



## BRIEFING PAPER

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# Iraq Historic Allegations Team

By Arabella Lang

### Inside:

1. When and why was IHAT set up?
2. What is its mandate?
3. Who is in IHAT?
4. How does it work?
5. What has it achieved so far?
6. Other related investigations
7. Recent publicity



# Contents

<b>Summary</b>	<b>3</b>
<b>1. When and why was IHAT set up?</b>	<b>4</b>
<b>2. What is its mandate?</b>	<b>5</b>
<b>3. Who is in IHAT?</b>	<b>7</b>
<b>4. How does it work?</b>	<b>8</b>
<b>5. What has it achieved so far?</b>	<b>10</b>
<b>6. Other related investigations</b>	<b>11</b>
<b>7. Recent publicity</b>	<b>13</b>

## Summary

This Commons Library briefing paper describes the Iraq Historic Allegations Team (IHAT): when and why it was set up; its mandate, staff and methods; and its achievements. It puts these in the context of other related investigations and recent publicity.

IHAT was set up in 2010 to investigate the large number of new claims that British military personnel unlawfully killed and abused Iraqis during the period from 2003 to 2009.

Its mandate now includes: allegations of criminality relating to the death or ill-treatment of Iraqis, whether in custody or not; deciding whether British soldiers should be referred to the Service Prosecuting Authority; and reporting on wider issues. The number of cases on its books has grown enormously.

It is now staffed by navy and ex-police investigators, following a ruling that its original army investigators were not sufficiently independent. Its investigative role is equivalent to that of the civilian police.

IHAT has been criticised for a lack of results, although the extent of the challenges facing it are recognised. One result of these criticisms was the establishment of the Iraq Fatalities Investigations, adding to the large number of arenas investigating civil, criminal and human rights claims against British military personnel in Iraq.

There have recently been renewed calls to find ways to restrict claims against British military personnel. The Solicitors Regulation Authority has been investigating two firms of solicitors involved in such cases.

# 1. When and why was IHAT set up?

The actions of British service personnel in Iraq in 2003-2009 have given rise to many legal claims. Two public inquiries were established, and then in February 2010 the law firm [Public Interest Lawyers](#) (PIL) began more judicial review claims seeking investigation of further cases of death or alleged ill treatment of Iraqi citizens by British service personnel.

The then Labour government responded in March 2010 by setting up the Iraq Historic Allegations Team (IHAT) – rather than another public inquiry – to sift through the new allegations, investigate those deemed credible, and decide which should then be referred for prosecution.<sup>1</sup>

After the 2010 elections, the coalition government decided to continue IHAT. In November 2010, the then Minister for the Armed Forces, Nick Harvey, announced that IHAT now had a full investigative capability, had begun work, and was expected to complete its work in around two years.<sup>2</sup> (The expected end date is now 2019.)

If IHAT had not been set up then, it probably would have been soon afterwards. In 2011 the European Court of Human Rights determined that the UK government had a duty under the European Convention on Human Rights to investigate allegations of deaths and ill treatment involving British service personnel in Iraq in the period 2003-09.<sup>3</sup> IHAT is now intended to meet that need too. There have however been legal cases over the extent of that duty and about IHAT's ability to meet it (see below).

An [MOD guide to IHAT](#) adds that the IHAT investigations, and potential prosecutions, would also allow the UK to satisfy the International Criminal Court that it is meeting its obligations under the [Rome Statute](#):

The Iraq Historical Allegations Team (IHAT) was set up in 2010 to ensure that credible allegations are properly investigated and the facts established. This is a complex and time-consuming process but meets the UK's legal requirement to investigate allegations of human rights violations or war crimes by its Forces. Without IHAT's vital work, our Armed Forces would be open to referral to the International Criminal Court – something this Government is determined to avoid.

The MOD guide reiterates that 'it is right that all allegations are investigated and that those against whom there is evidence of criminal conduct are prosecuted'.

