

# THE DEATH OF BAHA MOUSA

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*[Between March 2003 and September 2004, 100 000 Iraqis are believed to have died as a consequence of the invasion of Iraq on 20 March 2003. Baha Mousa, an Iraqi hotel clerk was one of them. Mr Mousa died in Basra on or around 15 September 2003, after sustaining 93 separate injuries while in the custody of British soldiers belonging to the Duke of Lancaster's Regiment. This think piece is about the law produced and invoked by his death.]*

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How violent Schultz had sounded over the telephone. 'I want justice,' he had said. I wonder how many murders have been committed, and how many wars have been fought with that as a slogan ... Justice is a thing that is better to give than to receive, but I am sick of giving it ... I think it should be a prerogative of the gods.<sup>1</sup>

## I INTRODUCTION

On 14 September 2003, in Basra, southern Iraq, a hotel receptionist named Baha Mousa<sup>2</sup> was detained by soldiers of the British Army's Duke of Lancaster's Regiment. Mousa and several other Iraqis were brought to a detention facility operated by the United Kingdom Armed Forces, and formerly run by Saddam Hussein's cousin, Ali Hassann al-Majid, better known as 'Chemical Ali'. Thirty-six hours later, Mr Mousa's family were informed that Mr Mousa had died during detention. A subsequent post-mortem revealed that he had received 93 separate injuries, including a broken nose and fractured ribs — other prisoners suffered serious kidney damage.<sup>3</sup>

The reaction (on the part of the military, the legal profession, the media and the British establishment) to this incident tells us a little about the way

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<sup>1</sup> The character of Judge Bernstein in Sloan Wilson, *The Man in the Gray Flannel Suit* (1956) 146 (emphasis in original). For an illuminating discussion of deities (though unaffiliated to Bernstein's), see Helen Durham, *International Humanitarian Law and the Gods of War: The Story of Athena versus Ares* (2007) 8 *Melbourne Journal of International Law* 248. I discuss Judaic and Greek conceptions of justice in Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (2007) chs 5, 8.

<sup>2</sup> Baha Mousa is sometimes referred to as Bahar Musa in reports of the case.

<sup>3</sup> Raymond Whitaker, '93 Injuries, One Killing, No Justice', *The Independent on Sunday* (London, UK) 18 March 2007, 19.

international criminal law works. Mousa's death provoked an extraordinarily diverse array of legal and political responses. These encompassed everything from the confusion and neglect that marked the initial British reaction; fury and recrimination among Iraqis; prosecution under the *Army Act 1955* (UK);<sup>4</sup> the first conviction under the UK's *International Criminal Court Act 2001* (UK);<sup>5</sup> the trial (on charges of negligently performing his duty to prevent maltreatment of civilians) and acquittal of a commanding officer not present at the place of detention;<sup>6</sup> a human rights case (in which relatives of Mousa argued for the application of the *European Convention on Human Rights*<sup>7</sup> and the *Human Rights Act 1998* (UK) to the Mousa detention);<sup>8</sup> and an attempt by the UK Government to settle the case by offering the Mousa family monetary compensation.<sup>9</sup>

This think piece largely will be about the range and interaction of legal responses to the Mousa death. But I hope, too, that somewhere in the contours of this sorry story there are traces of the human dilemma we face in doing international criminal law; a dilemma marked by the twin pathologies of wanting justice and being 'sick of giving it'.<sup>10</sup>

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The Iraq War has been thoroughly 'juridified'.<sup>11</sup> Mousa's death and its consequences represent only a sample of the manoeuvring around and through law that has become a mark of this episode. I have spoken elsewhere about the public enthusiasms expressed and tamed through legal language, about the angst of international lawyers who elect to use law to struggle with and against war, and about the broader turn to retribution in international law that the Iraq War has represented.<sup>12</sup> The war, though, has produced also a mountain of

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<sup>4</sup> See *R v Payne*, General Court Martial Charge Sheet (2006), available from <[http://www.army.mod.uk/apa/courts\\_martial\\_trials](http://www.army.mod.uk/apa/courts_martial_trials)> at 18 October 2007.

<sup>5</sup> See Robert Verkaik, "'Historic Prosecution' for Armed Services", *The Independent* (London, UK) 20 September 2006, 16.

<sup>6</sup> See 'Colonel Considered a Rising Star', *BBC News* (UK) 14 February 2007 <[http://news.bbc.co.uk/2/hi/uk\\_news/6362447.stm](http://news.bbc.co.uk/2/hi/uk_news/6362447.stm)> at 18 October 2007.

<sup>7</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 December 1953) ('*European Convention on Human Rights*').

<sup>8</sup> *R (Al-Skeini) v Secretary of State for Defence* [2005] 2 WLR 1401; *R (Al-Skeini) v Secretary of State for Defence* [2007] QB 140; *R (Al-Skeini) v Secretary of State for Defence* [2007] 3 WLR 33.

<sup>9</sup> Sam Knight, 'Inquiry Ordered into Baha Mousa Death', *Times Online* (UK) 21 December 2005 <<http://www.timesonline.co.uk/tol/news/world/iraq/article778445.ece>> at 18 October 2007. The House of Lords Judicial Committee handed down its decision just as I completed the writing of this think piece: *Al-Skeini v Secretary of State for Defence* [2007] 3 WLR 33.

<sup>10</sup> This idea is taken up in greater detail in Simpson, *Law, War and Crime*, above n 1.

<sup>11</sup> For a discussion of this idea of juridification in contexts other than the Iraq War, see *ibid* ch 6.

