



**public interest**  
ADVOCACY CENTRE LTD

## **Military Detention: uncovering the truth**

**Story 2 – Australia's role in capturing 66 detainees in Iraq on 11 April 2003 and the death in UK custody of a detainee**

**1 July 2011**

## 1. The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## 2. Executive Summary

On 11 April 2003, 20 members of the Australian Special Air Service (SAS) captured 66 Iraqi, Iranian and Syrian men who were driving through the western desert of Iraq. Among those captured was a 43-year-old Iranian man, Tanik Mahmud.

The SAS forces detained Mr Mahmud and his associates for 10 hours. They were then handed over to the UK Royal Air Force (RAF) for transport to a US-run detention facility in Iraq.

Documents released to PIAC reveal that Mr Mahmud subsequently died on a RAF helicopter. A UK investigation suggested the strong possibility that three RAF members had beaten Mr Mahmud to death, however no criminal charges were laid. The UK and Australian governments have refused to release the full details of the events on 11 April 2003.

As set out in Story 1, Australia, the UK and the US entered into an agreement, known as the Trilateral Arrangement, which governed how detainees would be transferred between the parties to the agreement in accordance with international law. However, Australia sought to circumvent the operation of the Trilateral Arrangement (and thus sought to avoid its responsibilities under international law and the Geneva Conventions) by adopting a practice whereby at least one US military representative would be present with the ADF when detaining prisoners. Australia and the US asserted that the presence of this single US representative allowed the US to take sole responsibility for the detention.

This practice, which relies on a legal and logical fiction, was used on 11 April 2003. That is, because there was one US soldier present when the SAS forces captured and detained the 66 men, including Mr Mahmud, Australia maintained that the US was the detaining power. Australia therefore claimed no transfer took place and the Trilateral Arrangement did not apply.

Australia sought to avoid its international legal obligations in relation to Mr Mahmud and the 65 other men. However, it seems clear that Australia was in reality the detaining power of the men and thus had obligations under the Geneva Conventions to ensure their humane treatment. The transfer to the UK should have been pursuant to the Trilateral Arrangement, which would have required Australia to monitor the US’s and UK’s treatment of the detainees. Instead, Australia simply handed the 66 men to the UK for transport to US custody.

Australia did not know where the men ended up, whether they were given prisoner of war status or what their conditions of detention were. Australia sought these details from the US, but Australia’s ally refused to provide them. When the Iranian Government requested information about the four Iranian men’s whereabouts, Australia simply responded that it was not the detaining power.

Until the release of these documents to PIAC, Australian authorities have not revealed Mr Mahmud’s death in custody. The story behind Mr Mahmud’s capture and detention illuminates the way in which Australia has relied on a legal fiction to avoid its legal responsibilities towards detainees in Iraq. His unexplained death highlights the gravity of the possible consequences that flow from this policy.

### **3. The events of 11 April 2003**

#### **3.1 Australian SAS troops capture 66 men**

Documents released to PIAC reveal that, at around 1pm on 11 April 2003, approximately 20 Australian SAS troops intercepted 66 men at a vehicle checkpoint in the western desert of Iraq. A US Special Forces member was ‘embedded’ with the SAS troops.

The 66 men were travelling in a bus and two cars along the main supply route out of Iraq, heading west from Ramadi. The group of travellers included 59 suspected

Fedayeen personnel, many of whom were Syrian; four Iranians; and three suspected Iraqi Baath Party members.

Based on advice from a local sheik, the SAS detained all 66 men as persons of interest. The sheik identified three as Baath Party officials, and thought one of these may have been a colonel. The four Iranians were of particular interest because they carried large quantities of jewellery and more than US\$630,000 cash. They also carried a letter that stated they would receive US\$5,000 for every US soldier they killed.

### **3.2 Treatment of detainees**

Armed Australian SAS personnel guarded the 66 men for approximately ten hours. During this time, the SAS questioned, searched and fed the detainees.<sup>1</sup> The men received blankets and water, and rice and lamb provided by local sheiks.

The SAS detained the men at the side of the road until nightfall and then moved them into their vehicles for shelter. An Australian Special Forces Arabic linguist was present. The linguist questioned the detainees about other possible threats in the area.

