

# **Can Kill, Won't Count**

## **the UK and the civilian death-toll in post-war Iraq**

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### **Executive Summary**

“no reliable means of ascertaining the numbers of civilians killed by United Kingdom Forces since the conflict ended”

## Introduction

In a parliamentary answer given to me by the Secretary of State for Defence on October 7<sup>th</sup> the British Government made the extraordinary admission that it was not in a position to know how many Iraqi civilians had been killed by British Forces since May 1<sup>st</sup> when the United States and the United Kingdom declared hostilities had ended<sup>1</sup>. During the

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<sup>1</sup> **Adam Price:** To ask the Secretary of State for Defence, how many Iraqi civilians have been killed by United Kingdom or United States military forces in (a) Iraq and (b) Baghdad since the end of the conflict in Iraq (129641)

**Mr Hoon:** We make every effort to minimise the impact of military operations on the Iraqi civilian population. We have no reliable means of ascertaining the numbers of civilians killed by United Kingdom Forces since the conflict ended.

war itself the Government could legitimately point to the difficulty of accurately ascertaining casualty figures in the confusion generated by the fog of war and Iraqi misinformation. To most objective observers, however, what holds true when your forces are bombing from 3,000 feet would appear less plausible when you're shot in close range in a residential area purportedly under UK protection. As this report demonstrates, for an occupying power whose primary responsibility is the protection of non-combatant civilians under its jurisdiction to admit it has no "no reliable means of ascertaining the numbers of civilians killed by United Kingdom Forces since the conflict ended" is a grave omission and a serious breach of both international humanitarian law – the law governing the conduct of armed conflicts and military occupations – as well as a violation of the UK's human rights obligations.

During the writing of this report the Government admitted that as of 12 November the Special Investigations Branch, the equivalent of C.I.D. within the Royal Military Police, had begun a total of seventeen investigations into cases where civilian fatalities, allegedly caused by British military personnel, had been confirmed, and where initial enquiries suggested there were grounds for a formal investigation.<sup>2</sup> In other words, these have been large numbers of innocent civilians killed in questionable circumstances allegedly at the hands of British forces, but the Government has kept the public in the dark, and have tried to buy the silence of the bereaved through the use of blood money<sup>3</sup>. Yet, the Government is required by law to ensure that "there must be a sufficient element of public scrutiny of the investigation and, in particular, the next of kin of the victim must be involved to the extent necessary to safeguard their legitimate interests."<sup>4</sup> As this paper demonstrates, the failure to acknowledge civilian casualties and to conduct independent and transparent investigations itself constitutes a serious breach of the British Government's responsibilities under the European Convention of Human Rights, actionable in law by dependents of the deceased.

### **Post-war civilian casualties**

Independent analysts, Iraq Body Count, claim that over 1500 Iraqi civilians have suffered violent deaths since the end of the conflict in Bagdad alone. According to Human

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<sup>2</sup> **Adam Price:** To ask the Secretary of State for Defence how many investigations have been held in Iraq into incidents involving confirmed civilian fatalities allegedly caused by United Kingdom military personnel since the end of the conflict. [136966]

**Mr. Ingram:** We investigate every incident in which we can confirm that there has been a civilian fatality allegedly caused by United Kingdom military personnel. We record centrally cases in which the initial investigation finds there are grounds for the Special Investigations Branch to conduct a formal investigation. As at 12 November the Special Investigation Branch had begun 17 investigations.

<sup>3</sup> *Sunday Times*, November 9<sup>th</sup> 2003

<sup>4</sup> *Jordan v. UK* (2001)

Rights Watch, the New York-based advocacy group, 94 of these were non-combatants shot in “questionable circumstances” by US troops.<sup>5</sup>

British military leaders have been quick to condemn the heavy-handed and trigger-happy tactics of the Americans, contrasting it with the ‘hearts and minds’ approach of British forces in the South. The official line is that after years of dealing with the IRA, British forces are better equipped than their American cousins to deal with the complications of the Iraqi invasion. British military professionalism – the replacement of helmets with less-threatening berets, the use of Iraqi-speaking officers, the greater skill and expertise in the use of roadblocks – has been widely lauded, but much of the information on the deaths of Iraqi civilians at the hands of British forces has been confined to foreign media and human rights groups.