<sup>12</sup> Gerry Simpson, 'The War in Iraq and International Law' (2005) 6 *Melbourne Journal of International Law* 167; Matthew Craven et al, 'We are Teachers of International Law' (2004) 17 *Leiden Journal of International Law* 363; Gerry Simpson, 'Piracy and the Origins of Enmity' in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (2007) 219.

jurisprudence and, what Judith Shklar has called, tribunality.<sup>13</sup> Some of this has not involved the courts directly. In the UK, there have been two major inquiries into matters arising out of the war. In the Hutton Inquiry, following Dr David Kelly's suicide, Lord Hutton, a former Law Lord, concluded that the BBC had acted improperly in broadcasting a news item alleging that the Government had 'sexed up' an official intelligence report in order to make Saddam appear more dangerous.<sup>14</sup> The Butler Inquiry covered some of the same ground but was more broadly directed at the relationship between the intelligence services and the political arms of government.<sup>15</sup> Sir Robin Butler concluded that the British Government was innocent of having dishonestly led the UK into war. At most, he found that ministers may have 'subconsciously' influenced the intelligence community into making inflated assessments of Iraq's weapons capability.<sup>16</sup> In Australia, of course, the Cole Inquiry into the Australian Wheat Board ('AWB') scandal found that the Department of Foreign Affairs and Trade and the Government were misled and lied to by corrupt AWB directors who had connived to pay the Iraqi Government illegal, disproportionate and deliberately concealed 'inland transportation fees' as part of the United Nations' Oil-for-Food Programme.<sup>17</sup>

The courts themselves, though, have been central. *Doe v Bush*<sup>18</sup> was an early American effort to have the judiciary involved in an explicit evaluation of the war, but it is in the UK where juridification in the courts has flourished. Historically, war, of course, has not proved susceptible to legal regulation within the UK (or the United States and Australia).<sup>19</sup> This mirrors a similar difficulty at the international level where the project to criminalise aggression, apparently

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<sup>13</sup> Judith Shklar, *Legalism* (1964).

<sup>14</sup> UK, Hutton Inquiry, *Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly* CMG (2004) 200–14. This point is discussed in a lacerating essay by Conor Gearty: 'A Misreading of the Law' (19 February 2004) 26(4) *London Review of Books* <[http://www.lrb.co.uk/v26/n04/gear01\\_.html](http://www.lrb.co.uk/v26/n04/gear01_.html)> at 18 October 2007.

<sup>15</sup> UK, Butler Inquiry, *Review of Intelligence on Weapons of Mass Destruction* (2004).

<sup>16</sup> *Ibid* 109.

<sup>17</sup> Commonwealth, Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme, *Final Report* (2005) 100–1 ('Cole Inquiry'). There were court proceedings arising out of the Inquiry: *Australian Wheat Board Ltd v Cole* [2006] FCR 382.

<sup>18</sup> *Doe v Bush* (2003) 322 F 3d 133. The case turned on the relationship between congressional power over decisions to go to war and presidential authority to make war. The First Circuit held that the plaintiffs had failed to identify a meaningful, ripe and justiciable dispute between the two branches of government, though the leading opinion (Justice Lynch) conceded that the courts might be willing to intervene in extreme cases where 'for example, Congress gave absolute discretion to the President to start a war at his or her will': at 23.

<sup>19</sup> See Geoffrey Lindell, 'The Coalition Wars against Iraq and Afghanistan in the Courts of the UK, Ireland and the US — Significance for Australia' (Law and Policy Paper No 26, Centre for International and Public Law, Australian National University College of Law, 2005). The role of judicial review in the conduct of foreign affairs is explored and illustrated by cases in the UK, Ireland and the US concerning or arising out of the two military actions conducted against Iraq in 1990–91 and 2003 respectively, and also an English case arising out of the military action in Afghanistan in the so-called 'war on terror', which followed the destruction of the New York Twin Towers on 11 September 2001.

consolidated at Nuremberg<sup>20</sup> and Tokyo,<sup>21</sup> is close to collapse in the face of disagreement about the nature of war (necessary? aberrant?); institutional competence over war (the Security Council? the International Criminal Court ('ICC')? the International Court of Justice?); and the definition of aggressive war (armed attack? use of force? pre-emptive self-defence?).<sup>22</sup> These three difficulties share a common source. Law is about regulating social life (codification) but it is also about constituting and patrolling the borders between areas of social life regarded as law-full and those where law is evacuated in favour of politics (jurisdiction). In the zone of the political, law's prerogatives are circumscribed. But law has a hegemonic impulse to cover the field and the globe with its own normativity. So, contrary to the conventional portrait of a weak normative regime and a rampant political sphere, politics often struggles to preserve *its* jurisdiction in the face of invasion from law and the legal form. The sharpest site of this confrontation, and law's greatest challenge, is the sphere of war or the deployment of armed force. This is where politics has tended to prevail. The regulation of armed force at the international law level has proved troublesome because war remains the last bastion of the political.<sup>23</sup> This accounts for the failure to achieve a satisfactory definition of aggression after just short of a century's worth of effort.<sup>24</sup>

In the domestic sphere, meanwhile, the executive has insisted on its exclusivity over war-making. In the US, this exclusivity has been preserved by deferential courts and a cowed Congress alike. In Australia, decisions to go to war are vested in the Queen and exercisable by the Governor-General, acting on the advice of the government of the day.<sup>25</sup> Recent deployments of troops abroad have not been preceded by parliamentary approval — for instance, the Australian deployments in Iraq and East Timor. In the UK, this executive privilege and dominance is under threat from two, rather obvious, sources: Parliament and the courts. One of the principal grievances directed towards the Blair Government was its centralising tendency. The Iraq War, already unpopular among a significant segment of the British citizenry, then became a lightning rod for opposition to presidential Blairism. The result of this was a shift in parliamentary mood, reflected in the headstone at Robin Cook's grave: 'I may not have succeeded in halting the war, but I did secure the right of Parliament to decide on

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<sup>20</sup> *Charter of the International Military Tribunal*, annexed to the *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, opened for signature 8 August 1945, 82 UNTS 280, art 6(a) (entered into force 8 August 1945).

<sup>21</sup> *Charter of the International Military Tribunal for the Far East*, TIAS 1589, art 5(a) (proclaimed 19 January 1946, amended 26 April 1946).

<sup>22</sup> International Criminal Court, Preparatory Commission, *Working Group Paper on History of Aggression* <<http://www.un.org/law/icc/prepcomm/prepfra.htm>> at 18 October 2007. See also Joachim Gewehr, *Defining Aggression for the International Criminal Court: A Proposal* (LLM Thesis, University of Cape Town, 2003) 25.

<sup>23</sup> See generally Michael Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (2001).

<sup>24</sup> See, eg, Oscar Solera, *Defining the Crime of Aggression* (2007).