Two detainees complained of minor ailments during their detention. One man had a minor cold; the other had sore feet.<sup>2</sup> Australian SAS medics attended to both complaints.<sup>3</sup>

The SAS troops listed and accounted for all of the detainees' personal effects, including passports, before handing the men over to UK forces for transportation. The SAS did not keep a list of the detainees' names,<sup>4</sup> nor did they give the detainees' personal details to the International Committee for the Red Cross (ICRC).<sup>5</sup> The SAS troops did not assess the legal status of the men they captured.<sup>6</sup>

### **3.3 Transfer by UK RAF helicopters**

At approximately 11pm, the SAS handed the 66 detainees over to members of the UK Royal Air Force (RAF) for transfer by helicopter to a US-run detention centre in Iraq.

In preparation for this transfer, the SAS troops 'ziptied' the detainees' thumbs together in front of their bodies.<sup>7</sup>

UK Royal Marines placed sandbag hoods over the head of each detainee before they boarded the RAF helicopters. Two UK CH47 Chinook helicopters were used to

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<sup>1</sup> Doc 183, TG 633.3 Response to Strategic Operations Division Request for Information", [7].

<sup>2</sup> Doc 182 CDF 521/04 [5a].

<sup>3</sup> Doc 182 CDF 521/04 [5a].

<sup>4</sup> Doc 97, 3.

<sup>5</sup> Doc 97, 3.

<sup>6</sup> Doc 97, 3.

<sup>7</sup> Doc 182 CDF 521/04 [5b].

transfer all the detainees, in several loads. The transfer was completed by 11.30pm on 11 April 2003.

## 4. Death in custody - Iranian detainee dies on board UK helicopter

Tanik Mahmud, one of the Iranian detainees, died while on board one of the UK helicopters. According to Australian Department of Defence documents obtained by PIAC:

- Mr Mahmud’s death was only discovered by the aircraft crew ‘*on arrival at the destination*’.<sup>8</sup>
- A US legal officer at the US Special Forces HQ investigated Mr Mahmud’s death and concluded: ‘*based on the medical advice available it was determined that the detainee had died as a result of a heart attack*’.<sup>9</sup>
- A US doctor examined Mr Mahmud’s body but gave no cause of death. A post-mortem was not conducted.
- ‘*There was no evidence of external physical injuries*’.<sup>10</sup> (It is unclear who made this observation.)
- Australian Special Forces did not know about Mr Mahmud’s death until some days, or weeks, later.<sup>11</sup>

### 4.1 Australian Government response to death

It is not clear precisely when Australian Department of Defence officials became aware of Mr Mahmud’s unexplained death. However, documents obtained by PIAC reveal the following details.

Australian Special Forces reportedly knew about the matter days or weeks after it occurred.<sup>12</sup>

Mr Mahmud’s death is mentioned in a memorandum dated 3 May 2004 from Major General D E Lewis, of Special Operations Headquarters in Canberra. In this memo, Mr Mahmud’s death is referred to as follows: ‘*I understand that it is likely that the PW [prisoner of war] had a heart attack during the flight but this is not yet confirmed*’.<sup>13</sup>

The then Minister for Defence, Robert Hill, appears to have been informed of the death in a ministerial minute from the Chief of the Defence Force (CDF), General Cosgrove, dated 8 June 2004.

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<sup>8</sup> Doc 182, CDF 521/04 [6].

<sup>9</sup> Doc 182, CDF 521/04 [7].

<sup>10</sup> Doc 182, CDF 1046/04 [3].

<sup>11</sup> Doc 182 CDF 521/04 [6].

<sup>12</sup> Doc 182 CDF 521/04 [6].

<sup>13</sup> Doc 196, 2 [4].

This minute, entitled '*Detainee Death in UK Forces' custody after Australian SAS helped facilitate capture by US Special Forces*',<sup>14</sup> summarises the 11 April 2003 incident. It informs the Minister that the UK Ministry of Defence conducted an investigation into the death and that UK Military Police interviewed Australian SAS troops in Perth, Australia.

The minute states: '*There was no suggestion that any Australian was implicated in the detainee's death*'.

The minute is classified "secret" and concludes that public disclosure of Mr Mahmud's death may be damaging to the US and UK Governments.

On 10 June 2004, Australia's Defence Minister noted in hand written comments on the minute: '*We should find out the results of the UK investigation urgently please*'.<sup>15</sup>

## 4.2 UK investigation into death

The UK RAF conducted an investigation into Mr Mahmud's death. It is not clear when this investigation began. According to an Australian Department of Defence document obtained by PIAC, the RAF lead investigator concluded that the deceased was '*Tanik s. Mahmud, born in Baghdad in 1960*'.