In 2011 the [Court of Appeal](#) dismissed a claim that IHAT should be replaced by a full public inquiry.<sup>4</sup>

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<sup>1</sup> HC Deb 1 Mar 2010 c93WS

<sup>2</sup> HC Deb 1 Nov 2010 c28WS

<sup>3</sup> *Al Skeini and others v United Kingdom* (2012) 53 EHRR 18

<sup>4</sup> [R \(Ali Zaki Mousa\) v Secretary of State for Defence \(No. 1\)](#)[2011] EWCA Civ 1334

## 2. What is its mandate?

IHAT's role is to review and investigate allegations of criminal abuse by British service personnel in Iraq from 2003 to 2009. This comes under the general responsibility of the service police to investigate allegations or circumstances which indicate that a criminal offence has or may have been committed by a member of the armed forces. It is akin to the role of the civilian police in investigating alleged crimes.

IHAT's original mandate was to investigate those cases involving the death or alleged ill-treatment of Iraqis in British custody which were the subject of judicial review claims calling for an investigation. This mandate was later widened to include more cases, including those alleging unlawful killing by British service personnel of Iraqis who were not in custody. By January 2016 its caseload had dramatically expanded to [more than 1,500 allegations](#).

On 1 May 2012 (when IHAT was reorganised to address issues of lack of independence – see below), the Provost Marshal (Navy) issued new terms of reference to IHAT. Under these, its objective was to:

Investigate as expeditiously as possible those allegations of mistreatment by HM Forces in Iraq allocated to it by the Provost Marshal (Navy), including those matters set out at paragraph 6-8 below: in order to ensure that those allegations are, or have been investigated appropriately.

The matters set out were:

6. The IHAT shall investigate all the judicial review claims relating to abuse of Iraqi civilians by British service personnel in Iraq during the period from March 2003 to July 2009 issued or notified by way of a pre-action protocol letter as at 30 April 2010. Other cases of alleged mistreatment notified to the Secretary of State after this date will be considered on a case-by-case basis and may be subject to investigation by the IHAT. The PM(N) will direct the Head of IHAT as to any additional allegations that should be investigated by IHAT.

7. Additionally the IHAT is to investigate the specific cases which the United Kingdom now has an obligation to investigate following the judgment in July 2011 of the European Court of Human Rights in the case of Al-Skeini.

8. The IHAT is also to review the report of the Baha Mousa Public Inquiry by Sir William Gage, in order to assess whether more can be done to bring those responsible for the mistreatment of Baha Mousa to justice.<sup>5</sup>

The [IHAT website](#) says that its aim is to 'Work with investigative independence but in partnership with other key organisations to deliver an effective criminal investigation into allegations of murder, abuse and torture'.

IHAT's most recent [quarterly report](#) says that its current strategic objectives are:

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<sup>5</sup> Quoted in [R \(Ali Zaki Mousa\) v Secretary of State for Defence \(No. 2\) \[2013\] EWHC 1412 \(Admin\)](#) (24 May 2013) para 26

- Allegations of unlawful killings in the custody/care/control of British Forces
- Allegations of the unlawful killings of juveniles
- Allegations of unlawful killings outside of custody
- Allegations of serious ill-treatment including GBH, rape, sexual assault
- Allegations of ill-treatment that may meet the war crimes threshold
- Allegations of ill-treatment not meeting war crimes threshold

The High Court suggests that, as well as its primary investigative function, IHAT has further functions of making or contributing to decisions on whether any members of the armed forces should be charged, and of reporting so that wider systemic issues can be considered and, where necessary, remedied.<sup>6</sup>

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<sup>6</sup> [\*R \(Ali Zaki Mousa\) v Secretary of State for Defence \(No. 2\)\* \[2013\] EWHC 1412 \(Admin\)](#) (24 May 2013) paras 35-37

### 3. Who is in IHAT?

According to its [gov.uk website](#), IHAT is led by a retired senior civilian police detective, Mark Warwick, and comprises some 145 employees, including Royal Navy Police personnel, civilian investigators and civil servants.

It has however been significantly under complement at times.

The site adds 'IHAT is independent of the military chain of command for the purposes of its investigations'.