<sup>25</sup> *Australian Constitution* s 68.

war'.<sup>26</sup> Cook, one time Foreign Secretary and later Leader of the House of Commons, did secure a vote on the Iraq War two days before it began (the Government won the vote, in favour of war, 412 to 149) but it is premature to say whether this has become a convention of any sort.<sup>27</sup>

My focus, though, is on the courts, the locus of some significant opposition to the war. In *CND v Prime Minister*,<sup>28</sup> for example, the antinuclear protest group, Campaign for Nuclear Disarmament, brought an administrative claim against the Government in which it sought an advisory declaration on the meaning of *Security Council Resolution 1441*<sup>29</sup> (it was, in effect, asking the court to declare that any war in Iraq had to conform to international law). Unsurprisingly, the courts declined to engage with the foreign affairs prerogative in this way, relying on the seminal *Chandler v Director of Public Prosecutions*<sup>30</sup> and *CCSU v Minister for the Civil Service*<sup>31</sup> cases as the controlling precedents.<sup>32</sup> This limit on judicial interference with the foreign affairs prerogative was decisive too in *R v Jones*.<sup>33</sup> This case concerned a simple enough question: was the war in Iraq a crime? Ms Jones and her comrades thought so. So, doing what any decent citizen would do, they set out to prevent the commission of the crime. Jones and her accomplices broke into a Fairfield Airbase and disabled some military equipment.<sup>34</sup> They were charged with criminal damage.<sup>35</sup> It is a defence to a criminal charge that the offence was committed in order to prevent a greater crime (this is an aspect of the defence of necessity). The appeal ended up at the House of Lords in 2006 on a point of law.<sup>36</sup> Three questions seemed pertinent to their Lordships. Was aggression a crime under international law? Was *this* war a

<sup>26</sup> Louise Gray, 'Cook's Anti-War Stance Is Now Set in Stone', *The Scotsman* (Edinburgh, UK) 10 January 2007, 13.

<sup>27</sup> Angharad Parry, 'The Future Role of the British Parliament in Decisions to Enter Armed Conflicts Abroad' (14 June 2005) *American Society of International Law Insights* <<http://www.asil.org/insights/2005/06/insights050614.html>> at 18 October 2007. The issue of parliamentary oversight was the subject of a House of Lords Constitution Committee Report which recommended that Parliament be given a formal role in approving decisions to deploy armed force abroad: Select Committee on the Constitution, House of Lords, *Waging War: Parliament's Role and Responsibility* (2006) 41. The Government's response to this paper was almost entirely negative: Select Committee on the Constitution, House of Lords, *Waging War: Parliament's Role and Responsibility Follow-Up* (2006); UK, *Government Response to the House of Lords Constitution Committee's Report Fifteenth Report of Session 2005–06*, Command Paper CM 6923 (2001). As I write this piece, however, Gordon Brown, the new UK Prime Minister, has indicated that Parliament will be given power over war-making: see George Jones, Rachael Sylvester and Alice Thomson, 'Brown Attacks Blunders over War in Iraq', *The Daily Telegraph* (London, UK) 12 June 2007, 1.

<sup>28</sup> *The Campaign for Nuclear Disarmament v The Prime Minister of the United Kingdom* [2002] EWHC 2777 ('*CND v Prime Minister*').

<sup>29</sup> UN SCOR, 57<sup>th</sup> sess, 4644<sup>th</sup> mtg, UN Doc S/RES/1441 (8 November 2002).

<sup>30</sup> [1964] AC 763.

<sup>31</sup> *Council of Civil Services Unions v Minister for the Civil Service* [1984] 3 All ER 935, 955 ('*CCSU v Minister for the Civil Service*') (Lord Roskill): 'The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner'.

<sup>32</sup> See also *R v Ministry of Defence; Ex parte Smith* [1995] 4 All ER 427.

<sup>33</sup> [2005] QB 259; *R v Jones* [2006] 2 All ER 741.

<sup>34</sup> *R v Jones* [2005] QB 259, 265.

<sup>35</sup> *Ibid.*

<sup>36</sup> *R v Jones* [2006] 2 All ER 741. The Court of Appeal decision is discussed in Robert Cryer, 'Aggression at the Court of Appeal' (2005) 10 *Journal of Conflict & Security Law* 209.

crime under international law? And, critically, was the war a crime under English law? This final question required an affirmative response in order to sustain the defence of necessity. The Law Lords held that inter-state aggression was not a crime under domestic law, but that aggression was a crime under international law.<sup>37</sup> They made no finding on the Iraq war, though their *obiter dicta* were suggestive.<sup>38</sup> Two familiar barriers stood in the way of a more favourable outcome for the plaintiffs. First, the Court made it clear that any declaration by it concerning the legality of the Iraq War would constitute a judicial intervention in the sphere of international politics.<sup>39</sup> Second, the Court deferred to Parliament by refusing to directly incorporate into English law an international legal norm (criminalising aggressive war) with no statutory presence in English domestic law.<sup>40</sup>

The legality of the war was also directly at issue in the court-martial of Malcolm Kendall-Smith, a Flight Lieutenant in the Royal Air Force. Kendall-Smith, a doctor, refused to serve in Iraq claiming that service would constitute a breach of international law and, indeed, would further an act of aggression under international criminal law.<sup>41</sup> The Judge at his court-martial sentenced him to eight months' imprisonment for disobeying orders, and admonished Kendall-Smith in the following terms:

You have, in the view of this court, sought to make a martyr of yourself and shown a degree of arrogance which is amazing. Consequently you have lost any credit you might have been given for guilty pleas.<sup>42</sup>

Kendall-Smith was unable to rely on the defence that he was resisting a war of aggression.<sup>43</sup>

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<sup>37</sup> *R v Jones* [2006] 2 All ER 741, 784, 787–8.

<sup>38</sup> *Ibid* 791.

<sup>39</sup> *Ibid* 741.

<sup>40</sup> *Ibid* 757. In Germany, Donald Rumsfeld was the subject of a criminal complaint made under the *Code of Crimes against International Law 2002* (Germany): see 'Rumsfeld Sued for Alleged War Crimes', *Deutsche Welle* (Germany) 30 November 2004 <<http://www.dw-world.de/dw/article/0,1564,1413907,00.html>> at 18 October 2007. This Code incorporates the *International Criminal Court Statute* into German law but also provides for universal jurisdiction over violators of international criminal law regardless of any nexus with Germany. The case was dismissed in 2005 on the basis of Rumsfeld's immunity at the time.