In June 2004, the Australian Government requested the results of the UK Ministry of Defence investigation. According to Australian Department of Defence documents, the British responded to this Australian request by advising that the '*investigation was ongoing*'.<sup>16</sup>

In October 2004, the RAF Police (Investigation Branch) informed the Australian Government that the investigation was complete. However, the RAF Police also said the investigation was being reviewed by the UK Attorney General's Office and could not be released until that review was complete.<sup>17</sup>

On 8 December 2004, the UK Deputy Provost Marshal of the RAF responded to the Australian Government's request for a copy of the final investigation report into Mr Mahmud's death. The UK RAF rejected the request, saying: '*The report is treated as information exempt from disclosure as it has been held for the purposes of criminal proceedings*'.<sup>18</sup>

The Deputy Provost Marshal added: '*However, I am able to confirm that the investigation centred on the alleged actions of British personnel and did not identify any impropriety on the part of individual members of the Australian Defence Forces*'.<sup>19</sup>

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<sup>14</sup> Doc 182 CDF 521/04.

<sup>15</sup> Doc 182 CDF 521/04.

<sup>16</sup> Doc 182, CDF 545/04.

<sup>17</sup> Doc 182, CDF 1046/04 [4].

<sup>18</sup> Doc 183, 1.

<sup>19</sup> Doc 183, 1.

### 4.3 Kicked to death: UK media reports on death

In July 2010, the *Guardian* newspaper in the UK reported on Tanik Mahmud’s death.<sup>20</sup> Mahmud was reported to have died on 12 April 2003 on a RAF helicopter after being detained by troops of the RAF regiment. In a later article, on 12 September 2010,<sup>21</sup> the *Guardian* reported further details, including:

- Mr Mahmud was detained at a checkpoint at Ramadi in western Iraq on 11 April 2003.
- He and a number of other detainees were put onboard a Chinook helicopter and guarded by three men from the 2<sup>nd</sup> Squadron of the RAF Regiment.
- Mr Mahmud was reportedly kicked to death whilst onboard the RAF helicopter by troops of the RAF Regiment.
- The Ministry of Defence said that Mr Mahmud had ‘*sustained a fatal injury*’.
- The RAF Police investigation commenced two months after Mr Mahmud’s death, following a complaint that three RAF ‘*had kicked, punched or otherwise assaulted*’ the Iranian.
- A year after Mr Mahmud’s death, the Ministry of Defence asked a pathologist whether a post mortem examination could be conducted on Mr Mahmud’s body.
- The pathologist advised that Mahmud’s body would be too decomposed for an examination to be worthwhile.
- The case was referred to the RAF’s most senior prosecutor, who decided not to bring charges because Mr Mahmud’s cause of death remained unknown.
- The Ministry of Defence would not confirm whether any of the alleged killers were interviewed as part of the investigation.
- The British military had made no attempt to contact Mr Mahmud’s family after he died in custody.

The *Guardian* article stated that the UK Ministry of Defence refused to disclose the reason why Mr Mahmud was detained. The *Guardian* reported that, when it requested a copy of the pathologist’s advice, a Ministry of Defence spokesman said a copy of the document could not be found in its files.

The *Guardian* quoted a professor of forensic medicine who contradicted the advice regarding a post mortem. The forensic medicine expert stated that a post mortem examination could still reveal evidence of an assault, even if that post mortem was conducted a year after Mr Mahmud’s death.

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<sup>20</sup> Ian Cobain, ‘Iraq Deaths in British Custody Could See Military Face Legal Challenges’, *Guardian* (Online), 1 July 2010 <<http://www.guardian.co.uk/world/2010/jul/01/iraq-deaths-custody-military-legal>>.

<sup>21</sup> Ian Cobain, ‘British Servicemen Suspected of Murdering Iraqi Civilians’, *Guardian* (Online), 12 September 2010 <<http://www.guardian.co.uk/uk/2010/sep/12/iraqi-citizen-murders-servicemen-suspects>>.

## 5. Official requests for information about Iranian death

### 5.1 Request by lawyers for People's Mujahedin Organisation of Iran

PIAC has discovered that, on 7 July 2003, lawyers for members of the People's Mujahedin Organisation of Iran (PMOI) wrote to the Australian Defence Minister, Robert Hill, requesting information about the arrest of four PMOI members on 11 April 2003 by Australian SAS troops.<sup>22</sup>

The PMOI letter lists the names of four individuals (these names are redacted) but does not refer to Tanik Mahmud. The letter requests information about a person (whose name is redacted) who is not on the records of the US Occupation Forces. For this reason, the letter's author assumes that the person is still detained by Australian forces.