In 2011 the [Court of Appeal](#) held that IHAT was not sufficiently independent because members of the Royal Military Police (RMP) were investigating matters in which that branch had been involved in Iraq.<sup>7</sup> The Minister, Nick Harvey, responded by announcing on 26 March 2012 that the RMP staff would be reassigned and replaced by Royal Navy Police personnel by 1 April 2012.<sup>8</sup>

In a [subsequent case](#) in 2013, the High Court found that 'IHAT has now been structured in such a way that it can independently carry out its investigative and prosecutorial functions'.<sup>9</sup>

Again according to its website, IHAT has two strands of investigation: one focuses on allegations of unlawful killing and the other on allegations of mistreatment. A Command Team, an Intelligence Cell and a Major Incident Room (MIR) support the two strands of investigation.

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<sup>7</sup> [R \(Ali Zaki Mousa\) v Secretary of State for Defence \(No. 1\)](#) [2011] EWCA Civ 1334

<sup>8</sup> [HC Deb 26 Mar 2012 c87WS](#)

<sup>9</sup> [R \(Ali Zaki Mousa\) v Secretary of State for Defence \(No. 2\)](#) [2013] EWHC 1412 (Admin) (24 May 2013), para 6

## 4. How does it work?

As the [MOD guide to IHAT](#) says, IHAT has no control over the type and number of allegations it receives; but 'just because an allegation has been passed to the IHAT it does not mean that a soldier will be investigated, let alone charged and prosecuted'.

New allegations have an initial assessment, after which there can be a full investigation, with any potential criminal cases referred for prosecution. According to its website, all the allegations forwarded to IHAT from various sources have been divided into ten 'caseloads', in order to manage the receipt and flow of cases within the organisation.<sup>10</sup> There are new allegations in four of these, which are subject to 'Initial Assessment'.

Once the initial assessment is complete, a report containing recommendations is forwarded to Provost Marshal (Navy). It is his decision as to which cases are then formally allocated to IHAT for further investigative work.

IHAT investigators may write to potential witnesses (including serving and former Armed Forces Personnel) appealing for information. Under Operation Mensa IHAT investigators also interview Iraqi complainants and witnesses.

The IHAT site explains what happens after an investigation:

Once an investigation is complete the findings are referred to the relevant authority and any cases identifying credible evidence of potential serious criminal acts are referred to the Director of Service Prosecutions in accordance with the Armed Forces Act 2006.

According to the [MOD guide](#), it is the Service Prosecuting Authority under the Director of Service Prosecutions (DSP) that makes the final decision on whether or not there is a case for prosecution – not IHAT.

Again, the High Court gave more detail in 2015

ii) The management and conduct of investigations is entirely a matter for IHAT, and not for the DSP. Nevertheless, the DSP can and does provide advice to IHAT in connection with investigations, and he has established a dedicated team of six lawyers (the Iraq Historic Allegations Prosecutions Team) for this purpose. In addition, IHAT and the SPA have agreed a protocol in May 2013 which sets out the process to be followed in cases referred to IHAT involving allegations of unlawful killing. Under this protocol a panel known as the Joint Case Review Panel has been established to review cases after IHAT has conducted a pre-investigation assessment (which involves the recovery and assessment of all available documentary material). As its name indicates, the membership of the Joint Case Review Panel (the "JCRP") is drawn from both IHAT and the SPA and includes both the Director of IHAT and the DSP.

iii) After reviewing a case, the JCRP makes a recommendation about next steps including whether the case

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<sup>10</sup> See Figure 1 of the [IHAT quarterly update, July-September 2015](#)



should proceed to a full investigation. The final decision about which cases should proceed to a full investigation is, however, that of the Director of IHAT.

iv) If on completing an investigation IHAT considers that there is sufficient evidence to charge, then it will refer the case to the DSP to decide whether to prosecute. The DSP will only direct a prosecution to be brought if satisfied that there is a realistic prospect of conviction and that it is in the public and service interest to bring charges.

v) If on completing an investigation IHAT considers that there is not sufficient evidence to charge, then it will consult with the DSP before discontinuing the case.<sup>11</sup>

In 2013 the High Court had criticised IHAT for not involving the Director of Service Prosecutions more closely in its investigations.<sup>12</sup>

It also decided that IHAT's methods were insufficient to deal properly with cases where Iraqi citizens had died.<sup>13</sup> This decision led to the establishment of a new judge-led investigation process akin to a coroner's inquest (see below).