Reported deaths involving British forces in southern Iraq include:

- A 14 year old boy, Ali Salim, shot by a British soldier on 3<sup>rd</sup> May<sup>6</sup>
- Radi Nu’ma who died in British custody in Basra on May 8<sup>th</sup><sup>7</sup>
- Two Iraqis who died in separate incidents in British custody in Basra on 13<sup>th</sup> and 18<sup>th</sup> May<sup>8</sup>
- Seven Iraqi civilians killed following demonstration in Majar al Kabir on June 24<sup>th</sup><sup>9</sup>
- Two Iraqi civilians killed at a wedding for which British forces later paid a “blood price”, or “Fasil”, in compensation<sup>10</sup>
- Iraqi civilian killed by a British soldier during a protest in Basra on August 9<sup>th</sup><sup>11</sup>
- Baha Musa who died in British custody in the Camp Steven detention facility, southern Iraq, 17<sup>th</sup> September<sup>12</sup>
- A demonstrator shot in Basra by British forces on October 4<sup>th</sup>

These sixteen deaths in nine incidents allegedly caused by the actions of UK military personnel may be the basis for some of the 17 investigations currently being conducted by the Special Investigations Branch. By implication, however, it would appear that there are additional deaths which are as yet unreported. But repeated attempts to get accurate information from the British Government on the number of civilian deaths have met with nothing but a stony silence.

The International Committee of the Red Cross in Baghdad does receive reports from victims’ families but says it does not have the requisite resources to investigate and that accurate recording of casualty figures is the responsibility of the occupying power. Like

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<sup>5</sup> *Hearts and Minds: Post-war Civilian Deaths in Baghdad Caused by U.S. Forces*, Human Rights Watch, October 2003

<sup>6</sup> *The Guardian*, May 5<sup>th</sup> 2003

<sup>7</sup> Amnesty International, *Memorandum on Concerns Relating to Law and Order*, Presented to UN Security Council 23<sup>rd</sup> July 2003

<sup>8</sup> *Sydney Morning Herald*, June 5<sup>th</sup>, 2003

<sup>9</sup> *al-Jazeera.net*, June 25<sup>th</sup> 2003

<sup>10</sup> *Guardian*, July 2<sup>nd</sup> 2003

<sup>11</sup> *ShiaNews.com*, August 10 2003

<sup>12</sup> *The Times*, October 4<sup>th</sup> 2003

the UK, the US keeps no statistics on civilian casualties claiming that is impossible to maintain an accurate account. According to the Coalition Press Office:

“It would be irresponsible to give firm estimates given the wide range of variables. For example, we have had cases where during a conflict, we believed civilians had been wounded and perhaps killed, but by the time our forces have a chance to fully assess the outcomes of the contact, the wounded or dead civilians have been removed from the scene. Factors such as this make it impossible for us to maintain an accurate account.”<sup>13</sup>

Yet each of the civilian casualties referred to above allegedly involving British Forces were in non-combat situations – the majority in custody or during demonstrations – in areas under British control. According to Human Rights Watch, the failure even to keep statistics on the number of deaths suggested that “civilian casualties are not a paramount concern”. As of October 1<sup>st</sup> the US military had acknowledged completing only five investigations above division level into the alleged unlawful killing of civilians. In four of those incidents, soldiers were found to have operated within the US military’s rules of engagement. In the fifth, a helicopter pilot and commander faced disciplinary action. Human Rights Watch, in contrast, has pointed to “over-aggressive tactics, indiscriminate shooting in residential areas and a quick reliance on lethal force” which taken together pointed to a failure to do “enough to minimise harm to civilians as required by international law”.