The letter refers to Australia's obligations under the Geneva Conventions. It goes on to request that information about the four PMOI members not be transmitted to the Islamic Republic of Iran for fear that such information may be used against the men's families.

It is not clear if the Government responded to this correspondence.

### 5.2 Request by Iranian Government

The newly obtained documents reveal that sometime before October 2004, the Iranian Ministry of Information and Security (MOIS) sent a diplomatic note to the Australian Embassy in Tehran requesting information about four Mujahedin-e Khalq Organisation (MKO) (also known as PMOI) members allegedly arrested by Australian forces in Iraq in 2003.<sup>23</sup>

This diplomatic note referred to the four MKO members as having US\$960,000 in their possession. The note also referred to the fact that one MKO member (name redacted) subsequently died during interrogations by US forces.<sup>24</sup> The Iranians requested full details of those arrested.

The Australian Embassy in Tehran responded by stating that Australia was not the detaining power and therefore did not detain the Iranians allegedly arrested by Australian troops.<sup>25</sup> The Australian Department of Foreign Affairs and Trade (DFAT) prepared this response.

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<sup>22</sup> Doc 182, 7.

<sup>23</sup> Doc 182, 1.

<sup>24</sup> Doc 182, 1.

<sup>25</sup> Doc 183, 1.

### 5.3 US Government deflects Australian request

Although Australian SAS troops took the personal details of the 66 individuals when they were detained on 11 April 2003, all the documentation was passed to UK personnel. An Australian Department of Defence report on the incident states: *‘It was not logistically possible within the TE’s resources, nor tactically appropriate to retain copies of any documentation.’*<sup>26</sup>

Following the request by the Iranian Government, Australian contacted the US Government to request further details about the Iranians who had been detained by the SAS. The Australian Government knew that US Central Command had a list of all 66 personnel who had been detained on 11 April 2003.<sup>27</sup> However, the US Government refused to provide further details and requested that any further inquiries be directed to the ICRC.<sup>28</sup>

## 6. The public interest issues

### 6.1 Death in custody: fatal assault or heart attack?

There is credible evidence suggesting that Tanik Mahmud died as a result of a serious assault at the hands of members of the 2<sup>nd</sup> Squadron of the British RAF Regiment while on board a UK RAF helicopter. However, the truth behind Mr Mahmud’s death may never be known due to the inadequate investigations conducted by the US and UK military.

The US doctor investigating the death gave no cause of death, reportedly found no evidence of external physical injuries, and did not conduct a post mortem examination.

Despite these shortcomings, internal Australian Government documents obtained by PIAC refer to Mr Mahmud’s death as the result of a heart attack, advising that a *‘US legal officer at the US Special Forces HQ conducted an investigation, and based on the medical evidence available, it was determined that the detainee had died as a result of a heart attack.’*<sup>29</sup>

It remains unclear on what basis the US legal officer concluded that Mahmud died of a heart attack.

The UK investigation seems inconsistent with the theory that Mr Mahmud died from a heart attack. The UK Ministry of Defence instead said Mr Mahmud *‘sustained a fatal injury’*.

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<sup>26</sup> Doc 183, TG 633.3 ‘Response to Strategic Operations Division Request for Information’, [7].

<sup>27</sup> Doc 183, 1.

<sup>28</sup> Doc 183, 1.

<sup>29</sup> Doc 182 CDF 521/04 [7].

The UK investigation commenced two months after Mr Mahmud died. However, it took a further 10 months before RAF investigators consulted a pathologist to ask whether a post mortem could be conducted. The RAF investigators were reportedly advised that a post mortem examination would not be possible due to the decomposition of the body. The results of the UK investigation seem to reject the cause of death being natural. This is evidenced by the RAF investigation being reviewed by the Attorney General's Office and held for the purposes of criminal proceedings.

The UK Ministry of Defence concluded that Mahmud's death was from a fatal injury sustained during the helicopter flight. However, to date, no criminal charges have been laid. According to the UK Ministry of Defence, RAF prosecutors decided not to lay charges because the exact injury and cause of death remained unknown.