In some cases where the IHAT concludes that no criminal offence has been committed, or the Director of Service Prosecutions decides not to prosecute, the [MOD may pay compensation](#).

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<sup>11</sup> [Al-Saadoon and others v Secretary of State for Defence \[2015\] EWHC 1769 \(Admin\)](#) (26 June 2015) para 21

<sup>12</sup> [R \(Ali Zaki Mousa\) v Secretary of State for Defence \(No. 2\) \[2013\] EWHC 1412 \(Admin\)](#) (24 May 2013) para 36

<sup>13</sup> [R \(Ali Zaki Mousa\) v Secretary of State for Defence \(No. 2\) \[2013\] EWHC 1412 \(Admin\)](#) (24 May 2013) paras 178-197

## 5. What has it achieved so far?

IHAT has repeatedly been criticised for delays and lack of results. However, this is at least partly due to the huge increase in its caseload since 2014.

In the *Mousa* case in 2013, the High Court found that IHAT's delays amounted to a failure to discharge the UK's duty to investigate. It noted that 'there seems to be recurring slippage', and concluded that 'there are likely to be further long delays before IHAT finishes its work'.<sup>14</sup>

In July 2014, the Secretary of State recognised that IHAT's work was not going to be completed by the end of 2016. He approved additional funding of £24m to cover the period from the end of 2016 to the end of 2019 – which increased the total level of funding of IHAT to £57.2m.<sup>15</sup>

By June 2015, following the huge increase in IHAT's caseload, the diagnosis was even worse:

It is not necessary to be a mathematician to appreciate that, at this rate, the task of investigating allegations arising from the activities of British armed forces in Iraq will never be completed.<sup>16</sup>

However, the High Court recognised the scale of IHAT's challenges:

It is clear from the evidence with which the court has been provided that considerable efforts and resources have been and are being devoted to the work of IHAT. It is also clear that the investigative work which IHAT is undertaking poses immense challenges. The difficulty and complexity of the task is increased by, amongst other factors:

- i) The length of time which has elapsed since the relevant events occurred;
- ii) The difficulties of collecting evidence from complainants and witnesses who live in Iraq and whose language is Arabic; and
- iii) The huge recent expansion in the number of cases which have been referred to IHAT.<sup>17</sup>

The [MOD guide](#) describes what has happened to the 59 allegations of unlawful killing that IHAT has 'reviewed' up to January 2016:

34 cases have been closed, or are in the process of being closed, with no further disciplinary action; 7 are currently subject to further limited, focused lines of enquiry; and, 17 are under investigation. Only one of these cases was referred to the Director of Service Prosecutions, who directed that there should be no prosecution.

<sup>14</sup> [R \(Ali Zaki Mousa\) v Secretary of State for Defence \(No. 2\) \[2013\] EWHC 1412 \(Admin\)](#) (24 May 2013) paras 186-7

<sup>15</sup> [Al-Saadoon and others v Secretary of State for Defence \[2015\] EWHC 1769 \(Admin\)](#) (26 June 2015) para 29

<sup>16</sup> [Al-Saadoon and others v Secretary of State for Defence \[2015\] EWHC 1769 \(Admin\)](#) (26 June 2015) para 15

<sup>17</sup> [Al-Saadoon and others v Secretary of State for Defence \[2015\] EWHC 1769 \(Admin\)](#) (26 June 2015) para 36

## 6. Other related investigations

Thousands of overlapping allegations concerning British military personnel in Iraq are also being investigated in other arenas, including the Iraq Fatality Investigations and the International Criminal Court.

Several different types of claim have been made, including:

- Over 1,000 judicial review claims seeking investigation of alleged human rights violations.
- Over 1,000 civil claims for compensation (around 300 of which have been settled by the MOD without admission of liability).<sup>18</sup>
- Criminal allegations, for instance of war crimes, murder, torture, mistreatment and unlawful detention, resulting in several prosecutions.

