoers has been allowed to trump any public interest in obtaining accountability from state agents and the executive, again delaying full examination of systemic wrongs. That preconditioned legal environment, as the Iraq cases demonstrate, allows collective and command accountability (if not responsibility) to be held in prolonged abeyance pending resolution of direct perpetrator culpability. Systemic wrongs become credible only if multiple perpetrators are successfully prosecuted thus providing evidence of a systemic problem. So, in the Iraq cases, even the possibility of a public inquiry into systemic matters has been disallowed until the completion of criminal investigations and proceedings. Assurances have been given that responsibility for systemic wrongdoing will be assessed as I/OAT investigations continue, but it would be absurd to see them as evident if no or few prosecutions arise. Individual criminal responsibility for systemic wrongs may still be triggered by independent processes of the police and the relevant prosecution agencies (though the approval of the Attorney General is required for a prosecution for crimes under the ICCA), but these bodies are ill-equipped to interpret and investigate allegations of systemic wrongs where the identity of those responsible is unclear or cultures of abuse have been formed. Equally, their work is of necessity out of the public gaze, leaving all putative wrongdoers subject to little political or legal sanction.

Together, these three features of the public inquiry as currently constructed in the UK legal context, reinforce the sense of law’s limitations in the context of systemic state violations of fundamental rights.

## Conclusion

To what extent, then, is this assessment of law particular to the issues of military operations (in Iraq) or indicative of a general inability to address systemic or institutionalised wrongs? It might be difficult to extrapolate from the case of Iraq given the peculiar relationship between politics, the public and the armed forces in the UK today. Examination of other situations of systemic wrongdoing by state agents and the histories of legal response would be necessary to fully answer the

question.<sup>92</sup> But at the very least, the Iraq example demonstrates how the current level of political control over the justice system, supported by judicial restraint and deference, can undermine any pretension that allegations of systemic serious human rights abuses will be uncovered effectively *through* law. In matters of principle (where jurisdiction can restrict consideration of wrongs), structure (where access to courts and independent review is also restricted by political determination) and practice (through the judicial preference for restraint and deference and limits to suitable remedies), the law has been constrained. Neither judicial review nor criminal justice processes, nor civil litigation for compensation, have been disposed towards uncovering whether institutionalised wrongdoing has developed. Despite acknowledged violations of human rights standards the truth of systemic wrongdoing has not been revealed through public law processes despite the multiple legal initiatives.

This begs the consequent question whether law (adept at resolving individual allegations or not) *should* have the capacity to wrest the complexities of accountability for institutionalised rights violations from political control. If the conclusion to that is that it should then what alternatives to the current structures might be feasible? The experience of many societies undergoing transition from dictatorship or civil war to democracy may offer some guidance. These too have struggled with the problem of accountability and attribution of responsibility for the most serious institutional human rights breaches. Different methods have been promoted internationally from truth commissions to boards of inquiry and fact-finding missions. Respect for the victims and the right to truth in general lie at the heart of such initiatives, as the UK Government has endorsed.<sup>93</sup> Prosecutions may form part of that process but not to the exclusion of unearthing what has taken place and recording that information as a memorialisation of wrongdoing and its impact through some independent body. Though the complete absence of political control may be something of a fiction, impartiality is deemed central to getting to the truth.

The UN Human Rights Commission has also recommended that all national permanent human rights bodies be mandated to consider systemic issues independently of political influence or direction.<sup>94</sup> In the UK, the Equality and Human Rights Commission (EHRC) might be expected to fulfil this role. But to date it has only occasionally examined systemic issues (for instance in relation to older people in home care).<sup>95</sup> Even when the EHRC was faced with persistent allegations of UK's "acquiescence or complicity in torture" abroad in 2014, it could only recommend that "an independent, judge-led inquiry" was necessary. Its advice was ignored in favour of review in secret by the Intelligence and Security

<sup>92</sup> The example of Northern Ireland and historical review of wrongdoing during the Troubles may be of particular importance here.

<sup>93</sup> See for instance the UKAid sponsored review by H. Haider, *Transitional justice: Topic guide* (Birmingham: GSDRC, University of Birmingham, 2016). Also see Ministry of Defence, *Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2005) which notes the value of "high-level formal inquiries into alleged violations" at para. 16.1(c).

<sup>94</sup> Office of the High Commissioner for Human Rights, *National Human Rights Institutions* (2010). A permanent inquiries unit was advocated by Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: post-legislative scrutiny* (TSO, 2014), paras 165–177.

<sup>95</sup> Equality and Human Rights Commission, *Close to home: An inquiry into older people and human rights in home care* (Equality and Human Rights Commission, 2011).

Committee of Parliament to which the EHRC could only make representations.<sup>96</sup> The Commission's influence as a national human rights institution, and possible antidote to a putative deficiency in public law, has been further undermined by "restructuring" with the effect that the EHRC's budget will be cut from £62 million in 2010 to £17.4 million by 2020. That suggests that although it has the potential to enhance accountability for systemic human rights concerns, at present it is unlikely to have a role in any scrutiny whether in respect of military/security issues or otherwise.<sup>97</sup> Nonetheless, enhancing rather than downgrading the EHRC could be a plausible response to the deficiencies of public law that I have outlined. Ironically that would take a political decision to bring about.

In the meantime, the Iraq allegations saga may continue for some years even with the dismissal of most individual claims and the closing of IHAT.<sup>98</sup> Some allegations may be false, though there has been extremely limited public exposure of these beyond the *Al-Sweady* case. In the absence of a properly constructed human rights institution to carry out informed and over-arching review, any public law led accountability for systemic wrongdoing remains a distant prospect. What precedent can the law then provide for other systemic wrongs that come to light and are found closer to home? The chaos of the Independent Inquiry into Child Sexual Abuse, which has been dogged by an extraordinary sequence of bizarre appointments and resignations, and the experience of historic wrongs in Northern Ireland, do not suggest that the current politically controlled and limited public law response to alleged systemic abuses will be effective when confronted by other large scale abuses. If nothing else, therefore, the Iraq allegations saga provides a warning that failure to map this inherent problem in law may further undermine the primary importance of respect for human rights and the rule of law as key principles of UK democracy.

<sup>96</sup> Equality and Human Rights Commission, *Response of the Equality and Human Rights Commission to the Consultation* (Equality and Human Rights Commission, 2014), <https://www.equalityhumanrights.com/en/file/4686/download?token=XBdlNTZv> [Accessed 17 April 2018].

<sup>97</sup> The problem of political support through allocation of resources has affected the Police Ombudsman for Northern Ireland, who has complained that investigations into killings during the Troubles could take decades following government cuts, see D. Marshall, "Troubles inquiries could take 20 years, says ombudsman", *BBC News*, 19 September 2017, <http://www.bbc.co.uk/news/uk-northern-ireland-41321687> [Accessed 17 April 2018].

<sup>98</sup> IHAT discontinued multiple allegations on the grounds that "it was not proportionate to continue investigating": *IHAT Quarterly Update*, January 2017.