<sup>41</sup> See Hyder Gulam and Mike O'Connor, 'Selective Conscientious Objection: The Court Martial of Flight Lieutenant Malcolm Kendall-Smith, RAF' (2006) 7(2) *ADF Health* 68. Questions about the legality of the war as a justification for refusing to serve in it emerged in the US, too, in several cases: see, eg, Transcript of Proceedings, *United States of America v Watada* (US Uniform Code of Military Justice Article 32 Hearing, Professor Boyle, 17 August 2006) (copy on file with author), where the *US Army Field Manual* 27-10, [498] was at issue: 'Any person ... who commits an act which constitutes a crime under international law is responsible therefore ... Such offenses in connection with war comprise ... crimes against peace'. See also *US v Huet-Vaughn*, 43 MJ 105, 113–14 (1995), stating that refusal to fight illegal war was not excusable under a defence of necessity.

<sup>42</sup> Judge-Advocate Bayliss, as cited in 'Jail for Iraq Refusal RAF Doctor', *BBC News* (UK) 13 April 2006 <[http://news.bbc.co.uk/2/hi/uk\\_news/4905672.stm](http://news.bbc.co.uk/2/hi/uk_news/4905672.stm)> at 18 October 2007. Kendall-Smith was dismissed from the RAF and ordered to pay £20 000 in costs.

<sup>43</sup> Peter Graff, 'British Airman's Iraq Order Legal, Judge Rules', *Reuters News* (UK) 22 March 2006.

In another set of cases before the English Courts, the *Human Rights Act 1998* (UK) has provided a hook for challenges to the legality of government behaviour arising out of the war. In *Gentle v Prime Minister*,<sup>44</sup> an application for judicial review of the decision to go to war rested on the argument that such a review was necessitated by the death in combat of Rose Gentle's son (and others). Fusilier Gordon Gentle was killed by a roadside bomb in Iraq on 28 June 2004. This fatality, the plaintiffs argued, engaged the right to life and, by implication, the right to an independent inquiry into the broader circumstances surrounding the death, that is, what the court called the 'invasion question' (an inquest was held into the immediate circumstances of Gordon Gentle's death).<sup>45</sup> Article 2 of the *European Convention on Human Rights* has been interpreted to provide an obligation on the part of member states to ensure that there is a framework of laws to protect the right to life and to ensure that there is no unjustifiable taking of life.<sup>46</sup> The European Court of Human Rights has recognised the presence of a procedural obligation to investigate cases where an unjustifiable loss of life may have occurred.<sup>47</sup> To put all this another way, the plaintiffs argued that an exception to the general right to life in the *Human Rights Act 1998* (UK) is available only in the case of *lawful* wars.<sup>48</sup> The Court in *Gentle* decided that there was no breach of art 2. The proposed implied duty in art 2 (to take reasonable care to ensure that an action or war is lawful) was, the Court said, indistinguishable from a political and therefore non-justiciable duty to ensure that a use of armed force was desirable.<sup>49</sup> This meant, and here the Court quoted Richards J in *CND v Prime Minister*,<sup>50</sup> that '[i]t is not possible to isolate a purely judicial or legal issue as "a clinical point of law"'.<sup>51</sup> Considerations of policy were therefore both unavoidable and non-justiciable.

The Iraq War, then, has been subject to a great deal of judicial evaluation but, even by these standards, the death of Baha Mousa has produced an unusual concatenation of legal claims. This juridical hyperactivity calls into question the role of law in war anew. Mousa's death has led to cases in at least four different fields or sub-branches of war law. One set of cases has been centred on the application of the ordinary military law to the 'undisciplined' behaviour of the UK soldiers alleged to have tortured and killed Mr Mousa. This law views war as normal and breaches of fundamental norms as 'unfortunate' exceptions to the force of military discipline.<sup>52</sup> In the second field, these crimes of war are converted into ordinary offences under the criminal law. War is not much different from peace in this field; murder is murder, whatever the context.<sup>53</sup> A

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<sup>44</sup> *R (Gentle) v Prime Minister* [2006] EWCA Civ 1690.

<sup>45</sup> *R (Gentle) v Prime Minister* [2007] 2 WLR 195, 199–200.

<sup>46</sup> *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, 191.

<sup>47</sup> *McCann v United Kingdom* (1995) 21 EHRR 97, 163.

<sup>48</sup> *R (Gentle) v Prime Minister* [2007] 2 WLR 195, 201–2.

<sup>49</sup> *Ibid* 213.

<sup>50</sup> [2002] EWHC 2777 [59].

<sup>51</sup> *R (Gentle) v Prime Minister* [2007] 2 WLR 195, 214.

<sup>52</sup> See below Part II.

<sup>53</sup> See below Part III.

third set of cases has revolved around the application of the *International Criminal Court Act 2001* (UK) to the activities of Mousa's jailers. These cases transformed the Mousa killing into a potential war crime to set beside other suspected breaches of the *Rome Statute*<sup>54</sup> by Thomas Lubanga (in the Democratic Republic of Congo), by Joseph Kony (in Uganda) and by high-ranking government officials and Janjaweed militia leaders (in Sudan).<sup>55</sup> The fourth field of law engaged by the death of Baha Mousa is human rights law and, in particular, the putative application of European human rights norms to Iraqi territory.<sup>56</sup> The extraterritorial reach of the *Human Rights Act 1998* (UK) and the *European Convention on Human Rights* was a central question in *Al-Skeini*, a civil claim arising out of the incidents in and around Basra that form the subject of this think piece.<sup>57</sup> I want to consider each of these in turn.

## II UNLAWFUL CONDITIONING

The killing of Baha Mousa has been understood by elements of the military as a breach of discipline or an act of insubordination.<sup>58</sup> Some of the indictments also read in this way. The charges against Major Peebles and Colonel Mendonca referred to the negligent failure to perform their duty under the *Army Act 1955* (UK). This is, of course, a form of command responsibility under international criminal law but the phraseology of the charge suggests a disciplinary breach. Much of the commentary around the trials was generated by a sense that this was the *only* appropriate way to deal with an incident involving the infliction of unlawful violence on detainees and the murder of one of their number. For these commentators, the killing of Mousa was neither a common crime (it took place in a military context in which some killing is permissible and, in the midst of which, the criminal law largely is suspended) nor a war crime. It was, instead, a breach of discipline. This breach of discipline was then explained by the difficult conditions under which UK soldiers were operating.<sup>59</sup>

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<sup>54</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('*Rome Statute*').