There is considerable overlap between the cases in each category, but the different categories are being handled separately.

Each of these types of claim can raise human rights issues even though they relate to incidents overseas, as a result of the 'extraterritorial application' of human rights law. The applicability of articles 2 and 3 of the European Convention on Human Rights to Iraqi civilians held in custody on British military bases was first recognised by the English courts in 2004.<sup>19</sup>

Even though human rights law applies during armed conflict, its standards can be 'read down' to the less restrictive ones of International Humanitarian Law (IHL, also known as the laws of war).<sup>20</sup> Some of the deaths being investigated by IHAT are likely to be lawful under IHL. The relationship between the two bodies of law is 'a matter of great complexity and uncertainty'.<sup>21</sup>

In 2015 the High Court in the [al-Saadoon](#) case looked at the scope of the UK's duty under the European Convention on Human Rights to investigate deaths and mistreatment abroad. The judge ruled that this duty applied wherever the UK 'purports to exercise legal authority or uses physical force' (not just where people were in British custody). However, he recognised that this potentially opens up the UK to 'a flood of claims' in any major foreign intervention.<sup>22</sup> The Government is appealing.

The [Iraq Fatality Investigations](#) (IFIs) were set up following the *Mousa* case on the independence and adequacy of IHAT.<sup>23</sup> They look at deaths

<sup>18</sup> See [Al-Saadoon & Ors v Secretary of State for Defence](#), [2015] EWHC 715 (Admin), 17 March 2015 para 3

<sup>19</sup> *R (Al-Skeini) v Secretary of State for Defence* [2004] EWHC 2911 (Admin)

<sup>20</sup> For example, following the case of *Hassan v United Kingdom* [2014] ECHR 936, it is now accepted that Article 5 ECHR (right to liberty and security of person) is not displaced by IHL during an international armed conflict but is modified in that its provisions must be interpreted in a manner which takes into account the applicable rules of IHL.

<sup>21</sup> *Serdar Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843 at 96

<sup>22</sup> [Al-Saadoon & Ors v Secretary of State for Defence](#), [2015] EWHC 715 (Admin), 17 March 2015 para 106

<sup>23</sup> [R \(Ali Zaki Mousa\) v Secretary of State for Defence \(No. 2\)](#) [2013] EWHC 1412 (Admin) (24 May 2013), paras 212-225. The court set out more detail of its

where the accused were acquitted or not prosecuted, after IHAT investigations have concluded. The IFIs provide an inquisitorial investigation very similar to a coroner's inquest in order to meet investigative requirements under the European Convention on Human Rights, including public and family access. The first two IFIs are headed by a retired judge, Sir George Newman.

In May 2014 the Chief Prosecutor of the International Criminal Court decided to open a [preliminary examination](#) into allegations of war crimes by the UK involving systematic detainee abuse in Iraq from 2003 until 2008. This followed a communication from the European Center for Constitutional and Human Rights together with PIL. The Prosecutor has not yet decided whether to proceed with an investigation.

Two public inquiries have also been held:

- In 2008 a retired judge, Sir William Gage, was appointed to conduct an inquiry into the death of Baha Mousa, who was killed while in the custody of British forces in Iraq in 2003, and the treatment of those detained with him. The three-volume [inquiry report](#), including 73 recommendations, was published on 8 September 2011; the Government accepted all but one of the recommendations.
- In 2009 an inquiry was established to investigate allegations that Hamid Al-Sweady and others who were allegedly taken prisoner by British forces after a fire-fight on 14 May 2004 were subsequently unlawfully killed or mistreated. [Sir Thayne Forbes's report](#) was published on 17 December 2014. He found some instances of ill-treatment in detention, but rejected all the most serious allegations as 'wholly without foundation and entirely the product of deliberate lies, reckless speculation and ingrained hostility'.