## 6.2 Cover up – Australian Government keeps us in the dark

The Australian and UK governments have failed to release the full details surrounding Mr Mahmud's death. It is not only the British and Australian public that have been kept in the dark. As of late 2010, some seven years after his death in UK custody, the British military had still made no attempt to contact Mr Mahmud's family.<sup>30</sup> It is unknown whether the family has since been contacted.

It is unclear when the Australian Government first became aware of Mr Mahmud's death in custody but Australian SAS troops are said to have known about the matter days or weeks after it happened.<sup>31</sup> It is possible that Defence Minister Robert Hill was not informed until 8 June 2004.<sup>32</sup> But if this is the case, why was the Minister only informed some 14 months after the incident? Was the chain of command not operating to communicate such critical information?

After Australia's Defence Minister was made aware of Mr Mahmud's death, there was a deliberate attempt to keep the public and Parliament in the dark.

In numerous Department of Defence media statements shortly after the capture of the 66 men, no mention was made of Mr Mahmud's death. At no stage thereafter has Defence or any other part of the Australian Government sought to clarify the public record by advising of Mr Mahmud's death.

Mr Mahmud's death was not raised at the Senate Estimates hearing in June 2004, despite questions being asked about the incident on 11 April 2003. PIAC has obtained a talking point drafted by the CDF for the Minister, which indicates some official effort to obfuscate the details of this incident. The talking point suggested that the death should only be disclosed if a question was specifically asked about it. However, this was unlikely given that the Government had not announced that there had been a death.

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<sup>30</sup> Ian Cobain, 'British Servicemen Suspected of Murdering Iraqi Civilians', *Guardian* (Online), 12 September 2010 <<http://www.guardian.co.uk/uk/2010/sep/12/iraqi-citizen-murders-servicemen-suspects>>.

<sup>31</sup> Doc 182, CDF 521/04 [6].

<sup>32</sup> Doc 182, CDF 521/04.

Nonetheless, if such a question was asked, the suggested response was misleading. The talking point stated:

During helicopter transportation, one detainee suffered a heart attack and unfortunately died. This was not due to any Australian SAS involvement and was the subject of a thorough investigation by our coalition partners.<sup>33</sup>

It is worth noting that at the time this talking point was prepared, the results of the UK investigation were unknown. Also the talking point’s reference to ‘*no Australian involvement*’ is curious, given that Mr Mahmud was said to have died of a heart attack.

Given the widespread interest in the issue of detention by Australian troops in Iraq and the handover of detainees to UK and US custody, full revelation of the details of this incident, including the circumstances of Mr Mahmud’s death, is clearly in the public interest and should have been disclosed by the Australian Government.

## 7. Legal fiction – Australia did not ‘detain’ the 66 detainees

The incident on 11 April 2003 involving Australian SAS forces illustrates that Australia’s detention policy in Afghanistan and Iraq was based on a legal fiction (see Story 1). This fiction arises from the view that Australia was not the Detaining Power because a single US soldier was with the SAS at the time the detainees were captured. PIAC has obtained internal Department of Defence documents in relation to the incident, and these reveal the Department’s own concerns about the credibility of the policy.

Soon after the incident on 11 April 2003, Department of Defence officials were publicly claiming responsibility for the capture of the 66 men. Public statements highlighted the key role played by Australian troops: ‘*our Australian SAS and they were the ones that conducted that [operation]*’,<sup>34</sup> and ‘*our special forces interdicted a bus carrying a large group of males*’.<sup>35</sup> Given the Department of Defence public statements and media reports on the incident, it would be reasonable to conclude that Australia was in reality the Detaining Power in relation to the 66 men. However, these public statements were inconsistent with the practice adopted by the SAS in relation to the capture on 11 April 2003; that is, that the US soldier present was responsible for the capture and that therefore the US was treated as the Detaining Power.

An internal Department of Defence brief prepared by Major General Ken Gillespie for the CDF, dated 12 May 2003, highlighted the problem:

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<sup>33</sup> Doc 182, CDF 521/04.

<sup>34</sup> Media Statement by Lieutenant Colonel Mark Elliott in Qatar on 14 April 2003, see Doc 97, 6.

<sup>35</sup> Department of Defence (Cth), ‘Australia’s Contribution to Global Operations’ (Media Briefing, 15 April 2003) <[www.defence.gov.au/media/2003/ACF1753.doc](http://www.defence.gov.au/media/2003/ACF1753.doc)>.