<sup>55</sup> *Prosecutor v Lubanga*, ICC-01/04-01/06 (2006); *Prosecutor v Kony*, ICC-02/04-01/05 (2005); *Prosecutor v Harun and Kushayb*, ICC-02/05-01/07 (2007).

<sup>56</sup> See below Part V.

<sup>57</sup> *R (Al-Skeini) v Secretary of State for Defence* [2007] QB 140.

<sup>58</sup> See 'General Dannatt Speaks after Close of Cpl Payne Court Martial', *Defence News* (UK) 30 April 2007, available from <<http://www.mod.uk/DefenceInternet/DefenceNews/Archive>> at 18 October 2007.

<sup>59</sup> This was one of the themes in the opening statements made on behalf of the accused soldiers at the beginning of the trial: *R v Payne*, General Court Martial Defence Opening Statement (2006) 39, 52, 85, 60–5, 34, available from <[http://www.army.mod.uk/apacourts\\_martial\\_trials](http://www.army.mod.uk/apacourts_martial_trials)> at 18 October 2007. These statements variously emphasised the classic war crimes defences: superior orders (Crowcroft Opening Statement); inexperience (Peebles Opening Statement); a context of fear and anxiety (*Mendonca Opening Statement*); general non-compliance with the laws of war (*Peebles Opening Statement*); a culture of violence; the existence of formal and informal norms encouraging or mandating abuse (Payne Opening Statement) and the injustice of prosecutions directed only at lower ranking soldiers (Payne Opening Statement).

General Dannatt, in a statement issued at the conclusion of the court-martial proceedings, set out his views ‘conscious that in April we lost 12 soldiers to enemy action in Iraq’.<sup>60</sup> This, then, is the context of the decision, though not a context existing at the time of Mousa’s death. Dannatt, while supporting the prosecutions, goes on to speak of Mousa’s death by torture in worryingly euphemistic terms. It is a case containing ‘some uncomfortable facts’.<sup>61</sup> These, he worries, might undermine the ‘operational effectiveness of the Army’.<sup>62</sup> The focus, then, is very much directed at the way in which torture and inhumane treatment might affect the UK Armed Forces’ reputation or command structure. Mousa and his fellow victims are consigned to the margins; their terrible suffering over 36 hours in Basra becomes an ‘unlawful conditioning process’.<sup>63</sup> In the end, there is no direct expression of regret or sense of outrage in the General’s carefully chosen statement. The killing of Mousa is understood here primarily as a breach of discipline that might have the effect of undermining discipline more broadly and diminishing the effectiveness of the UK Armed Forces.

### III COMMON LAW CRIME

Joseph Keenan, the American prosecutor at Tokyo, attempted to demythologise the high-ranking Japanese defendants by calling them ‘plain, ordinary murderers’.<sup>64</sup> This reflects a mood among some commentators that the law of war is simply a subspecies of that criminal law applied in times of peace. In the Mousa case, court-martial proceedings brought by the Army Prosecuting Authority (‘APA’) charged seven serving soldiers with a variety of ‘plain, ordinary’ offences (the majority of charges were laid under the *Army Act 1955* (UK)).<sup>65</sup> Corporal Payne, for example, was accused of having committed ‘a civil offence contrary to section 70 of the *Army Act* that is to say manslaughter’.<sup>66</sup> Sergeant Stacey was charged with assault ‘contrary to section 47 of the *Offences against the Person Act 1861*’ and battery ‘contrary to section 39 of the *Criminal Justice Act 1988*’.<sup>67</sup> Thus, what international criminal lawyers might understand as torture under the *Convention against Torture*<sup>68</sup> or art 7 of the *Rome Statute* is understood here as an offence analogous to, or perhaps the same as, an assault or battery one might be unlucky enough to witness on the London Underground.

Of course, it is not unusual for crimes against humanity or breaches of fundamental norms of international law to be rendered sensible to a domestic

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<sup>60</sup> See ‘General Dannatt Speaks after Close of Cpl Payne Court Martial’, above n 58.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.* Conditioning techniques of the sort applied to Mousa and others were declared unlawful in *Ireland v United Kingdom* (1978) 2 EHRR 25.

<sup>64</sup> Tim Maga, *Judgment at Tokyo* (2001) 1.

<sup>65</sup> *R v Payne*, General Court Martial Charge Sheet (2006), available from <[http://www.army.mod.uk/apa/courts\\_martial\\_trials](http://www.army.mod.uk/apa/courts_martial_trials)> at 18 October 2007.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (‘*Convention against Torture*’).

legal order. The Pinochet<sup>69</sup> extradition proceedings arose out of the extraterritorial application of the same *Criminal Justice Act 1988* (UK) used to charge Stacey (this time s 134).<sup>70</sup> In *R v Zardad*,<sup>71</sup> acts of abuse and intimidation committed by an Afghan national (later a resident of South London) at a checkpoint outside Kabul against fellow Afghans led to a conviction under the same provision of the Act.<sup>72</sup> In *Attorney General (Israel) v Eichmann*,<sup>73</sup> the bulk of the charges related not to crimes against international law, but to crimes against the Jewish people under the terms of the *Nazi and Nazi Collaborators (Punishment) Law 1950* (Israel). These cases were about crimes against humanity from the perspective of international law, but had been translated into 'ordinary' criminal categories by the national legal order.

This approach, though, proved problematic from two perspectives. First, sections of the unofficial military establishment (retired officers with the liberty to speak freely on the matter) made the point that these sorts of offences are precisely *not* like an assault on the London Underground because war in Iraq bears no resemblance to peace on the London Underground. The contexts are radically dissimilar. To treat the offences in the same way is to do an injustice to military personnel operating under the perpetual threat of death or serious injury in a hostile environment. George Fletcher makes this point in a different way. For him, Adolf Eichmann and Radislav Krstić are less guilty than the Boston Strangler or the Yorkshire Ripper because the former commit their crimes in the context of mass criminality.<sup>74</sup> Their individual criminality is offset or discounted by the criminal context.<sup>75</sup> Mass murderers in a peaceable local context have no possibility of such mitigation. The law should understand offences in war as extraordinary crimes accompanied by diminished levels of culpability.<sup>76</sup>

From another perspective, though, crimes of war are unlike domestic crimes because they are *more* serious. To treat them as common crimes is to be unresponsive to the experience of mass criminality. This was the view of the prosecuting authorities in relation to at least some of the defendants in the Mousa case. Corporal Payne was charged with having committed a war crime 'contrary to section 51(1) of the *International Criminal Court Act 2001* namely inhumane treatment ... as defined by article 8(2)(a)(ii) of schedule 8 [a schedule containing the *Rome Statute*]'.<sup>77</sup> Fallon and Crowcroft also were charged with war crimes defined in the *Rome Statute*.<sup>78</sup>

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<sup>69</sup> *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147.