The Commons Defence Select Committee reported on [UK Armed Forces Personnel and the Legal Framework for Future Operations](#) in April 2014.<sup>24</sup> One of its conclusions was that:

Detainees should be treated with humanity and respect and where this is found not to be the case, the individuals and the MoD should be prosecuted. However, the number of cases and the requirement for full and detailed investigations of every death resulting from an armed conflict is putting a significant burden on the MoD and the Armed Forces, not just in resources spent but in the almost unlimited potential for retrospective claims against them.<sup>25</sup>

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proposed approach a few months later: [R \(Ali Zaki Mousa\) v Secretary of State for Defence \(No. 2\)](#) [2013] EWHC 2941 (Admin) (2 October 2013).

<sup>24</sup> [12<sup>th</sup> report of 2013-14](#), HC 931, 2 April 2014

<sup>25</sup> *Ibid* para 129

## 7. Recent publicity

There has been a lot of discussion recently about IHAT, in the context of the large number of claims against serving or former British soldiers and the impact this has on them.

In December 2015, the defence secretary, [Michael Fallon, told the Sunday Telegraph](#) that 'ambulance chasing' law firms were inhibiting the effectiveness of British troops abroad. He reportedly argued that there was 'a strong case' for suspending European human rights law when sending forces into action overseas. The newspaper suggested that possible options included derogations from the European Convention on Human Rights, setting a time limit for legal claims to be brought, taking legal action against law firms that have brought bogus cases, and in the longer term replacing the *Human Rights Act 1998* with a new Bill of Rights.

Perhaps in response to Mr Fallon's comments, the head of IHAT, [Mark Warwick said in an interview](#) with the *Independent* (published on 1 January 2016) that IHAT investigations were likely to result in some prosecutions for crimes including murder:

There are serious allegations that we are investigating across the whole range of IHAT investigations, which incorporates homicide, where I feel there is significant evidence to be obtained to put a strong case before the Service Prosecuting Authority to prosecute and charge.

But on 11 January 2016, former Armed Forces Minister Nick Harvey told BBC Radio 5 live he believed IHAT had lost its focus.

The same day, the [Daily Mail](#) criticised PIL for pursuing compensation claims for its 1,000 or more cases, on top of the IHAT investigations. An [MOD spokesperson](#) responded:

It is a matter for law firms and their clients to decide whether to make compensation claims. The MOD contests vigorously claims which it does not believe to be valid and does everything appropriate to safeguard the legitimate interests of the taxpayer. The Government is also considering ways to reduce the burden on the armed forces of false claims.

The [MOD guide](#) says the Government has commissioned 'detailed work' on how to reduce the volume of claims:

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. We are taking steps to ensure our Armed Forces overseas are not subject to persistent legal claims that undermine their ability to do their job. Ministers have commissioned detailed work on this and will make further announcements in due course.

In a [statement on 22 January 2016](#), the Prime Minister set out plans to tighten legal aid and no-win, no-fee schemes:

It is clear that there is now an industry trying to profit from spurious claims lodged against our brave servicemen and women

who fought in Iraq. This is unacceptable and no way to treat the people who risk their lives to keep our country safe – it has got to end.

The National Security Council will produce a comprehensive plan to stamp out this industry, including proposals to clamp down on no win, no fee schemes used by law firms, speeding up the planned legal aid residence test, and strengthening investigative powers and penalties against firms found to be abusing the system. We will also take firm action against any firms found to have abused the system in the past to pursue fabricated claims.

Another Library Briefing Paper<sup>26</sup> describes the availability of legal aid for civil claims in England and Wales, as it may relate to claims brought against members of UK armed forces, and examines:

- current eligibility criteria for legal aid, in particular the merits test
- the development of the Ministry of Justice's plans to introduce a residence test for civil legal aid
- the commentary on that proposed test from the Joint Committee on Human Rights, the Justice Committee and others and
- challenges in the courts to the legality of the test.

The [Solicitors Regulation Authority investigated](#) both PIL and another legal firm, Leigh Day, in relation to the Al-Sweady inquiry. It has now [referred Leigh Day to the Solicitors Disciplinary Tribunal](#). Leigh Day '[strongly denies](#)' the allegations and argues that it has not been given a proper opportunity to respond to them.

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<sup>26</sup> [Legal aid in England and Wales for civil claims against UK armed forces](#), CBP 7477, 22 January 2016

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