Particular concern has been expressed at the lack of training and resources for post-war security operations. Coalition Forces have been asked to perform a policing function for which they have been neither physically nor mentally equipped. Last month, Stephen White, the assistant Chief Constable in Ulster, appointed as the Director of Law and Order for Southern Iraq, condemned the British Government for not giving him more resources. Mr White was promised a contingent of 1,500 recruits, but only had a team of 15, and says he has been shocked by the limited backing from authorities, despite continued outbreaks of violence. The only way to restore order in the Basra area, he claims, is not more soldiers, but more international police officers.<sup>14</sup>

### International humanitarian law and military occupation

Under international humanitarian law (IHL), the US-UK coalition is the “Occupying Power” in Iraq, and as such their conduct is governed by two major international legal instruments that relate to the treatment of civilians in occupied territories: the 1907 Hague Regulations annexed to the Convention (IV) Respecting the Laws and Customs of War on Land, and the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War. This is recognised by the UN Security Council in Resolution 1483 on the occupation of Iraq adopted on 22 May 2003 under Chapter VII of the UN Charter which allows the Security Council to make decisions which are binding on all members. In the preamble the Security Council notes the letter of 8<sup>th</sup> May 2003 from the USA and the UK and recognises:

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<sup>13</sup> *Hearts and Minds*, ibid, p.10-11

<sup>14</sup> *Face up to dangers on frontline, says chief*, Belfast News Letter, October 14<sup>th</sup> 2003

“the specific authorities, responsibilities and obligations under applicable international law of these states as occupying powers under unified command (‘the Authority’).”

Paragraph 4 and 5 set out in more detailed terms the legal obligations of the occupying powers. The Security Council:

“Calls upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.

Calls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Convention of 1949 and the Hague Regulations of 1907.”

Under international humanitarian law, an occupying power is obligated to restore and ensure public order and safety. Article 43 of the Hague Regulations of 1907 states:

“the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety (*la vie* in the French version), while respecting, unless absolutely prevented, the laws in force in the country.”

In the absence of a fully functioning Iraqi police force, Coalition Armed Forces are thus responsible for security and law enforcement. Achieving security must, however, be in conformity with international standards of human rights, and the customary rules governing law enforcement. In combat situations – dealing with armed Iraqi insurgents, for example – the rules of international humanitarian law on hostilities apply. Article 46 of the Hague Regulations states that the “lives of persons...must be respected.” This explicitly prohibits a direct attack on civilians, unless and for such time as they take direct part in hostilities. As already noted above most of the civilian deaths since the end of the conflict have been in non-combat situations – in custody, at checkpoints, during routine patrols and searches, and in the dispersal of demonstrations – where the use of limited force may be necessary, but using policing methods rather than military rules of engagement.

Articles 13 and 27 of the Fourth Geneva Convention and Article 46 of the Hague Regulations place a duty on the occupying powers to protect civilians from acts of violence. In particular, the occupying powers must ensure that members of its own armed forces refrain from all use of force towards the inhabitants of the occupied territory, unless their orders and the prevailing situation make it necessary. In such a case, only absolutely necessary force may be used and only to the required extent, in accordance with the principle of proportionality.

## **The Occupying Power and Human Rights**

Under the Fourth Geneva Convention the occupying power must respect the fundamental human rights of the territory's inhabitants. Among these, the right to life is often said to be the most fundamental of all human rights, the basic precondition of the enjoyment of all other rights. This is a non-derogable. Following further questioning the Government admitted that as of 12 November the Special Investigations Branch, the equivalent of C.I.D. within the Royal Military Police, had begun a total of seventeen investigations into cases where civilian fatalities, allegedly caused by British military personnel, had been confirmed, and where initial enquiries suggested there were grounds for a formal investigation. In other words, there have been large numbers of innocent civilians killed in questionable circumstances allegedly at the hands of British forces, but the Government has kept the public in the dark, and allegedly tried to buy the silence of the bereaved through the use of blood money. Yet, the Government is required by law to ensure that "there must be a sufficient element of public scrutiny of the investigation and, in particular, the next of kin of the victim must be involved to the extent necessary to safeguard their legitimate interests."<sup>15</sup> As this paper demonstrates, the failure to acknowledge civilian casualties and to conduct independent and transparent investigations itself constitutes a serious breach of the British Government's responsibilities under the European Convention of Human Rights, quite apart from the particular circumstances surrounding each individual death.

right which applies even when hostilities rise to the level of armed conflict.