<sup>70</sup> *Ibid* 189.

<sup>71</sup> Unreported, Royal Courts of Justice, Central Criminal Court (Old Bailey), Treacy J, 7 April 2004.

<sup>72</sup> *R v Zardad* [2007] EWCA Crim 279.

<sup>73</sup> (1961) 26 ILR 5.

<sup>74</sup> George Fletcher, 'The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt' (2002) 111 *Yale Law Journal* 1499, 1539.

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid* 1543.

<sup>77</sup> *R v Payne*, General Court Martial Charge Sheet (2006), available from <[http://www.army.mod.uk/apa/courts\\_martial\\_trials](http://www.army.mod.uk/apa/courts_martial_trials)> at 18 October 2007.

<sup>78</sup> *Ibid*.

## IV WAR CRIME

Reconceptualising these offences as war crimes, though, raised a whole new set of objections around the limits of law and the prerogatives of the political in these cases. When the UK Government announced that it would begin prosecuting British soldiers for alleged war crimes committed during the occupation of Iraq in 2003, there was almost universal condemnation of this decision in the UK media and significant opposition elsewhere. During a debate in the House of Lords, one of the peers accused the Army Legal Services of engaging in a politically-motivated process inspired by ‘extraneous reasoning’ irrelevant to the guilt or innocence of those under investigation. He ended by inquiring of any future proceedings: ‘Was that to have been a show trial on that reason?’<sup>79</sup> Many commentators and letter-writers, while conceding that Payne and his colleagues were accused of very grave crimes, could not imagine an international criminal law that applied to one-off acts of murder or assault committed by the personnel of states engaged in largely lawful combat.<sup>80</sup> The commanding officer of the regiment most closely involved stated: ‘From the moment that Mr Baha Mousa lost his life while in our custody, the regiment has made clear that this was an isolated, tragic incident that should never have happened and which I and every member bitterly regrets’.<sup>81</sup> Defence counsel for Crowcroft claimed that the stigma associated with war crimes was, in his client’s case, ‘gross and unwarranted’.<sup>82</sup> In the House of Lords, similar sentiments were expressed:

What is now hanging over him and other soldiers is that the case may be referred to the International Criminal Court. That court was not set up for that purpose. It was set up to deal with cases of genocide and with war criminals. That that gallant officer [Colonel Mendonca, the commanding officer of the soldiers accused of killing Baha Mousa in custody] could be in the same dock [sic] as that in which Milosevic has appeared must be wrong in itself.<sup>83</sup>

These commentators equated the idea of war crimes with the practice of mass atrocity, that is, with large scale political offences. Now, there are familiar

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<sup>79</sup> UK, *Parliamentary Debates*, House of Lords, 14 July 2005, vol 673, column 1222 (Lord Campbell of Alloway).

<sup>80</sup> See, eg, Editorial, ‘We Can’t Brand These Soldiers War Criminals’, *The Daily Telegraph* (London, UK) 21 July 2005, 25; Thomas Harding, ‘Britain’s Armed Forces “Under Legal Siege”’, *Telegraph* (UK) 15 July 2007, available from <<http://www.telegraph.co.uk>> at 18 October 2007; Thomas Harding, ‘Don’t Put Our Troops on Trial, Say Ex-Defence Chiefs’, *The Daily Telegraph* (London, UK) 12 July 2007, 1.

<sup>81</sup> Neil Tweedie, ‘Uproar over War Crimes Trials’, *The Daily Telegraph* (London, UK) 21 July 2005, 1.

<sup>82</sup> *R v Payne*, General Court Martial Defence Opening Statement (2006), available from <[http://www.army.mod.uk/apa/courts\\_martial\\_trials](http://www.army.mod.uk/apa/courts_martial_trials)> at 18 October 2007.

<sup>83</sup> UK, *Parliamentary Debates*, House of Lords, 14 July 2005, vol 673, column 1223 (Lord Hoyle).

enough technical objections to this. Grave breaches of the *Geneva Conventions*<sup>84</sup> are capable of being committed regardless of any atmosphere of terror or criminality. Indeed, in *P v Jelusic*,<sup>85</sup> the International Criminal Tribunal for the Former Yugoslavia, conceded the possibility of a lone genocidal maniac. Jelusic was acquitted of the crime of genocide in this case because his killings, like Stalin's, were too indiscriminate to constitute genocide.

However, the response of the British establishment to the Mousa prosecutions reflects a broader tendency in the way that war crimes are understood. It is indeed the case that the Nazi genocide, and its contemporary variants, loom over the field as ideal types. The critics of the Basra investigations are responding to a (legitimate) sense that war crimes law, in its broadest sense, is associated with mass criminality. At a very obvious level, the *Rome Statute* restates this in its preamble. The negotiators at Rome were at pains to emphasise that the ICC would have jurisdiction over only 'the most serious crimes of concern to the international community'.<sup>86</sup> This seriousness is engaged, it seems, by an intention to 'destroy, in whole or in part', groups of human beings (genocide) or by criminal acts carried out as part of a 'widespread or systematic attack directed against any civilian population' (crimes against humanity) or by the 'large scale commission' of war crimes.<sup>87</sup> In other words, there is an assumption underlying the *Rome Statute* that war crimes law is to be concerned with bureaucratically directed or state-controlled acts of large-scale political criminality. Little wonder, then, that in the UK, the ICC prosecutions were met with anger and bemusement. This is likely to be the case when any self-styled 'civilised' state prosecutes its own personnel, not for breaches of discipline or even common crimes, but with that genus of offences indelibly linked to the mass atrocities perpetrated by Others.<sup>88</sup>

## V HUMAN RIGHTS VIOLATION

On this view, then, law travels outwards from the civilised core to the savage periphery. The final case I want to consider conforms to this trajectory in one sense, but reverses it in another. The violations in Basra became a case before English courts applying UK and European law; Europe extending its civilising expectations to an insurgency in the Arabian desert. The reversal is produced by

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<sup>84</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, 'Geneva Conventions').