The later incident [on 11 April 2003] involving the AS SF [Australian Special Forces] now causes some concern. Defence media statements have been interpreted by the media as a claim that the AS SF was the capturing force in relation to the detainees concerned. However, the particular policy adopted at the tactical level indicated that the US, not AS, formally fulfilled this role for the purpose of the Geneva Conventions or, more technically, was the responsible “Detaining Power”.

This brief explains the nature and consequence of a possible inconsistency between the media perceptions and the formal position adopted by the AS SF. The concern for Defence is that the media may feel misled, and suggestions may emerge that AS has not fulfilled its legal obligations.<sup>36</sup>

The brief goes on to outline the problems with Australia’s claim that it was not the Detaining Power. It states *‘Defence may find it difficult, although not impossible, to coherently explain that AS was not the Detaining Power, without this being portrayed as an admission that AS had claimed responsibility for something that it did not do’*. One of the difficulties was the number of captives taken (66). The brief states the number *‘places pressure on the credibility (visually, if not legally) of asserting that the sole US member attached to the AS SF element, formally effected the detention’*.<sup>37</sup> Although the fact that only one US soldier was present has been publicly disclosed,<sup>38</sup> the number of Australian SAS troops present has been withheld. When discussing Australia’s detention policy before the Senate Estimates hearings, General Cosgrove appeared evasive when stating *‘we have never specified the number of ADF people, but it was not huge’*.<sup>39</sup>

## 7.1 Legal analysis

The claim that Australia was not the Detaining Power does not withstand legal scrutiny.

The term “Detaining Power” is not defined in Geneva Convention III (which deals with prisoners of war). The ICRC Commentaries to the Geneva Conventions, an authoritative guide to their meaning, provides some guidance on determining which country is a Detaining Power. The Commentaries conclude that the country of the individual or military that captures prisoners of war is considered the Detaining Power.<sup>40</sup> On this basis, and as a matter of logic, the 66 men were captured by 20 Australian SAS troops, not by a single US soldier. Without the armed presence of the

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<sup>36</sup> Doc 97.

<sup>37</sup> Doc 97, 4.

<sup>38</sup> Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 17 June 2004, 68 (Peter Cosgrove, Chief of the Defence Force).

<sup>39</sup> Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 17 June 2004, 68 (Peter Cosgrove, Chief of the Defence Force).

<sup>40</sup> ICRC, *Commentary to Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949*, article 12 Responsibility for the Treatment of Prisoners <<http://www.icrc.org/ihl.nsf/COM/375-590016?OpenDocument>>.

SAS troops, the single US soldier would have been unable to detain the 66 men. Therefore Australia was the Detaining Power.

Even if Australia did not accept responsibility as a Detaining Power, at the very least Australia should have been jointly responsible for the 66 men, together with the US. The Commentaries provide guidance on situations of uncertainty involving a coalition of States, fighting side by side. It states:

[...] one general principle prevails: wherever it is impossible or difficult, for any reason, to determine which is the State which has captured prisoners of war and consequently is responsible for them, this responsibility is borne jointly by all the states concerned.<sup>41</sup>

This principle is also reflected in clause 10 of the Trilateral Arrangement, which provides that in cases of doubt as to which country is the Detaining Power all parties will be jointly responsible. Therefore, although the most logical conclusion from the incident on 11 April 2003 was that Australia, with its 20 SAS troops, captured the men and was the sole Detaining Power, at the very least Australia and the US were jointly responsible for the detainees.

One of the Department of Defence arguments in support of Australia not being the Detaining Power was that troops at the time of capture made a determination as to which nation was to be the responsible Detaining Power.<sup>42</sup> General Cosgrove remarked that it was unremarkable that 66 unarmed ‘Iraqis were able to be captured by a US soldier—actually a member of the US Air Force—with the assistance of some of our chaps’.<sup>43</sup> Another view put forward by DFAT lawyer, Dr Greg French, in support of the position that Australia was never a Detaining Power in Iraq, was that the Party, which undertook to register the prisoners with the ICRC, became the Detaining Power. French said, ‘Effectively it is the act of registration that triggers the detaining power responsibilities and obligations under the third Geneva convention.’<sup>44</sup> The common element to these views is that there is no objective criterion to determine which country is the Detaining Power, eg the number of troops from one country’s armed forces. This appears to be inconsistent with the Commentaries to the Conventions.

If Australia had accepted its responsibility as a Detaining Power, then the transfer of the 66 detainees to the UK for transport and eventually to US custody should have

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<sup>41</sup> ICRC, *Commentary to Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949*, Article 12 Responsibility for the Treatment of Prisoners <<http://www.icrc.org/ihl.nsf/COM/375-590016?OpenDocument>>.