The United Kingdom is also a signatory to the International Covenant on Civil and Political Rights. Article 6 of the Covenant guarantees every human being the inherent right to life and states that "[t]his rights shall be protected by law. No one shall be arbitrarily deprived of his life." The United Nations Human Rights Committee, the body that monitors compliance with the Covenant, has said that the deprivation of life by state authorities, including arbitrary killing by their own security forces, is "a matter of the utmost gravity." A state must strictly control and limit the circumstances in which the authorities might deprive persons of their lives. Furthermore, the Human Rights Committee and other bodies monitoring the implementation by states of their human rights obligations under the treaties they have ratified, have consistently stressed that such obligations extend to any territory in which a state exercises jurisdiction or control, including territories occupied as a result of military action. In administering Iraq, the USA and UK must therefore respect their own international human rights obligations in addition to those under international humanitarian law.

Governments also have a duty to prosecute serious violations of physical integrity under international law under article 26 of the Covenant. The Human Rights Committee has further held that the state not only has a duty to protect its citizens (or Protected Persons in the case of occupied territories) from such violations, but also to investigate violations when they occur and to bring the perpetrators to justice. To ensure effective implementation, the U.N. Economic and Social Council in 1989 adopted the Basic Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions. Principle 9 states:

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<sup>15</sup> *Jordan v. UK* (2001)

“[There] shall be a thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives and other reliable reports suggest unnatural deaths. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death.”

The use of force by law enforcement officers, including soldiers performing this function as a result of a military occupation, is also strictly governed. Article 3 of the 1979 U.N. Code of Conduct for Law Enforcement Officials, states that force may only be used “when strictly necessary to the extent required for the performance of their duty.” The 1990 U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides guidance on the use of force and firearms by those enforcing the law. These principles are not legally binding, though they do represent a high level of international consensus governing the use of force in law enforcement with a view to respecting the fundamental right to life.

The Basic Principles are clear that they also apply to military personnel conducting policing operations:

“In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.”<sup>16</sup>

The Basic Principles provide that the intentional lethal use of firearms may only be made “when strictly unavoidable in order to protect life” (Principle 9), and that law enforcement officers should “as far as possible apply non-violent means before resorting to the use of force and firearms (Principle 4).” Exceptional circumstances such as internal instability or other public emergency may not be invoked to justify a departure from these basic principles.

In the event that firearms are used, Principle 10 requires clear warning and sufficient time for the warning to be observed unless inappropriate to the circumstances. Even when the use of firearms is deemed necessary, Principle 5 lays out clear guidelines for their use, including:

- Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
- Minimize damage and injury; respect and preserve human life;
- Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;
- Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment<sup>17</sup>.

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<sup>16</sup> *Basic Principles*, Notes

In the event of death, Principle 6 requires any incident to be reported immediately to superiors, and Principle 22 requires an independent investigative procedure, stating:

“Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.”

Furthermore, Principle 23 sets out the right of redress for the family of the deceased:

Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly.

Overall the inability to state civilian casualty numbers casts grave doubt on a number of requirements placed on Governments under customary international law. :

- **Was urgent medical assistance made available at the earliest opportunity?**
- **Were relatives or close friends of the deceased notified at the earliest possible moment?**
- **Were the deaths reported by Forces personnel to their superiors, and has a detailed report been prepared and sent promptly to the competent judicial authorities?**
- **Were the families of the deceased given access to an independent judicial process?**

The UK, the US and Iraq are all signatories to the International Covenant. However, the United Kingdom has not ratified the Optional Protocol allowing individuals the right to petition the Committee in relation to their grievances. Nevertheless, the failure to comply with international norms could be material to cases brought before the British Courts, acting in first instance, as well as the International Criminal Court (ICC) and the European Court of Human Rights.