<sup>85</sup> *Prosecutor v Jelusic (Judgment)* Case No IT-95-10-A (5 July 2001).

<sup>86</sup> *Rome Statute*, above n 54, preamble.

<sup>87</sup> *Ibid* arts 6–8.

<sup>88</sup> This theme is worked through in Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in Anne Orford (ed), *International Law and Its Others* (2006) 265.

the sense that the brutality of the Iraq War and the law regulating it travels back to England with the soldiers involved in the incident.<sup>89</sup>

In the *Al-Skeini* case, Baha Mousa's death has been re-inscribed as a human rights violation — a killing with civil law consequences. More than this, Mousa has become posthumously famous for his contribution to the jurisprudence of jurisdiction in the European system of human rights protection. The question of human rights in war is a fraught one. There is a popular response to this problem that sees human rights as irrelevant to war either because *inter arma enim silent leges*, or because human rights law is a law of the norm and war is practiced in the realm of the exception (usually allied to a sense that human rights observance might corrode military discipline). This is consistent with a more legalistic argument to the effect that war is regulated by a special legal regime (a *lex specialis*) that effectively usurps other forms of law. The US has, for example, asserted the inapplicability of the *Convention against Torture* to the detentions at Guantánamo Bay on precisely these grounds.<sup>90</sup> In the case of Iraq, the special regime is a law of occupation found in the *Geneva Conventions*<sup>91</sup> and, at times, a *sui generis* legal order established by Security Council decree.<sup>92</sup>

In this context, the arguments advanced by the plaintiffs in *Al-Skeini* represent quite a provocation. They depend, after all, on a finding by the Court that human rights law persists in times of war and occupation, that the activities of military units on patrol and in detention facilities are governed by human rights norms and, most radically, that a specifically European body of human rights norms (articulated in the *European Convention on Human Rights* and the *Human Rights Act 1998* (UK)) apply *in Iraq* to these activities. This represents a specific and quite unprecedented project of juridification. As Brooke LJ put it:

It may seem surprising that an Act of the UK Parliament and a European Convention on Human Rights can arguably be said to confer rights upon citizens of Iraq which are enforceable against a UK governmental authority in the courts of England and Wales.<sup>93</sup>

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<sup>89</sup> The *Human Rights Act 1998* (UK), implementing the obligations under the *European Convention on Human Rights*, was enacted under the banner 'bringing rights home': Department of Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (DCA Report, July 2006) 8.

<sup>90</sup> Arguing that international humanitarian law is the relevant body of law and that other sub-regimes (eg, human rights law) are evacuated: see Working Group on Detainee Interrogations in the Global War on Terrorism, Department of Defence, *Draft Report* (2003). The US has applied international humanitarian law to the detainees as a matter of jurisdiction, but, in substance, a number of international humanitarian law standards have been breached.

<sup>91</sup> For a discussion of the law of occupation see Bruce Oswald, 'The Law on Military Occupation: Answering the Challenges of Detention during Contemporary Peace Operations' (2007) 8 *Melbourne Journal of International Law* 311.

<sup>92</sup> In *Al-Jedda*, the English Court of Appeal held that Security Council resolutions on Iraq prevailed over conflicting human rights standards: *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327. Article 103 of the *Charter of the United Nations* makes *Charter* law supreme in any conflict with general international law. See discussion in *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v US) (Order)* [1992] ICJ Rep 114; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v UK) (Order)* [1992] ICJ Rep 3.

<sup>93</sup> *R (Al-Skeini) v Secretary of State for Defence* [2007] QB 140, 248.

The case, decided in June 2007 by the House of Lords (oral hearings having taken in place in April 2007), concerns the death of Baha Mousa and five other rather different fatalities involving Iraqis in Basra. The five other deaths occurred in five separate incidents each involving shootings by UK soldiers.<sup>94</sup> The lawyers acting for Al-Skeini argued that the victims' right to life (art 2) and right not to be tortured (art 3) were breached.<sup>95</sup> The High Court found that Baha Mousa was protected by the *European Convention on Human Rights* but that the other individuals were not.<sup>96</sup> Convention protection, according to the High Court, depends on a state signatory to the *European Convention on Human Rights* possessing 'jurisdiction' over persons or places; jurisdiction, it held, was present in the case of Mousa but not in the case of the other detainees.<sup>97</sup> The issue of jurisdiction was clarified at the Court of Appeal in 2006 where the Court found that jurisdiction, in the absence of sovereign authority, depended on effective control over a territory (for example, Turkey's effective control over Cyprus or, at one point, its occupation of Northern Iraq) or a form of state agent authority (often associated with a specific place, for example, a consulate, embassy, or place of detention).<sup>98</sup> The Court of Appeal went on to state that Mousa had come under UK jurisdiction, and the protection of the *European Convention on Human Rights*, when he was taken into custody.<sup>99</sup> The other Iraqis were not under British authority in this way, nor was the area in which the killings had taken place under the effective control of the UK (control was sporadic and piecemeal).<sup>100</sup>

More pertinently for the purposes of this think piece, the Court held, too, that the right to access justice in the form of an independent investigation, found in the *Human Rights Act 1998* (UK) and the *European Convention on Human Rights*, was not satisfied by an inquiry undertaken by the commanding officer (even when this resulted in a court-martial).<sup>101</sup> In the end, only one of the soldiers charged was found guilty of an offence (Corporal Payne had entered a guilty plea to the charge of inhuman treatment).<sup>102</sup> Unsurprisingly, opinion was divided on the outcome of the courts-martial. Amnesty International issued a press release deploring the proceedings in the Mousa case. According to Amnesty International, the court-martial proceedings were deeply flawed, lacked independence and impartiality, and were initiated by the Royal Military Police

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<sup>94</sup> For example, Hazim Jum'aa Gatteh Al-Skeini was shot by a British soldier while attending a funeral (the British Army issued an apology) and Hannan Mahaibas Saeed Shmailawi died when UK forces fired into the Institute of Education in Basra: *R (Al-Skeini) v Secretary of State for Defence* [2005] 2 WLR 1401.