<sup>42</sup> Doc 97,4.

<sup>43</sup> Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 17 June 2004, 67 (Peter Cosgrove, Chief of the Defence Force).

<sup>44</sup> Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 2 June 2004, 133 (Greg French, Legal Adviser, DFAT).

been pursuant to the Trilateral Arrangement. Under the Arrangement, Australia would have been responsible for determining the status of the detainees and whether they were prisoners of war. Also, Australia would have been obliged to have collected, retained and transmitted the personal details of the 66 men to the ICRC. As it happened, Australia had no idea what happened to the 66 men and whether they were afforded prisoner of war status.<sup>45</sup> Had the transfer to UK and US forces occurred pursuant to the Trilateral Arrangement, Australia would have had the right to request the return of the detainees. In particular, Australia would have been within its rights to request the return of the detainees following knowledge of Mr Mahmud's death. Indeed, Mr Mahmud's death in UK custody suggests grave breaches of Geneva Convention III.<sup>46</sup>

It is arguable that Australia's continued support of the UK and likely subsequent transfers of prisoners to UK custody constitutes Australian complicity in detainee ill-treatment. Under Geneva Convention III, Australia has an obligation to sanction those committing grave breaches, which include "wilful killing, torture and inhuman treatment",<sup>47</sup> regardless of the nationality of those committing the breaches. Although it would have been difficult for Australia to take action against the UK in relation to Mr Mahmud's death, particularly given the Australian Government was denied access to the investigation reports, Mr Mahmud's death put Australia on notice about problems in detainee treatment.

By the end of 2003, after becoming aware of abuses at Abu Ghraib (see Story 5), the Australian Government should have had serious concerns about handing detainees to UK and US custody. It would have been prudent for the Australian Government to reconsider its detainee policy, and even if it was decided that the policy of handing ADF captured detainees to the US and UK was to continue, at the very least any transfers should have been subject to closer Australian scrutiny.

## 8. Coalition of the (un)Willing

The Australian Government sought to change the media message in relation to the incident on 11 April 2003 and downplay the role played by Australian forces. A draft Question Time Brief referred to the incident as a '*well conducted, effective Coalition operation, involving troops and assets from Australia, US and the UK.*'<sup>48</sup> However, the incident on 11 April 2003 reveals that Coalition cooperation was not always forthcoming.

When the Iranian MOIS sought information from the Australian Government for details about the four men who had been detained, the Australian Government approached the US. Although Australian SAS troops had taken the details of the four men, and the 62 others, these details were not retained but were handed over to UK troops during the helicopter transfer. However, the US was unwilling to provide such details. The Australian Government was not requesting the return of the Iranians to Australian

<sup>45</sup> Doc 97 TG 633.3 Response to Strategic operation Division Request for Information, 3.

<sup>46</sup> See Geneva Convention III, article 130.

<sup>47</sup> See Geneva Convention III, articles 129 and 130.

<sup>48</sup> Doc 97.

custody, as would have been its right if the transfer had taken place pursuant to the Trilateral Arrangement, but simply for details about the four men. The response from the US was that they were unable to assist and instead directed inquiries to the ICRC.

The UK Government was also uncooperative with Australian Government requests. The Australian Defence Minister sought the results of the UK military investigation into Mr Mahmud’s death but the UK Government declined to share this information.<sup>49</sup> It seems Australia’s allies in the Coalition of the Willing were only willing to cooperate on some matters.

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<sup>49</sup> Doc 183.

## 9. Timeline

**11 April 2003:** 1:00pm: Australian SAS and one member of the US armed forces detain 66 men in Ramadi, Iraq.

11:30pm: The SAS hands the 66 detainees over to the UK RAF.