### **Rights of redress – Basra, London, Strasbourg and the Hague**

Coalition forces are not subject to Iraqi law. According to Coalition Provisional Authority Regulation Number 17, coalition personnel are “immune from local criminal, civil and administrative jurisdiction and from any form of arrest or detention other than by person acting on behalf of their parent states”

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<sup>17</sup> Police are also required to ensure that assistance and medical aid are rendered immediately to injured persons, according to article 6 of the U.N. Code of Conduct for Law Enforcement Officials.

However, there are at least two avenues available to people wishing to bring cases as a result of their human rights being violated by agents acting on behalf of the British Government: the International Criminal Court Act 2001 in which the UK ratified the Rome Statute of the ICC and the Human Rights Act 1998 which enacted the European Convention of Human Rights into UK law.

### *1. The International Criminal Court*

The UK is party to the Rome Statute, and members of its Armed Forces, as well as Government Ministers are subject to the jurisdiction of the ICC whose provisions on war crimes would cover the violation of the Geneva Convention. However, Article 53 of the International Criminal Court Act 2001 states that:

“Proceedings for an offence shall not be instituted except by or with the consent of the Attorney General”.

Since the Attorney General may himself be implicated in the systematic failure to observe the customary norms of international humanitarian law, it's highly unlikely that he would grant an application to indict Government colleagues whose first line of defence would be the very legal advice proffered by the principal law officer.

Thankfully there is an alternative route available for those wishing to see justice for the long-suffering people of Iraq.

### *2. European Convention of Human Rights*

#### *2.1 The Convention and the right to life*

Article 2 of the European Convention on Human Rights states:

“Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

Article 2 is one of the few Convention Articles from which no derogation is permitted in times of war or emergency.

Article 2 (2) describes the situations in which it is permitted to “use force” which may result, as an unintended consequence, in taking life:

“Deprivation of life shall not be regarded as inflicted in contravention of Article 2 when it results from the use of force which is **no more than absolutely necessary**

in defence of another person from unlawful violence,

in order to affect a lawful arrest, or to prevent the escape of a person lawfully detained

in action lawfully taken for the purpose of quelling a riot or insurrection.”

These exceptions are to be considered exhaustive and must be narrowly interpreted. According to the Court:

“the use of the term ‘absolutely necessary’ in Article 2 (2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable... In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2.”<sup>18</sup>

In *Gülec v Turkey*, for example, the Court held that there was a breach of Article 2 when police fired into a crowd to disperse demonstrators. The Court described the unavailability of less forceful means of crowd control such as truncheons, riot shields, water cannon, rubber bullets or tear gas as “incomprehensible and unacceptable”.

## 2.2 The Convention and Occupied Territories

It is part of well-established case law of the European Convention on Human Rights (ECHR) that Contracting parties have responsibility for actions taken by its armed forces outside its national territory, including in circumstances when, as the result of military action – whether lawful or unlawful – a treaty State exercises effective control of part or the whole of a foreign country.<sup>19</sup> Commenting on the extra-territorial application of the Convention in its Decision as to Admissibility in Bankovic (Application no. 52207/99) the European Court of Human Rights stated (para.71):

“the case law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation...exercises all or some of the public powers normally to be exercised by that Government.”

In these circumstances the guarantees provided by the Convention under Article 2 (right to life), Article 3 (prohibition of torture), Article 4 (prohibition of slavery and forced labour) and Article 7 (no punishment without law), with the exception of deaths resulting from lawful acts of war, apply to their full extent. The Court has, for example, held admissible a complaint against the activities of the Armed Forces of the Republic in Turkey while on an operation in northern Iraq<sup>20</sup>. Victims of acts committed by Italian or Belgian troops in Somalia could also have brought a complaint under the ECHR against the respective states for violations carried out during the UN operations in Somalia. As a consequence, therefore, Iraqi citizens may obtain redress as the European Court in Strasbourg for human rights violations that they suffer at the hands of the Coalition Provision Authority. The UK is directly liable for its own actions though the Court may also deem it complicit in human rights violations committed by American Forces.