<sup>95</sup> *R (Al-Skeini) v Secretary of State for Defence* [2007] QB 140, 148; *Human Rights Act 1998* (UK) sch 1, pt 1, art 2, 3.

<sup>96</sup> *R (Al-Skeini) v Secretary of State for Defence* [2005] 2 WLR 1401, 1482.

<sup>97</sup> Parties to the *European Convention on Human Rights* are bound to 'secure to everyone within their jurisdiction the rights' defined in the *Convention*: above n 7, art 1.

<sup>98</sup> *R (Al-Skeini) v Secretary of State for Defence* [2007] QB 140, 270.

<sup>99</sup> *Ibid* 279.

<sup>100</sup> The families of these five appealed to the House of Lords on this point of law: *R (Al-Skeini) v Secretary of State for Defence* [2007] 3 WLR 33.

<sup>101</sup> *R (Al-Skeini) v Secretary of State for Defence* [2005] 2 WLR 1401, 1498.

<sup>102</sup> Michael Evans, 'Basra Military Abuse Case: What the Court Martial Heard', *Times Online* (UK) 14 February 2007 <<http://www.timesonline.co.uk/tol/news/uk/article1385291.ece>> at 18 October 2007.

(an organisation that could not be expected to carry out investigations ‘effectively and professionally’).<sup>103</sup> Others were, of course, pleased with the outcome, but angry that the investigations and courts-martial had taken place at all. For them, the investigations had been a highly politicised effort to harm the reputation of the armed forces.<sup>104</sup> As of 1 April 2007, the APA is refusing to describe the incident as closed: ‘The Service Police, with advice from the APA, will now consider what further investigations should take place, bearing in mind the evidence that came to light during the trial’.<sup>105</sup>

## VI BAHAMOUSA

Where is Baha Mousa in all this? Colonel David Black of the Queen’s Lancashire Regiment was reported as having welcomed ‘the sense of closure’ brought by the acquittals in the court-martial.<sup>106</sup> But there is no closure. Baha Mousa’s two sons are now orphans (his wife died of illness six months before his detention and death),<sup>107</sup> Jorge Mendonca has since left the army,<sup>108</sup> the *Al-Skeini* civil claim, like so many struggles for justice, became a battle over jurisdiction,<sup>109</sup> and the Iraq War continues (four years after it, too, was declared closed).<sup>110</sup>

Mousa’s case, like that of an Iraq War of which he did not choose to be part, is an example of law’s hegemony over war. A shift has occurred, and it is one that lawyers need to come to terms with. The idea of war, detention and occupation as lawless worlds is a compelling narrative.<sup>111</sup> But there is another story to be told, too. This is one in which law is pervasive. Guantánamo Bay, an affront to the rule of law or ‘legal black-hole’,<sup>112</sup> is a place generating legal doctrine at breathtaking pace. The Iraq War and occupation — variously illegal, chaotic, turbulent — has produced a slew of cases, articles and resolutions. Outlaw and failed states — threatening, anarchic, violent — have become

<sup>103</sup> Amnesty International, ‘United Kingdom Court Martial Acquittals: Many Questions Remain Unanswered and Further Action Required to Ensure Justice’ (Press Release, 15 March 2007).

<sup>104</sup> See, eg, Editorial, ‘Our Soldiers Must Not Be Treated As Toys’, *The Daily Telegraph* (London, UK) 15 February 2007, 1; Thomas Harding, ‘Colonel “Victim of Witch-Hunt” over Witchunt’, *The Daily Telegraph* (London, UK) 16 February 2007, 1.

<sup>105</sup> Government News Network, ‘General Court Martial at Bulford — Cpl Payne and Others’ (Press Release, 30 April 2007).

<sup>106</sup> Redress, ‘Court Martial Acquittals in Baha Mousa Case: The Full Truth of What Happened Remains Unknown’ (Press Release, 14 March 2007).

<sup>107</sup> Robert Fisk, ‘A Cry for Justice from a Good Man Who Expected Us to Protect His Son’, *The Independent on Sunday* (London, UK) 17 June 2007, 5.

<sup>108</sup> Mark Oliver, ‘Cleared Mendonca Quits Army’, *Guardian Unlimited* (UK) 1 June 2007 <<http://www.guardian.co.uk/Iraq/Story/0,,2093177,00.html>> at 18 October 2007. Most of the focus in the English press has been on Mendonca, partly because he was not present at the time of detention and partly because of class sympathies.

<sup>109</sup> *R (Al-Skeini) v Secretary of State for Defence* [2007] 3 WLR 33.

<sup>110</sup> In *The Man in the Gray Flannel Suit*, when the protagonist, Tom Rath, informs Judge Bernstein that he has decided to support a child he has fathered in Italy during the Second World War, Bernstein recognises that what survives our justice claims is ‘simple justice’ — perhaps, in the end, a form of kindness: Wilson, above n 1, 288.

<sup>111</sup> Indeed, Philippe Sands has turned it into a compelling and widely read book: *Lawless World: America and the Making and Breaking of Global Rules* (2005).

<sup>112</sup> Johan Steyn, ‘Guantanamo Bay: The Legal Black-Hole’ (Speech delivered at the 27<sup>th</sup> FA Mann Lecture, London, UK, 25 November 2003).

primary users of that most legalistic of bodies, the ICJ. The Democratic Republic of Congo, Libya, the Islamic Republic of Iran and the Serbian State have each, and sometimes more than once, brought highly legalistic claims before the Court. And often these cases have been about war.<sup>113</sup> War and law are now jammed together in our legal and political culture. The death of Baha Mousa is unusual in that his case was considered under four different politico-judicial regimes: military discipline, municipal criminal law, international criminal law and human rights law. The Mousa case typifies, though, the tendency, sketched in the preliminary remarks of this think piece, to juridify war. Increasingly, war is played out in the key of law. But law — ubiquitous, exemplary and majestic; yet elusive and equivocal, too — promises an ongoing argument about the politics of war, and not a decisive break from them.

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<sup>113</sup> See, eg, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (Order)* [2002] ICJ Rep 219; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v US) (Order)* [1992] ICJ Rep 114; *Aerial Incident of 3 July 1988 (Iran v US) (Order)* [1989] ICJ Rep 132; *Legality of Use of Force (Serbia and Montenegro v UK) (Order)* [1999] ICJ Rep 826.