**12 April 2003:** Sometime on this day, Tanik Mahmud ‘*sustained a fatal injury*’ and died while on the RAF’s Chinook helicopter.<sup>50</sup>

**June 2003:** The RAF police investigation commences.<sup>51</sup>

**7 July 2003:** The People’s Mujahedin Organization of Iran sends a letter to Australia (Robert Hill) asking for the release of the detainees.<sup>52</sup>

**April 2004:** RAF police investigators ask a pathologist if a post mortem is worth conducting. This pathologist advised that Mahmud’s body was too decomposed.<sup>53</sup>

**17 May 2004:** The UK House of Commons is told an investigation into Mahmud’s death is ongoing.<sup>54</sup>

**2 June 2004:** Robert Hill states to Senate Estimates ‘*We don’t know of any suggestion that any prisoners in whose capture Australia was involved have been mistreated.*’<sup>55</sup>

**8 June 2004:** A minute from General Cosgrove to Robert Hill advises that the detainee died of a heart attack. It is not clear when Australia first became aware of the detainee’s death.<sup>56</sup>

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<sup>50</sup> Ian Cobain, ‘Iraq Deaths in British Custody Could See Military Face Legal Challenges’, *Guardian.co.uk*, 1 July 2010 <<http://www.guardian.co.uk/world/2010/jul/01/iraq-deaths-custody-military-legal>>; Ian Cobain, ‘British Servicemen Suspected of Murdering Iraqi Civilians’, *Guardian.co.uk*, 12 September 2010 <<http://www.guardian.co.uk/uk/2010/sep/12/iraqi-citizen-murders-servicemen-suspects>>.

<sup>51</sup> Ian Cobain, ‘British Servicemen Suspected of Murdering Iraqi Civilians’, *Guardian* (online), 12 September 2010 <<http://www.guardian.co.uk/uk/2010/sep/12/iraqi-citizen-murders-servicemen-suspects>>.

<sup>52</sup> Doc 182.

<sup>53</sup> Ian Cobain, ‘British Servicemen Suspected of Murdering Iraqi Civilians’, *Guardian* (online), 12 September 2010 <<http://www.guardian.co.uk/uk/2010/sep/12/iraqi-citizen-murders-servicemen-suspects>>.

<sup>54</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 17 May 2004, vol 421, col 663W (Adam Ingram); Severin Carrell, ‘New Allegations of Systematic Abuse of Iraqis by British Troops’ *The Independent* (online), 23 May 2004 <<http://www.independent.co.uk/news/world/middle-east/new-allegations-of-systematic-abuse-of-iraqis-by-british-troops-564419.html>>.

<sup>55</sup> Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 2 June 2004, 142 (Robert Hill, Minister for Defence).

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**10 June 2004:** Robert Hill asks General Cosgrove to find out ‘*urgently*’ the results of the UK investigation.<sup>57</sup>

**Before October 2004:** The Iranian Ministry of Information and Security (MOIS) requests information from the Australian Embassy in Tehran about the four detained Iranians.<sup>58</sup>

**8 December 2004:** The UK RAF Deputy Provost Marshal declines Australia’s request for a copy of the UK investigation report. He states the reason for non-disclosure is because the report is being held ‘*for the purposes of criminal proceedings*’.<sup>59</sup>

**Before 20 December 2004:** A response to the Iranian MOIS is sent, stating that Australia did not detain the Iranians, as Australia is not a detaining power.

**23 January 2005:** It is revealed that UK troops will face prosecution for abuses in Iraq. The media consider it likely that one such abuse was Mahmud’s death.<sup>60</sup>

**April 2009:** The UK *Guardian* begins asking the Ministry for Defence about further information into Mahmud’s death.<sup>61</sup>

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<sup>56</sup> Doc 182 CDF 521/04 [7].

<sup>57</sup> Doc 182 CDF 521/04, 2.

<sup>58</sup> Doc 182 CDF 1046/04.

<sup>59</sup> Doc 183.

<sup>60</sup> Severin Carrell, ‘More Soldiers Implicated in Further Iraqi Abuse Claims’, *The Independent* (online) 23 January 2005 <<http://www.independent.co.uk/news/uk/crime/at-least-20-soldiers-implicated-in-further-iraqi-abuse-claims-487954.html>>.

<sup>61</sup> Ian Cobain, ‘Iraq Deaths in British Custody Could See Military Face Legal Challenges’, *Guardian* (online), 1 July 2010 <<http://www.guardian.co.uk/world/2010/jul/01/iraq-deaths-custody-military-legal>>.

**July 2010:** UK lawyers representing 102 Iraqi civilians attempt to have a judicial review of the UK Ministry of Defence's decision to refuse to conduct a public inquiry into all cases of abuse of Iraqi civilians after the March 2003 invasion.<sup>62</sup>

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<sup>62</sup> Ian Cobain, 'Iraq Deaths in British Custody Could See Military Face Legal Challenges', *Guardian* (online), 1 July 2010 <<http://www.guardian.co.uk/world/2010/jul/01/iraq-deaths-custody-military-legal>>.



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