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<sup>18</sup> *Andronicus and Constantinou v Cyprus* (1997)

<sup>19</sup> *Cyprus v. Turkey*, 6780/74 & 6950/75; *X&Y&Zv. Switzerland*, 7289/75 & 7349/76; *Drozd and Janousek v. France and Spain*

<sup>20</sup> *Halima Musa Issa and others v. Turkey*

### 2.3 The Convention and Civilian Casualties

The Court has had to consider a number of cases where military operations have resulted in considerable injury or in the deaths of civilians. In the view of the Convention bodies the key questions in assessing whether a killing is unlawful is whether there was a legal target, whether the attack on the lawful target was proportionate, and whether there was a foreseeable risk of death to non-combatants that was disproportionate to the military advantage. In the Gülec case already referred to, the Commission found that the security forces had killed a civilian through the manifestly disproportionate use of a combat weapon, in violation of Article 2 of the European Convention.<sup>21</sup> Given that the Commission also found that the area was in a region under a state of emergency, that civil disturbances were frequent and popular unrest could be expected at any moment, this indicates that the basic Convention rights apply even in these situations.

In *Ergi v. Turkey* (23818/94) the Court and the Commission had to examine a military operation in which a woman, standing in the doorway of her home, had been killed in the course of an alleged ambush operation. The Commission considered that the planning and control of the operation needed to be assessed "...not only in the context of the apparent targets of an operation but, particularly where the use of force is envisaged in the vicinity of the civilian population, with regard to the avoidance of incidental loss of life and injury to others"<sup>22</sup> It went on to find that the ambush operation was not implemented with the requisite care for the lives of the civilian population, that there was significant evidence that misdirected fire from the security forces had killed a civilian, and that steps or precautions were not taken to minimize the development of a conflict over the village. The Court explicitly noted that the responsibility of the State "may also be engaged where (the security forces) fail to take all feasible precaution *in the choice of means and methods* of a security operation mounted against an opposing group with a view to avoiding or, at least, minimizing incidental loss of civilian life".

In *McCann and others v United Kingdom* the Court took the view that it had to consider not only whether the force used by soldiers in killing three IRA members was proportionate but also "whether the anti-terrorist operation was planned and controlled by the authorities so as to minimize, to the greatest extent possible, the recourse to lethal force" This emphasis on the role of planning, including terms of engagement issued by commanding officers, and the general policy framework, means that the actions or omissions of Ministers are as relevant to assessing the legality of military operations as the actual details of the operations themselves.

Finally, and most significantly, both the Commission and the Court have stated explicitly that the existence of an armed conflict does not exempt killings from scrutiny and investigation to assess their lawfulness. In a case where the applicant's brother was killed in the course of a military operation and it was a subject of dispute whether he had been a combatant in the clash or not, the Court made it clear that there was a procedural requirement to investigate the killing to establish whether his killing had been lawful:

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<sup>21</sup> Gülec v. Turkey

<sup>22</sup> Commission Report paras 145-149

“Neither the prevalence of violent armed clashes nor the incidence of fatalities can displace the obligation under Article 2 to ensure that an effective independent investigation is conducted into deaths arising out of clashes involving the security forces”<sup>23</sup>

The Court similarly ruled in McCann:

“The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State’s general duty under Article 1 (art 2 + 1) of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention’, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.”

This was reiterated by the Court in *Kaya v Turkey* (1998):

“The Court observes that the procedural protection of the right to life inherent in Article 2 of the Convention secures the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances”

The Court went on to rule:

“neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces, more so in cases such as the present where the circumstances are in many respects unclear.”

More recently, in May 2002, the Court ruled that the UK had violated the right of life of Dermot McShane, who was crushed by an army vehicle in Northern Ireland in 1996, by failing to ensure an effective investigation into his death.

The Convention bodies are clear, therefore, that there should be an effective investigation when individuals have been killed as a result of the use of force.<sup>24</sup> For such an investigation to be effective a number of requirements must be fulfilled as set out in *Jordan v UK* (2001):

- the persons responsible for the investigation must be independent of those implicated in the events – this must be ‘practical independence’
- the investigation must be effective in the sense that it is capable of leading to a determination as to whether or not the force was justified and to the identification and punishment of those responsible

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<sup>23</sup> *Kaya v. Turkey*, judgement of 19 February 1998, para.91. The Court reiterated this jurisprudence in its judgement in *Ergi v. Turkey*

<sup>24</sup> A position confirmed in UK law by *R (Wright) v. Secretary of State for the Home Department* (2002) where the Court held that the state has an obligation to procure an effective official investigation into any alleged breach of Article 2.

- a requirement of promptness and reasonable expedition is implicit in this context;
- there must be a sufficient element of public scrutiny of the investigation and, in particular, the next of kin of the victim must be involved to the extent necessary to safeguard their legitimate interests

In *Yasa v Turkey* the Court widened the circumstances where States are required to conduct investigations into deaths by holding that ...."the obligation is not confined to cases where it has been established that the killing was caused by an agent of the State." In the *McShane case v UK* (2002) the UK Government submitted that the death was the result of an accident, and thus Article 2 was therefore not applicable. The Court rejected this argument, holding that as the death was the result of a use of force by the state it was covered by Article 2, notwithstanding that it may have been unintentional.

The same applies as regards deaths in custody. If the state is unable to provide an explanation for the death of a person who is taken into custody in good health then there may be two separate violations of Article 2: in respect of the death and in respect of a failure to carry out an investigation.<sup>25</sup> In *R v Director of Public Prosecutions, ex p Manning* (2001) it was held given the importance of Article 2 (1) there had to be compelling grounds for not giving reasons as to why a prosecution was not going to follow a death in custody.

Where an applicant alleges that State agents have killed a person in violation of Article 2, the Court will have to be satisfied that there is sufficient evidence to "enable it to conclude beyond all reasonable doubt" that the State was responsible for the death before it can hold the State directly accountable under the Convention. But even though the Court sometimes is unable to determine who is actually responsible for a particular killing it may find a State liable for breaching other aspects of Article 2 ( such as failing to take proper care in the planning of a security operation<sup>26</sup> or failing to conduct an effective investigation into the death<sup>27</sup>).

## **UK Human Rights Violations in Occupied Iraq**

With very limited information, and for fear of prejudicing any possible criminal investigations, it would be wrong to speculate in detail about human rights violations by British forces since the beginning of the occupation in southern Iraq. What can be said is that at the time of writing at least seventeen civilian fatalities in questionable circumstances have been admitted by the British Government. No-one as yet has been charged. Even if each one of these deaths can be shown to be lawful it is my submission that the United Kingdom has still violated the right to life, under Article 2 of the European Convention, of Iraqi citizens which under international law should enjoy its protection. In particular the Government stands condemned by its failure:

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<sup>25</sup> *Velikova v. Bulgaria* Judgment of 18 May 2000; *Tanli v. Turkey*, Judgement of 10 April 2001; *Salman v. Turkey* (2002)

<sup>26</sup> *Ergi v Turkey*(1998)

<sup>27</sup> *Yasa v Turkey* (1998);*Kaya v Turkey* (199 8)

- to keep an accurate count of civilians killed by British Forces since the end of the war
- to train and equip military personnel adequately for law enforcement duties, and to deploy civilian law enforcement and judicial personnel as quickly as possible. This is despite the lessons from similar failings during peacekeeping duties in Bosnia, Kosovo and East Timor.<sup>28</sup>
- to conduct a sufficiently impartial and independent investigation into civilian deaths resulting from the use of force by British military personnel.

This last point may seem to some to prejudge the outcome of the Royal Military Police's enquiries, some of which are ongoing. However, there is good reason to doubt whether an internal military investigation is sufficiently independent in this context. The Royal Military Police have been stationed in Iraq since before the end of the conflict. By mid May, some 480 members of the RMP were based in the British Zone with about one hundred on active patrol in Basra. They must be commended on their courage and sensitivity and have regrettably suffered a high number of casualties. However, due to the nature of their mission in Iraq, it is possible that members of the RMP may themselves have been involved in some of the incidents under investigation.

Not only is the Army the investigating force in these cases, it is also judge and jury. It is entirely a matter for the Commanding Officer of the reported person to act upon the findings of the Special Investigations Branch. He may dismiss charges, deal with them summarily, refer the matter to higher authority, or remand the accused for trial by Court Martial, or order a Regimental Board of Inquiry.

The need for clear and unambiguous civilian control of investigations of non-combatant deaths allegedly arising from the actions of British soldiers was emphasized by the High Court's recent condemnation of the RUC in their decision to delegate to the Army in the case of Kathleen Thompson shot by British soldiers in 1971. This was echoed by the Surrey Police in their report on the Deepcut affair who concluded that "in order to ensure confidence that the truth is available, the civil police must assume primacy immediately when an untimely and non-combatant death occurs in the military and conduct an independent investigation that treats each case as having the potential to be a homicide unless, and until, compelling evidence to the contrary is available"<sup>29</sup>

For any of these omissions, and any unlawful actions on the part of those acting on behalf of the United Kingdom, the Court has repeatedly stated that the notion of an effective remedy entails compensation, (which could be set at \$10 million per civilian life lost following the amount Libya was forced to pay in the recent settlement of the Lockerbie case, not the derisory £6,000 reportedly being offered to Iraqi families) and a thorough and effective investigation capable of leading to the identification and punishment of those responsible.

## Conclusion

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<sup>28</sup> *Basra: Crime and Insecurity under British Occupation*, Human Rights Watch, New York, June 2003

<sup>29</sup> Surrey Police, Report to the Coroner, 19<sup>th</sup> 2003

With the threat from phantom Weapons of Mass Destruction conveniently buried as a war aim, we are now told by the Prime Minister that we went to war because Saddam Hussein breached international law, and killed his own citizens with impunity. Now Saddam has gone, it appears that it is us who are now violating international law, and killing Iraqi citizens without due legal process.

Last November in an assault on the moral high-ground in the run-up to the conflict the UK Government published a dossier cataloguing the atrocities committed by Saddam Hussein's regime against the Iraqi people as part of its justification for the ensuing war. A year later, as we have seen in this report, it is the UK and the US who now stand accused of the illegal killing and torture of innocent Iraqis. And the Arab world marvels at our leaders' seemingly infinite capacity for the display of double standards.

Each civilian death at the hands of an occupying soldier is a tragedy, each failure to investigate a crime. For the British Government to refuse to acknowledge and properly establish the causes of these deaths is to show the same callous disregard for human life we rightly condemn in others. As at Hilla and Halabja, it is a moral and a legal duty for us to ensure that each death is recorded, given the gravity it deserves, and is investigated to establish whether there are grounds for criminal or disciplinary proceedings depending on the seriousness of the offence.

In particular, the UK Government should as a matter of urgency:

- Agree to abide by the standards set forth in the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials
- Begin to keep accurate records of civilian casualties in the areas under its control
- Ensure that proper mechanisms are in place to ensure competent, impartial and independent investigations into all non-combatant deaths
- Take appropriate action against anyone shown to be guilty of the use or tolerance of excessive or indiscriminate force, including those in postions of responsibility
- Facilitate a complaints procedure through adequate legal representation for the Iraqi population and agree to pay compensation to victims of unlawful use of force
- Provide additional training and resources for those performing law enforcement duties
- Hand legal authority to the UN, pending Iraqi elections, and replace troops with an international law enforcement force

As a next step in our efforts,together with Jill Evans MEP, Plaid Cymru Leader in the European Parliament, I am in the process of assembling a team to visit Iraq to conduct on-the-ground research into civilian deaths allegedly casued by UK Forces. We will aim to interview witnesses to civilian deaths, family members of the deceased, Iraqi police, journalists, lawyers and human rights activists, British soldiers and members of the Coalition Provisional Authority. This will need to be done as a matter of urgency as

applications need to be made within six months of the alleged violation. For many of the families of those who have died it is already too late.

To those innocent victims of our hypocrisy this report is intended as a source of redress. It is not intended as a condemnation of the dedicated members of the Armed Forces who have been asked to perform policing duties with neither the training nor the resources sufficient to the task. The real responsibility lies with Ministers who claim to be rebuilding a country while turning a blind eye to the deaths of its people.